

Modern Problems Require Modern Solutions*: Internet Memes and Copyright

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*That which hath been is that which shall be, And that which hath been done
is that which shall be done; And there is nothing new under the sun.*¹

Introduction

In late 2018, a lawsuit was filed against Epic Games, creator of the smash-hit video game *Fortnite Battle Royale*.² The plaintiff was Alfonso Ribeiro, known for playing Carlton Banks in the hit 1990s sitcom, *The Fresh Prince of Bel-Air*.³ Ribeiro asserted copyright claims against Epic for using digital representations of his “signature” dance, the “Carlton Dance,”⁴ as a player character “emote” in its game.⁵ Ribeiro alleged that “Epic creates emotes by copying and coding dances and movements directly from popular videos, movies, and television shows without consent.”⁶ His complaint also commented on the general popularity of the dance: “The Dance ha[d] garnered over sixty-nine million views on YouTube” prior to the release of *Fortnite*,⁷ and since its release, “[p]rofessional athletes . . . have based their celebrations on Fortnite emotes” and “[y]oung adults, teenagers, and kids

* *Modern Problems Require Modern Solutions*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/modern-problems-require-modern-solutions> [<https://perma.cc/CG6Y-VLPB>] (last updated Feb. 4, 2019, 6:04 AM).

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1. *Kohelet (Ecclesiastes)* 1:9.

2. Mike LaSusa, ‘*Fresh Prince*’ Actor Sues Game Makers Over ‘*Carlton*’ Dance, LAW360 (Dec. 17, 2018, 10:42 PM), <https://www.law360.com/articles/1112298/fresh-prince-actor-sues-game-makers-over-carlton-dance> [<https://perma.cc/C4R6-8SDB>].

3. *Id.*; Complaint at 1, *Ribeiro v. Epic Games, Inc.*, No. 2:18-cv-10412 (C.D. Cal. Dec. 17, 2018).

4. *Carlton Banks’ Dance*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/carlton-banks-dance> [<https://perma.cc/R4HS-MLHD>] (last updated Feb. 20, 2019, 7:50 AM).

5. Complaint, *supra* note 3, at 1; LaSusa, *supra* note 2. A similar lawsuit against Epic was filed by rapper Terrence Ferguson, better known by his stage name “2 Milly,” asserting copyright claims over use of the “Milly Rock” dance in *Fortnite*. Complaint at 1, *Ferguson v. Epic Games, Inc.*, No. 2:18-cv-10110 (C.D. Cal. Dec. 5, 2018). Ribeiro and Ferguson also brought copyright claims against the maker of the popular *NBA 2K* series of basketball video games. Complaint, *Ribeiro v. Take-Two Interactive Software, Inc.*, No. 2:18-cv-10417 (C.D. Cal. Dec. 17, 2018); Complaint, *Ferguson v. Take-Two Interactive Software, Inc.*, No. 2:18-cv-10425 (C.D. Cal. Dec. 17, 2018). Other figures have since filed similar lawsuits against Epic as well. LaSusa, *supra* note 2.

6. Complaint, *supra* note 3, at 7.

7. *Id.* at 4.

also post videos of themselves on YouTube and social media performing emotes under various hashtags, including #fortnitedance or #fortnitevideos.”⁸ Epic Games sells the accused emote, entitled “Fresh,” as downloadable content (DLC) for 800 V-Bucks (*Fortnite*’s virtual currency), which equates to about \$8.00 USD.⁹ Though *Fortnite* is free to play, it has generated billions of dollars through the sale of DLC such as the dance emote.¹⁰ However, the Copyright Office disagreed with Ribeiro’s position: it concluded that the Carlton Dance was too simple to be protected as choreography and refused to register a copyright for the work.¹¹ Should Ribeiro be allowed to exercise private rights over a meme? Should Epic Games be allowed to reap the pecuniary rewards?

Contrast the *Fortnite* litigation with the case of Matt Furie and Pepe the Frog. Furie created the Pepe character in 2005 as a “peaceful frog-dude” who was always “blissfully stoned,” and Pepe became an immensely popular internet meme.¹² In recent years, however, Pepe was co-opted by alt-right groups and began to appear in highly offensive memes, often with swastikas and other anti-Semitic and white-supremacist imagery.¹³ Pepe soon became an alt-right “mascot.”¹⁴ In one case, Pepe appeared in an Islamophobic children’s book written by a North Texas public-school administrator.¹⁵ Furie threatened copyright litigation.¹⁶ The author settled, agreeing to destroy all copies of the book and to donate his profits to the Council on American–

8. *Id.* at 7.

9. See *Fortnite Dances and Emotes List*, PRO GAME GUIDES, <https://progameguides.com/fortnite-dances-and-emotes-list/> [<https://perma.cc/74HK-TNNV>] (listing all available emotes); *Fortnite V-Bucks: What They Are, How Much Do They Cost, and Can You Get Free V-Bucks?*, PCGAMESN (July 30, 2019), <https://www.pcgamesn.com/fortnite/fortnite-free-v-bucks-win-prices-buy> [<https://perma.cc/GN94-NJUS>] (explaining *Fortnite*’s virtual currency system).

10. See Ben Gilbert, *How Much Money Is ‘Fortnite’ Making? Nearly \$2.5 Billion in 2018 Alone, According to the Latest Report*, BUS. INSIDER (Jan. 16, 2019, 11:00 AM), <https://www.businessinsider.com/how-much-money-does-fortnite-make-2019-1> [<https://perma.cc/JJJ7-NFJT>] (describing Epic Games’s business model for *Fortnite*).

11. Bill Donahue, *After Big Copyright Ruling, Dance Cases To Be Refiled*, LAW360 (Mar. 7, 2019, 10:11 PM), <https://www.law360.com/articles/1136676> [<https://perma.cc/8YKF-TS24>]. Ribeiro has since taken voluntary dismissal without prejudice to correct a procedural error due to an intervening Supreme Court decision, *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019). Ribeiro has indicated plans to refile. See Donahue, *supra*.

12. Matt Furie, *Pepe the Frog’s Creator: I’m Reclaiming Him. He Was Never About Hate*, TIME (Oct. 13, 2016), <http://time.com/4530128/pepe-the-frog-creator-hate-symbol/> [<https://perma.cc/SVZ2-ZC7W>]; *Pepe the Frog*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/pepe-the-frog> [<https://perma.cc/998Y-8XU9>] (last updated June 11, 2019, 4:00 PM).

13. Oren Segal, *Pepe the Frog: Yes, a Harmless Cartoon Can Become an Alt-Right Mascot*, GUARDIAN (Sept. 29, 2016, 12:08 PM), <https://www.theguardian.com/commentisfree/2016/sep/29/pepe-the-frog-alt-right-mascot-racist-anti-semitic> [<https://perma.cc/5PLQ-BSLB>].

14. *Id.*

15. Melissa Daniels, *Pepe the Frog Artist Asserts IP, Shuts Down Children’s Book*, LAW360 (Aug. 28, 2017, 11:33 PM), <https://www.law360.com/articles/958414/pepe-the-frog-artist-asserts-ip-shuts-down-children-s-book> [<https://perma.cc/WZV3-L72E>].

16. *Id.*

Islamic Relations.¹⁷ But in another case, conspiracy theorist Alex Jones's media company Infowars refused to stop selling a "MAGA" poster featuring Pepe, and Furie filed copyright claims in federal court.¹⁸ Among Infowars's defenses was a novel argument that "meme-ification" meant that Pepe was entitled to weaker copyright protection; the district court rejected this, and Infowars, too, settled.¹⁹ Should Furie be allowed to exercise control over how the Pepe meme is used? Does Infowars have a valid expressive interest that should overcome Furie's interest in controlling his intellectual work?

These lawsuits present examples of the types of hard normative questions raised when technological and cultural developments outpace the development of the law. Society has developed by leaps and bounds since the Copyright Act of 1976 was passed by Congress. Gone are the days when the sage advice was to "send an e-mail message to the owner of [a] site" before reusing "text or pictures" from the web.²⁰ The consumer's online experience is no longer that simple. One outgrowth of the modern internet is the internet meme: a new, unique form of expression and communication whose birth is a result of unprecedented connectedness and access to creative tools. And as technology surges ahead, policymakers, scholars, courts, and litigants are often left scratching their heads as for how to grapple with new legal problems. What happens when copyright law and internet memes collide? What *should* happen?

To date, commentary has largely addressed how internet memes fit into the existing framework of United States copyright law. For example, authors have written about internet memes in the contexts of copyrightable subject

17. *Id.*

18. Bill Donahue, *'Pepe the Frog' Artist Sues Infowars over Copyrights*, LAW360 (Mar. 6, 2018, 4:23 PM), <https://www.law360.com/articles/1018881/pepe-the-frog-artist-sues-infowars-over-copyrights> [<https://perma.cc/3CFG-ZGLJ>].

19. Bill Donahue, *'Pepe the Frog' Case Against InfoWars Heads to Trial*, LAW360 (May 17, 2019, 4:47 PM), <https://www.law360.com/articles/1160959/pepe-the-frog-case-against-infowars-heads-to-trial> [<https://perma.cc/QM5M-WRAS>]; *Infowars and Alex Jones Settle 'Pepe The Frog' Copyright Dispute*, FORBES: LEGAL ENT. (June 11, 2019), <https://www.forbes.com/sites/legalentertainment/2019/06/11/infowars-and-alex-jones-settle-pepe-the-frog-copyright-dispute/> [<https://perma.cc/Y4AL-4AU4>]; see also Order at 34, *Furie v. Infowars, LLC*, No. 2:18-cv-01830 (C.D. Cal. May 16, 2019) ("Defendants have not pointed to any authority for the proposition that 'meme-ification' of an image or character destroys or diminishes the original author's copyright interest.").

20. JOHN R. LEVINE ET AL., *THE INTERNET FOR DUMMIES* 113 (7th ed. 2000). This advice was from a time when the idea of copyright on the internet was "[c]ontrary to popular belief." *Id.*

matter,²¹ the derivative-work right,²² and fair use.²³ In this Note, I address the antecedent issue of theory: whether or not internet memes belong within a copyright framework *at all*. An argument based on theory permits principled discussion of copyright law in relation to sound copyright policy.

I frame the issue in two questions: First, should there be copyright *protection* for internet memes? Second, should there be copyright *liability* for internet memes that allegedly infringe? I attempt to answer these questions by analyzing internet memes through the lens of the traditional justification for copyright in the United States: the economic-incentives argument. If the basis of copyright protection is to provide necessary incentives to create works of expression, does it make sense to give rights in internet memes? Does it make sense to allow rights to be enforced against internet memes?

I conclude the answer is “no” to both questions. I argue that there are categorical differences between internet memes and traditional copyright subject matter. I do so by developing a normative framework for internet memes, in conformity with the utilitarian-economic assumptions underlying American copyright policy. I conclude that the justifications for both copyright *protection* and copyright *liability* do not work with internet memes. In concluding the answer is “no” to both questions, I examine some present copyright doctrines and proposed copyright reforms. In this sense, my Note is anchored to the broader copyright dialogue, and the examination of internet memes can act as a vehicle for a larger discussion of the direction in which copyright law is going (and should go).

As a practical matter, the objective of this Note is to highlight the misalignment between copyright law and modern policy ideas encapsulated in copyright theory. This Note does not take the position that internet memes require a structural overhaul of copyright law, and it does not advocate for any specific legislative reforms. However, it does recognize that some categories of reforms discussed in other contexts would help address policy concerns raised by internet memes. Internet memes, though unique, are not anomalous. Conversations about reforming the Copyright Act of 1976 have been ongoing for some time, and it is important to reassess the law as society advances. Consequently, I conclude that internet memes add weight in favor of reforming the Copyright Act.

21. *E.g.*, Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Communication*, 52 U. RICH. L. REV. 387, 406–13 (2018); Cathay Y.N. Smith, *Beware the Slender Man: Intellectual Property and Internet Folklore*, 70 FLA. L. REV. 601, 628–35 (2018).

22. *E.g.*, Aaron Schwabach, *Reclaiming Copyright from the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody*, 8 BUFF. INTELL. PROP. L.J. 1, 10–16 (2012); *see also* 17 U.S.C. § 106(2) (2018) (defining the derivative work right).

23. *E.g.*, Schwabach, *supra* note 22, at 16–25; Terrica Carrington, Note, *Grumpy Cat or Copy Cat? Memetic Marketing in the Digital Age*, 7 GEO. MASON J. INT’L COM. L. 139, 147–59 (2016); *see also* 17 U.S.C. § 107 (2018) (defining fair use).

This Note is organized as follows: Part I reviews background principles of the economic-incentives framework underlying much of American copyright policy, and of internet memes. Part II makes theoretical arguments to answer the critical questions about internet memes and copyright. Part III examines salient features of the present doctrine, along with some considerations for reform.

I. Background Principles

Should intellectual works be protected? If so, which deserve protection, and how much protection is appropriate? Intellectual property law seeks to answer these questions. Theories of intellectual property attempt to provide principled justifications for the answers. Theory, in turn, drives principled discussion of policy.²⁴ This Note uses intellectual-property theory to provide a “first principles” approach to the copyright problems of internet memes. In order to discuss copyright and internet memes together, this Note begins by reviewing the principles of each topic.

A. *The Economic-Incentives Argument for Copyright*

The dominant paradigm for justifying intellectual-property protection in the United States is the economic-incentives framework.²⁵ The economic-incentives framework is rooted in principles of welfarism.²⁶ The basic argument views the granting of legal rights in intellectual works as an *ex ante* incentive to create and disseminate those works. Aspects of this framework were envisioned by the Framers of the United States Constitution, which vests Congress with the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁷

24. See generally William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001) (discussing the value of theory and surveying various schools of thought).

25. PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2018 16 (Clause 8 Publishing 2018) [hereinafter IPNTA].

26. Welfarism, roughly, is a consequentialist mode of decision-making where decisions are made so as to achieve a desired level of social good by some measure. Different branches of welfarism define these terms differently. For utilitarianism, a subset of welfarism, the typical objective is to maximize utility in the aggregate, and a common measure of utility is willingness and ability to pay. Welfarism typically makes an assumption that the measure of good is commensurable (i.e., reducible to a dollar value) and fungible (i.e., tradable in “the same” dollar value). Because utilitarianism is the dominant welfarist framework in intellectual property, the incentives model is often called the “utilitarian-economic framework” or simply the “utilitarian framework.” On the relationship between utilitarianism and the Law & Economics school, see generally Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

27. U.S. CONST. art. I, § 8, cl. 8. For a discussion on the origins of the “Patent and Copyright Clause” or the “Intellectual Property Clause,” see generally Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109 (1929).

The starting premise of the incentives argument is a desire to create a socially optimal number of works of expression—works that, themselves, have social benefits.²⁸ Those works must be created by authors, and those authors incur costs.²⁹ An author who seeks to develop a work of expression incurs costs both in creating the work (for example, by investing time and resources into the work) and in disseminating the work (for example, in negotiating with a publisher or perhaps self-publishing).³⁰ Economic principles dictate that an author will only create the work if her expected returns from creating the work exceed her expected costs.³¹ If the prospective author's costs exceed her expected returns, she will likely not create the work in the first place.³²

The same economic principles apply to one who seeks to create copies of an already-existing work. Like the author, the subsequent copier will create copies until his marginal costs exceed his marginal returns.³³ But the copier will incur much lower costs, as he did not make the same initial investments in developing the work.³⁴ Because he can produce his copies at a lower cost, he can sell them to consumers at a lower price.³⁵ He can undercut the returns due to the author and prevent her from recouping her initial investment.³⁶ Fearing this, the author will probably not invest her

28. Under many analyses, the notion that creative works create desirable social benefits is a given. As early as 1788, James Madison wrote that “[t]he utility of” Congress’s power to create copyrights “will scarcely be questioned.” THE FEDERALIST NO. 43, at 220 (James Madison) (Ian Shapiro ed., 2009). Some discussions start from the Constitution’s imperative that copyright law should be used to “promote the Progress of Science.” *E.g.*, IPNTA, *supra* note 25, at 499. It is probably not controversial to assume that creative and expressive works create social benefits, and it is easy for anyone to list some benefits conferred by creative and expressive works. It is also possible to view these benefits as positive externalities worthy of incentivizing. *See* Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTEL. PROP. L. 1, 13 (2005) (“Copyright law is designed to encourage allocatively efficient levels of positive externalities and to minimize the social cost of those benefits.”).

29. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326–27 (1989).

30. *Id.* Landes and Posner refer to these costs collectively as the “costs of expression.”

31. *Id.* Whether this is true in practice is, of course, subject to debate. In an early empirical study preceding the passage of the Copyright Act of 1976, Justice Stephen Breyer (then a professor at Harvard) questioned the truth of this proposition and the need for copyright protection as the incentive. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 294–308 (1970). While objections to the absolutes of economic analysis raise questions about what the proper incentive might be, they do not inherently undermine the basis for the cost/incentive scheme. And while exclusive rights are the current approach, other forms of incentives are possible and have been proposed. *See, e.g.*, Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents–Prizes Debate*, 92 TEXAS L. REV. 303, 311–12 (2013) (discussing alternative schemes for incentivizing the creation of intellectual products).

32. Landes & Posner, *supra* note 29, at 327.

33. *Id.* at 328.

34. *Id.* at 327.

35. *Id.* at 327–28.

36. *Id.*

initial costs in the first place, and the work will probably not be produced.³⁷ In this state of nature, society is unable to realize the benefits of a socially optimal number of works.

What permits this arbitrage by an unscrupulous copier is, in part, that information resources have the characteristics of so-called “public goods.”³⁸ A public good is “nonexcludable”: once distributed, it is difficult or impossible to exclude others from using the good.³⁹ A public good also has “nonrivalrous” consumption: consumption by one individual does not decrease the value of consumption by another.⁴⁰ The butcher, the baker, and the candlestick maker can each sell on their own terms, but the author cannot.

And so, the law steps in. Copyright protection vindicates the author’s economic interests *ex ante* by means of an incentive. By granting to the author some exclusive right to produce copies of her work—that is, by cutting out the unscrupulous copier, channeling revenue to the author, and giving the author bargaining power—the author is incentivized to produce her work.⁴¹ But the author’s exclusive rights also have the potential to restrict access to the work and downstream expression; thus, the extent of the rights granted must be determined by finding an optimal balance between incentives to create and restrictions on expression.⁴²

B. Principles of Internet Memes

1. *Origins and Memetic Theory.*—Like the modern Copyright Act, the concept of the meme was born in 1976. The term “meme” was coined by famed evolutionary biologist Richard Dawkins in his 1976 book, *The Selfish Gene*. Dawkins used the term as “a noun that conveys the idea of a unit of cultural transmission, or a unit of imitation.”⁴³ He described culture as evolving through the transmission of memes, analogous to biological evolution through the transmission of genes.⁴⁴ Dawkins gave the following illustration:

37. *Id.*

38. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEXAS L. REV. 989, 994 (1997).

39. *Id.* at 994–95.

40. *Id.* at 994.

41. Landes and Posner summarize this incentives problem succinctly:

In [the] absence [of copyright protection] anyone can buy a copy of the book when it first appears and make and sell copies of it. The market price of the book will eventually be bid down to the marginal cost of copying, with the unfortunate result that the book probably will not be produced in the first place, because the author and publisher will not be able to recover their costs of creating the work.

Landes & Posner, *supra* note 29, at 327–28.

42. *See id.* at 332 (noting the potential for exclusive rights to raise the cost of expression).

43. RICHARD DAWKINS, *THE SELFISH GENE* 192 (30th anniversary ed. 2006) (emphasis omitted).

44. *Id.*

Examples of memes are tunes, ideas, catch-phrases, clothes fashions, ways of making pots or of building arches. Just as genes propagate themselves in the gene pool by leaping from body to body via sperms or eggs, so memes propagate themselves in the meme pool by leaping from brain to brain via a process which, in the broad sense, can be called imitation.⁴⁵

Dawkins discussed three qualities that make some memes more successful than others (in the sense that they replicate, or are *imitated*, more than others): longevity, fecundity, and copying-fidelity.⁴⁶ He suggests that longevity is relatively unimportant, as a particular copy of a meme is unlikely to exist for more than a limited time.⁴⁷ The fecundity of a meme—its speed of replication⁴⁸—is more important than the longevity of a particular copy.⁴⁹

As to copying-fidelity, memes appear at first to be low-fidelity replicators, as their transmission is subject to mutation and blending.⁵⁰ However, Dawkins notes that the notion of copying-fidelity depends on how the “single unit-meme” is defined: “I have said a tune is one meme, but what about a symphony: how many memes is that? Is each movement one meme, each recognizable phrase of melody, each bar, each chord, or what?”⁵¹ While this question of abstraction may be vexing, the lack of a concrete answer⁵² is not an obstacle to applying memetic theory to copyright. Similar questions of abstraction are present in the copyright context, and contemplating the “unit-meme” can be no more vexing than contemplating an “idea” as distinct from “expression.”⁵³

To aid in understanding the concept, Dawkins circumscribes his definition of the meme with a number of examples.⁵⁴ One example is framed in terms that intuitively cohere with copyright: “If a single phrase of Beethoven’s ninth symphony is sufficiently distinctive and memorable to be abstracted from the context of the whole symphony, and used as the call-sign of a maddeningly intrusive European broadcasting station, then to that extent it deserves to be called one meme.”⁵⁵

45. *Id.*

46. *Id.* at 194.

47. *Id.*

48. *Id.* at 17.

49. *Id.* at 194.

50. *Id.* at 194–95.

51. *Id.* at 195.

52. Dawkins did not find its resolution to be necessary, having defined the term “meme” “not in a rigid all-or-none way, but as a unit of convenience.” *See id.*

53. *See infra* notes 112–14 and accompanying text (discussing the idea–expression dichotomy and the merger doctrine).

54. *E.g.*, DAWKINS, *supra* note 43, at 195 (using a portion of a musical symphony to illustrate the abstraction problem); *id.* at 195–96 (discussing Charles Darwin’s theory of evolution as a meme); *id.* at 197 (analogizing to computer memory); *id.* at 198 (discussing faith as a religious meme).

55. *Id.* at 195.

Dawkins's memetic theory provides important context for discussing the copyright implications of internet memes, a specific subset of memes. However, basic memetic theory does not answer (or even ask) the critical copyright questions.⁵⁶ Dawkins's definition of the meme is sufficiently broad to include the whole of copyright subject matter and more. It can encompass the very core of copyright-protectable expression (for example, Beethoven's original musical compositions), while also encompassing matters generally understood to be beyond the reach of copyright protection (for example, the idea of an evolutionary theory). Basic memetic theory alone is not granular enough to do the heavy theoretical lifting in assessing the copyright implications of internet memes. The definition of "internet meme" requires refinement.

2. *Internet Memes.*—The copyright literature has sometimes defined the internet meme in a manner that presupposes copyright, such as through use of terms such as "image" or "video."⁵⁷ To fiddle too closely the copyright tune would be self-defeating (at least for purposes of this Note), so it is desirable to start from first principles. Since Dawkins first wrote in 1976, scholars of memetic theory have developed differing, and sometimes conflicting, definitions of the meme.⁵⁸ Indeed, even Dawkins later distanced himself from his original theory.⁵⁹ Carlos Mauricio Castaño Díaz, a research psychologist at Aarhus University, catalogued these varying definitions and used their common elements to synthesize a formal definition of the "internet meme":

An internet meme is a unit of information (idea, concept or belief), which replicates by passing on via Internet (e-mail, chat, forum, social networks, etc.) in the shape of a hyper-link, video, image, or phrase. It can be passed on as an exact copy or can change and evolve. The mutation on the replication can be by meaning, keeping the structure of the meme or vice versa. The mutation occurs by chance, addition or parody, and its form is not relevant. An [internet meme] depends both on a carrier and a social context where the transporter acts as a filter and decides what can be passed on. It spreads horizontally as a virus at a fast and accelerating speed. It can be interactive (as a game),

56. See Lantagne, *supra* note 21, at 388 ("The problem begins with the very definition of the word 'meme,' which is used to encompass an enormous gamut of behavior. Previous articles have argued that meme usage is fair use, with an implication that meme usage is a single interchangeable activity, identical in all circumstances.").

57. E.g., Carrington, *supra* note 23, at 141; Elizabeth Rocha, Note, *Y U No Let Me Share Memes?!—How Meme Culture Needs a Definitive Test for Noncommercial Speech*, 28 DEPAUL J. ART TECH. & INTELL. PROP. L. 37, 37 (2017).

58. See Carlos Mauricio Castaño Díaz, *Defining and Characterizing the Concept of Internet Meme*, 6 REVISTA CES PSICOLOGÍA, July–Dec. 2013, at 82, 87–88 (cataloguing various definitions of the meme).

59. *Id.* at 88.

and some people relate them with creativity. Its mobility, storage, and reach are web-based (Hard disks, cell phones, servers, cloud, etc.). They can be manufactured (as in the case of the viral marketing) or emerge (as an offline event taken online). Its goal is to be known well enough to replicate within a group.⁶⁰

Castañó's definition is very helpful for a few reasons. First, it emphasizes the informational nature of the internet meme.⁶¹ Second, it makes a critical distinction between the internet meme and the medium that embodies it⁶² (in the definition above, Castañó calls this the "shape"). Third, Castañó highlights the ready mutability of internet memes.⁶³ Fourth, by noting that the "goal" of an internet meme "is to be known well enough to replicate within a group," Castañó both anchors his definition to memetic theory and provides a useful criterion for determining which internet memes are successful.⁶⁴

It is readily apparent that internet memes come embodied in many different media (or "shapes," in Castañó's formulation). Many internet memes (including some of the earliest ones) fall into the broad category of "image macros."⁶⁵ A meme embodied in an image macro generally comprises an image and a caption, which may be "a witty message or catchphrase."⁶⁶ Several popular types of image macros include "demotivational posters,"⁶⁷

60. *Id.* at 97 (emphasis omitted).

61. *See infra* subpart II(A) (discussing the informational nature of internet memes); *cf.* Lantagne, *supra* note 21, at 391–92 (discussing how internet memes carry information).

62. A similar distinction is made in copyright between a "work" and the "tangible medium of expression" in which the work is "fixed." *See, e.g.*, 17 U.S.C. § 102 (2018) (using those terms to define copyrightable subject matter). For example, using the terminology from U.S. law, a *literary work* may be fixed in a book, but the book itself is considered a *copy* (a medium of expression) rather than a work. Similarly, a cassette tape may embody a *musical composition work* or a *sound recording work* (or both), but the cassette tape itself is a *phonorecord* (a medium of expression) rather than a work. *Id.*; *see also id.* § 101 (defining those terms). The importance of the distinction is demonstrated by "exhaustion" or "first-sale" doctrines, which generally prohibit copyright owners from exercising control over lawfully made physical copies or phonorecords. *See, e.g., id.* § 109 (codifying the first-sale doctrine under U.S. law); WIPO Copyright Treaty art. 6, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 121 (codifying an international exhaustion doctrine).

63. *Accord* Lantagne, *supra* note 21, at 390–92 (differentiating between "static memes" and "mutating memes").

64. *See* Castañó Díaz, *supra* note 58, at 97 ("[The] *goal* [of an internet meme] is to be known well enough to replicate within a group." (emphasis in original)); *cf.* DAWKINS, *supra* note 43, at 197–98 (discussing memes as replicators).

65. *Image Macros*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/image-macros> [<https://perma.cc/3MUT-FWBG>] (last updated Mar. 31, 2019, 2:33 AM).

66. *Id.*

67. *Demotivational Posters*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/demotivational-posters> [<https://perma.cc/X7LM-XXHL>] (last updated July 22, 2019, 6:58 AM). Demotivational posters parody popular "motivational posters," replacing motivating or uplifting messages with dark or pessimistic ones. *Id.*

“LOLcats,”⁶⁸ and “advice animals.”⁶⁹ Another category of image memes is the recent trend of “deep-fried” memes.⁷⁰ “Deep-fried” memes are images that are ironically and intentionally overedited, often to the point of near incoherence and surrealism.⁷¹ They often parody other memes and may act as meta-commentary on the meme-making process or community. Some internet memes may only have a textual component, with examples including copy-pasta,⁷² the SCP Foundation,⁷³ and catchphrases such as “it really do be like that sometimes.”⁷⁴ Other internet memes may be more ethereal, such as the Carlton Dance.⁷⁵

These examples have varying degrees of communicative or informational properties. Some are more clearly communicative (such as the advice animals or the SCP Foundation) by way of a clear theme or the explicit

68. *LOLcats*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/lolcats> [<https://perma.cc/2TSU-95XF>] (last updated Mar. 10, 2019, 5:19 AM). LOLcats typically comprise an image of a cat with a humorous caption written in “LOLspeak,” a form of broken English used colloquially for brevity on the internet. *Id.*

69. *Advice Animals*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/advice-animals> [<https://perma.cc/3Q9X-NBXX>] (last updated Jan. 27, 2019, 4:56 AM). Advice animal memes feature images of animals with captions. Each animal typically has an archetype, and the captions typically relate to the animal’s archetype. For example, the “Philosoraptor” meme features a philosopher-raptor, captioned with some perplexing question or philosophical musing. *See Philosoraptor*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/philosoraptor> [<https://perma.cc/BCM5-X2KC>] (last updated Oct. 10, 2019, 6:58 AM).

70. *Deep Fried Memes*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/deep-fried-memes> [<https://perma.cc/2EER-RKA6>] (last updated Apr. 2, 2019, 5:42 AM). For a “tame” example, see *Fred Flintstone*, KNOW YOUR MEME, <https://knowyourmeme.com/photos/1223180-deep-fried-memes> [<https://perma.cc/7XEJ-MKB3>] (last updated Feb. 16, 2017, 2:22 PM). For a more “intense” example, see *Lord Marquaad E*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/lord-marquaad-e> [<https://perma.cc/4MX9-LDDL>] (last updated Sept. 11, 2019, 5:58 PM).

71. *See Deep Fried Memes*, *supra* note 70.

72. *Copy-pasta*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/copy-pasta> [<https://perma.cc/FLL4-M75K>] (last updated Apr. 18, 2019, 8:45 PM). Copy-pasta, a portmanteau of “copy” and “paste,” is a “block of text that gets copied and pasted over and over again, typically disseminated by individuals through online discussion forums and social networking sites.” *Id.* One notable copy-pasta is the entire script of Jerry Seinfeld’s *Bee Movie*. *See Bee Movie Script*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/bee-movie-script-according-to-all-known-laws-of-aviation> [<https://perma.cc/JF5L-492V>] (last updated Apr. 7, 2019, 6:45 AM) (“According to all known laws of aviation, there is no way a bee should be able to fly. Its wings are too small to get its fat little body off the ground. The bee, of course, flies anyway because bees don’t care what humans think is impossible.”) (slavishly copying BEE MOVIE (Paramount Pictures 2007)).

73. SCP FOUNDATION, <http://www.scp-wiki.net/> [<https://perma.cc/CH98-JC9Q>]. The SCP Foundation (“Secure, Contain, Protect”) is a collaborative writing project where users write wiki entries for (fictional) classified research experiments and projects. *See SCP Foundation*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/sites/scp-foundation> [<https://perma.cc/3SCH-NTPL>] (last updated Jan. 26, 2019, 1:25 PM).

74. *It Really Do Be Like That Sometimes*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/it-really-do-be-like-that-sometimes> [<https://perma.cc/4QK2-HWZE>] (last updated Oct. 22, 2018, 3:59 AM); *see also They Don’t Think It Be Like It Is, But It Do*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/they-don-t-think-it-be-like-it-is-but-it-do> [<https://perma.cc/EFJ4-AFM2>] (last updated May 25, 2016, 8:26 PM).

75. *Carlton Banks’ Dance*, *supra* note 4.

conveyance of information. Others are less clearly communicative (such as the “deep fried” memes or the Carlton Dance): the exact meaning may be unclear; there may be multiple meanings to different audiences; or there may be no explicit meaning at all.

The examples also have varying degrees of originality and mutation. For some internet memes (such as the SCP Foundation), the common memetic aspect is merely an idea or theme, and the original content may predominate. For others (such as image macros), the common memetic aspect (the image) is largely static across individual memes, and there is a lesser degree of original or mutative content (the caption). For others still (such as the “deep-fried” memes), there may be no “true” original content, and the mutative aspect may primarily involve combining unoriginal content from different sources.⁷⁶ Some memes may be disseminated as is, with no original content at all.⁷⁷

II. Internet Memes and Copyright Theory

Like a good story, copyright enforcement has two sides. On one side, the plaintiff has rights in a protected work, which he seeks to enforce. On the other side, the defendant’s actions are accused of infringement, usually by way of having copied the plaintiff’s protected work. It is important to understand that internet memes could appear on either side (or both) of the equation. While it may be obvious that internet memes are a potential target for copyright *liability*, the creator of an internet meme might also seek copyright *protection* for her meme.

A. *Protected Memes?*

Should internet memes receive copyright protection? Under an incentives-based scheme, the answer should only be yes if incentives are necessary to realize greater aggregate social welfare. If there is no incentives problem, there is no need to grant private rights. I argue that this is the case for internet memes.

Internet memes increase social welfare by facilitating efficient communication. Internet memes reduce information costs.⁷⁸ A more familiar

76. *E.g.*, *Lord Marquaad E*, *supra* note 70. Instances of “Lord Marquaad E” typically involve the face of YouTube personality Markiplier superimposed on a character from the movie *Shrek* with the letter “E” as a caption. They may also involve images of Facebook creator Mark Zuckerberg testifying before Congress.

77. *See* Lantagne, *supra* note 21, at 390–91 (discussing static memes).

78. *Id.* at 407 (discussing the communicative value of internet memes). Lantagne also draws support from trademark law’s genericity doctrine, which prevents trademark owners from asserting rights to a mark that has come to be a general term for a class of products to the consuming public. *Id.* at 411. For an overview on the genericity doctrine in U.S. trademark law, see generally J. THOMAS MCCARTHY, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:1–:64 *et seq.* (4th ed. 2017). For an interesting discourse on the relationship between genericity and expression, see Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the*

internet meme will reduce information costs to a greater degree.⁷⁹ The most successful internet memes will therefore be those that are most familiar: by way of popularity or by way of having familiar elements.⁸⁰ This is because internet memes clothe new information in a familiar and understandable context. Ideally, a recipient of memetic information will be familiar with the format of a particular internet meme (perhaps having seen other examples) and will readily understand how the old information frames the new. But even if the recipient is not familiar with the internet meme on a high level, she may still be able to understand an unfamiliar meme by analyzing its lower-level elements. In a simple sense, an internet meme is a shorthand for an idea.

As an example, consider the Distracted Boyfriend meme.⁸¹ The idea conveyed is a relationship between a subject and two objects: one that the subject presently has, and one that the subject desires instead. A typical example comprises an image of three people. In the background, and in focus, is a man and a first woman walking (or standing) together. In the foreground, and slightly out-of-focus, is a second woman, who is smiling.⁸² The man is staring at the second woman with a look of intrigue, and the first woman has a look of disgust.⁸³ In a typical example, text is used to label the man as the subject, the first woman as that which the subject has, and the second woman as that which the subject desires.

Pepsi Generation, 65 NOTRE DAME L. REV. 397 (1990).

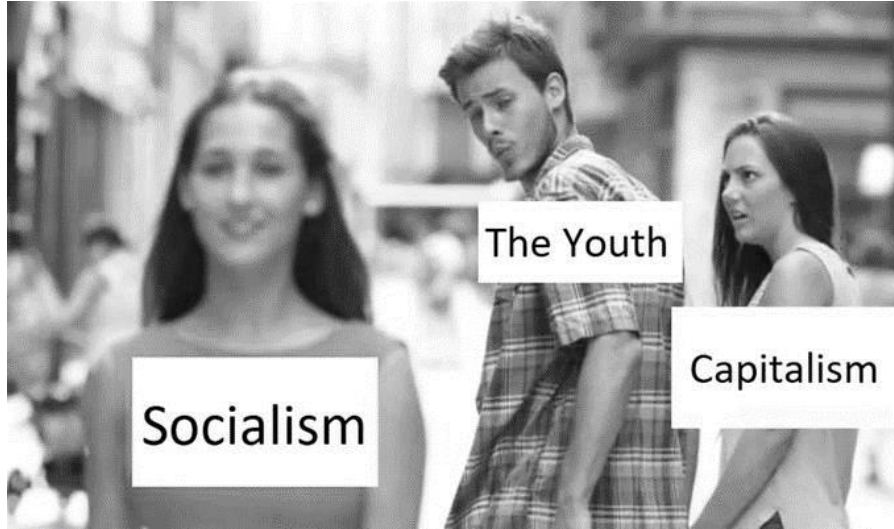
79. See Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 482–84 (2004) (noting how familiarity reduces information costs).

80. Cf. Castaño Díaz, *supra* note 58, at 97. Castaño defines the “goal” of an internet meme as to be known well (i.e., familiar) enough to replicate within a group. Thus, the more familiar an internet meme is, the better it serves its communicative or informational function.

81. *Distracted Boyfriend*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/distracted-boyfriend> [<https://perma.cc/774H-RNXP>] (last updated Apr. 1, 2019, 9:08 AM); see also Heather Schwedel, *The Distracted Boyfriend Meme Was onto Something*, SLATE (Mar. 22, 2018, 11:36 AM), <https://slate.com/technology/2018/03/memes-are-object-labeled-now.html> [<https://perma.cc/9SHW-WQ9T>] (discussing the trend of “object labeling” memes).

82. *Distracted Boyfriend*, *supra* note 81.

83. *Id.*



A person familiar with the general format of this internet meme would readily understand the meaning of a particular example by reference to other known examples.⁸⁴ But even a person unfamiliar with the meme could understand the meaning by drawing on familiar expressions of human emotion and social norms of monogamy.⁸⁵ In either case, the meme can convey the information more readily, more succinctly, and more expressively than an attempt to describe the idea in words. In a clichéd sense, the picture (or video, sound, phrase, etc.) is truly worth a thousand words.

A reduction of information costs increases aggregate social welfare, subject only to the corresponding cost of obtaining that benefit. But those costs are demonstrably low: despite the lack of an incentive system or economic benefits for creators of internet memes, the memes continue to flourish. Meme creators engage in their task without any expectation of economic returns—due to legal rights, or otherwise. There is no need for artificial incentives.

It is worth noting that internet memes can also confer some of the same social benefits as traditional expressive works. This is the case when an internet meme assumes a copyright-familiar form, such as an image, a video, or literary content. However, these benefits are ancillary: they are not categorically unique to internet memes, but are merely an artifact of the form of the particular meme. An image meme may create some of the same social benefits as images in general, but this has nothing to do with it being a *meme*.

Internet memes might also be more closely public goods than even traditional copyright subject matter itself. Internet memes categorically have

84. See Long, *supra* note 79 (noting how familiarity reduces information costs).

85. See *id.* (noting how social norms reduce information costs).

a public informational or communicative function, whereas this is not necessarily the emphasis for expressive or creative works. The important social benefit of internet memes is the *efficient* transmission of information; this is not what drives the argument for copyright. Internet memes are strongly informational, and there is no need to allocate their use among private users in order to realize their benefits efficiently.⁸⁶ And because there is no incentives problem either, the tension of justifying private “property” rights in informational resources is avoided.⁸⁷ So, if the justification for exclusive rights is to incentivize a socially optimal level of production, there is no justification for giving copyright protection to internet memes.

B. *Infringing Memes?*

The purpose of giving authors (and copyright owners, more broadly) a cause of action against copiers is to provide the necessary *ex ante* incentives to produce the work. Having invested resources to produce the work, authors will labor to realize their potential revenue streams, ideally by selling copies of their works. Subject to lead time, copiers might then attempt to undercut the authors’ revenues. The law strives to prevent this. In this respect, the law might be thought of as a form of “insurance” to guarantee that this revenue (should it exist) will go to the creators. This channeling occurs ideally through licensing (possibly enforced by threat of litigation) and secondarily through litigation itself.

Where a copyright owner seeks to enforce his rights against internet memes, the law’s mechanism is at odds with its own reasoning. An internet meme is not a substitute for the work.⁸⁸ Internet memes do not impair the returns of authors to the degree that would result in a less-than-socially-

86. See Oren Bracha, *Give Us Back Our Tragedy: Nonrivalry in Intellectual Property Law and Policy*, 19 THEORETICAL INQUIRIES L. 633, 636 (2018) (“[I]nformation goods are nonrival, which means that a use by one person does not impose negative use externalities on others.”).

87. See *id.* at 643–45. In Bracha’s account, nonrivalry obviates the need for allocating the use of property. A dominant justification for private property is the “tragedy of the commons”: by allocating the static use of property to private individuals, a situation is avoided where commonly owned property is used inefficiently at the cost of imposing externalities on others. Bracha argues that it is harder to justify property rights to incentivize dynamic production of a nonrival resource because any governance of static use excludes others and represents a “pure negative.” See *id.* at 658–59, 669. In the case of internet memes, there is no need for incentives and no need to justify private property rights at all.

88. See Glynn S. Lunney, Jr., *Copyright, Derivative Works, and the Economics of Complements*, 12 VAND. J. ENT. & TECH. L. 779, 782–83 (2010) (arguing that derivative works are not substitutes, but complements, for original works). In some cases, an internet meme may be complementary to the underlying work. A popular meme might generate additional demand for the underlying work. See, e.g., David Sims, *Why Is the Internet So Obsessed with Shrek?*, ATLANTIC (May 19, 2014), <https://www.theatlantic.com/entertainment/archive/2014/05/why-is-the-internet-so-obsessed-with-shrek/371189/> [<https://perma.cc/432A-QVK2>] (discussing how internet memes have contributed to the sustained popularity of the *Shrek* franchise, and even that of the band Smash Mouth, whose music is featured in the *Shrek* films).

optimal level of production of works.⁸⁹ The Facebook user who takes copyrighted material and fashions it into an internet meme is not the same as the unscrupulous copier in the classic copyright accounts. She usurps none of the returns that would otherwise be due to the copyright owner. And she could not, even if she wanted to: the consumers of internet memes expect them to be freely available. Nobody would pay to view an internet meme, just as no meme creator expects to be paid. The stream of revenue that copyright seeks to protect simply does not exist in this context, and it never existed in the first place. The threat of diversion of nonexistent future returns has no effect on *ex ante* incentives to create. Where the author can expect no good, the copier can do no harm.

Moreover, it is questionable whether the author of a work can even predict memetic use of his work, regardless of its connection to economic returns. In addition to the “core” expectation that a work will be used in the market designated by the author, copyright law at its periphery recognizes some expectation of use in other markets. The fiction writer expects to sell books, of course; to a lesser degree, he might also expect to sell movies, video games, toys, or apparel. Copyright law gives him some right to prepare derivative works.⁹⁰ Use in internet memes is not foreseeable. This is because internet memes are created by (and necessarily dependent on) the consuming public itself. The author *ex ante* has no idea what aspect of his work may later find itself in an internet meme, or if any aspect of his work will become an internet meme at all. This is rooted in the very idea of internet memes as replicators. A movie is a movie by virtue of its creation, regardless of its popularity or success. In contrast, an internet meme is only an internet meme *because* of its popularity or success, as dictated by the consuming public.⁹¹

Internet memes might also share some characteristics with trademarks. The common thread between the two is the capability of efficient communication of information. “[T]rademarks economize on consumer search costs. Consumers benefit from concise and effective designations of the source of products.”⁹² Trademark law has its doctrinal and normative foundations in the law of consumer protection and unfair competition.⁹³ To give a cause of action to the producers of the products simply represents a choice as to who is in the best position to police the public harm of misinformation.⁹⁴ But when trademark protection goes too far, enforcement

89. See Lunney, *supra* note 88, at 791 (“[W]hat needs to be shown is that, absent such a right, copyright owners would earn so little on their work that too few original works would exist, relative to the conjectured social optimum.”).

90. See, e.g., 17 U.S.C. § 106(2) (2018).

91. Additionally, if a work is so popular that it spawns memetic usage, this may also signal that the work itself has been successful enough to generate the economic returns that copyright law seeks to channel to the creator.

92. IPNTA, *supra* note 25, at 865.

93. *Id.* at 863.

94. *Id.* at 863–64.

can actually impede the flow of information and raise consumer search costs.⁹⁵

Analogous information costs exist if copyright in traditional works can be enforced against internet memes. Because internet memes are not tied to products (and thus have no bearing on efficient market competition), the analogous costs are magnified. In the natural state, the free flow of memetic information is at its zenith; *any* enforcement of property rights against internet memes would impose information costs on the public. There is no tradeoff. In this sense, internet memes may be particularly analogous to *generic* trademarks.⁹⁶ Enforcement of copyright would impose both direct costs and transaction costs on the informational function of internet memes.⁹⁷ The economic arguments for copyright therefore fail to justify why internet memes should have a place in the copyright scheme—either as copyrighted works, or as infringing copies.

C. *Commercial Use: The Not-So-Hypothetical “What If?”*

The argument above proceeds, in part, on an assumption that people will not pay for internet memes. In general, this is true: if I were to launch a “Premium Memes” website and charge a fee to users, I would be out of business in a week’s time. But what happens when internet memes are commercialized indirectly, such as by tying them to a good or service with independent economic value and demand?

Epic Games’s DLC (including the Carlton Dance) is an example of commercialized internet memes exposing the user to copyright liability.⁹⁸ An example where a firm might seek copyright protection in an internet meme is Blizzard Entertainment’s use of the “Leeroy Jenkins” meme in and from its *Warcraft* video game series.⁹⁹ “Leeroy Jenkins” was the name of a player-created character in *World of Warcraft* that became an internet meme after the player’s video went viral.¹⁰⁰ Blizzard has since capitalized on the popularity of the meme by incorporating a Leeroy Jenkins virtual trading card into its subsequent game *Hearthstone: Heroes of Warcraft*, and by licensing Leeroy Jenkins plastic figurines.¹⁰¹

95. *Id.* at 867.

96. See Lantagne, *supra* note 21, at 411 (“Unique protection for [usage of] mutating memes can also find support in trademark law’s genericism doctrine. This doctrine strips words of trademark value when they become the best way to describe the product or service . . . where forcing people to resort to some other way to communicate that idea would be undesirable.”).

97. See IPNTA, *supra* note 25, at 867–68 (discussing the information costs of enforcing intellectual property rights).

98. See *supra* Introduction (discussing the copyright litigation over Epic Games’s use of the “Carlton Dance” in *Fortnite*).

99. *Leeroy Jenkins*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/leeroy-jenkins> [<https://perma.cc/F8TP-9D65>] (last updated May 14, 2019).

100. *Id.*

101. *Id.*; see also *Copyright Notices*, BLIZZARD ENT., <https://www.blizzard.com/en-us>

On the one hand, there are some features of the commercial case that might suggest an opposite approach. First, sale of internet memes tied to products may ring closer to traditional copyright. While the author of the work cannot expect memetic use or economic returns from internet memes, the author of the work might *ex ante* expect some form of derivative market for products with economic value. When an internet meme is tied to a commercial product, the licensing revenue stream exists independently of copyright and not merely because of it.

Additionally, when an internet meme is sold as part of a good or service, it is less likely to be exhibiting an informational function. In many cases, the product is mass-produced and is more likely static than mutative.¹⁰² When an internet meme is less communicative, we may be less concerned with the potential imposition of information costs—either by the user’s sales or by the copyright owner’s enforcement. But this could leave the analysis in the tenuous position of having to distinguish between when use of an internet meme is “too commercial,” so as to expose the user to copyright liability, and when it is not “too commercial,” so as to remove the user from liability.

On the other hand, a blanket rule of exclusion may be more attractive. Though it may come at a cost of cutting off some returns that are (arguably) due to the author, there are a number of benefits to having blanket exclusion regardless of the commercial nature. First, blanket exclusion allows the free flow of memetic information to reach a more socially optimal level. Though commercial sellers are imposing direct costs on internet memes, a licensing or liability scheme would result in even greater costs being passed on to the end user. Under either result of the commercial case, these costs are still less than allowing enforcement in the noncommercial case, where internet memes are more clearly informational.

Second, blanket exclusion limits the ability of copyright owners to assert frivolous claims (under the guise of commerciality) against noncommercial users and creators of internet memes. Even when claims are sure to fail, some litigation costs are imposed on the defendant, and the threat of litigation may have an overall chilling effect on the free exchange of memetic information via internet memes. Commercial claims would also chill users from creating new internet memes (which themselves should be unprotectable); this would result in an asymmetry where the downstream users cannot avail themselves of protection but nonetheless risk liability.

Third, internet memes themselves are naturally replicators, and their success and popularity are necessarily dictated by the consuming public. This suggests that commercial use would be problematic only in the minority of

/company/about/copyrightnotices.html [https://perma.cc/J5TK-AEB4] (claiming copyright); *Legal FAQ*, BLIZZARD ENT., <https://www.blizzard.com/en-us/company/about/legal-faq.html> [https://perma.cc/8JQ3-GAA5] (same).

102. *Cf.* Lantagne, *supra* note 21, at 391–92 (discussing how static memes are less communicative than mutating memes).

cases: the most likely internet memes to be commercialized are those that are already the most popular (and, therefore, the most freely available). The most popular internet memes, in turn, are likely to derive from works that are themselves already popular. These reasons bolster the justifications for excluding internet memes from copyright liability. The best way to view internet memes is as belonging outside the copyright framework.

III. Internet Memes and the Broader Copyright Conversation

This Part takes the conclusions of the foregoing theory and analyzes them under existing copyright doctrine and alongside suggested copyright reforms in the United States.¹⁰³ In one sense, this Part is an application of the theory discussed in the preceding parts. In another, larger sense, this Part serves to anchor this Note to the broader conversations about copyright. Internet memes are certainly not the first outgrowth of modern technology to raise hard questions about copyright, and the questions are starting to add up. Is it time to revisit the Copyright Act?

A. *Modern Problems: Internet Memes and Copyright Law*

1. *Copyrightability and Copyright Subject Matter.*—Pursuant to its constitutional authority,¹⁰⁴ Congress has authorized protection for a limited duration of “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁰⁵ Section 102 of the Copyright Act lists a number of categories of “[w]orks of authorship.”¹⁰⁶ The statute also excludes from copyrightable subject matter “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.”¹⁰⁷

The constitutional minimum for originality is “independent creation plus a modicum of creativity.”¹⁰⁸ Whether a particular internet meme satisfies

103. Though state statutory and common law copyright still exist to a limited extent, they are generally preempted by the Copyright Act once subject matter comes within its purview. *See* 17 U.S.C. § 301 (2018) (preempting state law).

104. U.S. CONST. art. I, § 8, cl. 8.

105. 17 U.S.C. § 102(a) (2018).

106. *Id.* The categories are: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” *Id.* These terms are further defined in 17 U.S.C. § 101.

107. 17 U.S.C. § 102(b).

108. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 348 (1991); *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2019) [hereinafter NIMMER ON COPYRIGHT] (discussing the standards for originality and creativity).

this standard largely depends on the degree of original or mutative content.¹⁰⁹ While originality is a low bar, many internet memes would not satisfy the standard due to a complete lack of original or mutative content.¹¹⁰ But those that do have original or mutative content likely would satisfy the standard. Even those combining unoriginal content from different sources may satisfy the originality standard to the extent that the *combination* exhibits independent creation and a modicum of creativity.¹¹¹

In at least some of these cases, however, the internet meme may run into the idea–expression dichotomy and the merger doctrine that implements it. Section 102(b) ensures that copyright fulfills its purpose of protecting *expression* and not merely *ideas*.¹¹² The merger doctrine excludes from copyright protection instances of expression when there are few permutations for expressing an idea.¹¹³ In that case, allowing copyright protection for the expression might give de facto rights over the idea itself; the expression is said to “merge” with the idea, and protection is precluded or sharply limited in scope.¹¹⁴ This might be the case with image macros and other internet memes where the original content is a simple caption expressing an idea. But internet memes can vary considerably in terms of expressive complexity, so the idea–expression dichotomy would not provide the desired results in all (or even most) cases.

Internet memes would satisfy the requirement of fixation in a tangible medium of expression. In many cases, they assume copyright-familiar forms of fixation, such as images, videos, or text. In the general case, they are necessarily fixed in a medium “from which they can be perceived, reproduced, or otherwise communicated” by and through “the aid of a machine or device” (namely, a computer).¹¹⁵

Under the Copyright Act’s present scheme for subject matter, there would likely be copyright protection for internet memes to the extent that they involve original expression. In many cases, the original expression may

109. See *supra* section I(B)(2); Lantagne, *supra* note 21, at 390–94 (distinguishing between “static” memes and “mutating” memes).

110. See Lantagne, *supra* note 21, at 390–94 (discussing “static” memes).

111. See *Feist*, 449 U.S. at 361 (suggesting that Rural’s phone book, despite comprising uncopyrightable material, may nonetheless be subject to copyright protection *as a whole* to the extent that it also comprises original copyrightable material, namely an original foreword and advertisements); see also 1 NIMMER ON COPYRIGHT § 3.03 (discussing the standard of originality in relation to derivative works). When copyrighted material is used unlawfully in a derivative work, copyright protection cannot “extend to any part of the work in which such material has been used unlawfully.” 17 U.S.C. § 103 (2018). The tension underlying the scope of protection in derivative works demonstrates the close nexus between the two questions discussed in Part II.

112. 17 U.S.C. § 102; see also 4 NIMMER ON COPYRIGHT § 13.03[B][2][a] (discussing the idea–expression dichotomy).

113. See 4 NIMMER ON COPYRIGHT § 13.03[B][3] (discussing merger).

114. *Id.* § 13.03[B][3][c].

115. 17 U.S.C. § 102; see also Castaño Díaz, *supra* note 58, at 97 (“Its mobility, storage, and reach are web-based (Hard disks, cell phones, servers, cloud, etc.).”).

be a very small part of the meme (such as a selection or arrangement of elements taken from other sources). In other memes with greater degrees of original content, the copyright protection may be more significant. This does not comport with the conclusions reached in Part II.

2. *Exclusive Rights of Copyright Owners.*—Section 106 of the Copyright Act defines the exclusive rights of copyright owners.¹¹⁶ Copyright infringement occurs when one of those rights is violated.¹¹⁷ Though conduct vis-à-vis internet memes could violate any of the Section 106 rights, two are of particular salience: the Section 106(1) right to reproduce copies, and the Section 106(2) right to produce derivative works.

A prerequisite for infringing any of the Section 106 rights is that the infringer must have copied protected material from the copyright owner's work.¹¹⁸ To infringe the reproduction right in a plaintiff's copyright-protected work, the infringing action may be as simple as copying protected material and fixing it in a tangible medium of expression.¹¹⁹ Thus, an internet meme that copies and fixes protected material could be subject to liability for infringing the reproduction right. And, if an internet meme is *itself* subject to copyright protection, the reproduction right might even be infringed by simple acts such as downloading the meme or retweeting it.

A copyright owner could also assert the right “to prepare derivative works based upon the copyrighted work.”¹²⁰ The Copyright Act defines a “derivative work” as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions,

116. 17 U.S.C. § 106 (2018). Those rights are:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

117. See 17 U.S.C. § 501 (2018) (“Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . .”).

118. 2 NIMMER ON COPYRIGHT § 8.01[A].

119. *Id.* § 8.02[A].

120. 17 U.S.C. § 106(2) (2018).

annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”¹²¹

It is quite likely that an internet meme could fit within this definition. First, internet memes themselves typically fit into the categories of “works of authorship” listed in § 102. Second, internet memes are categorically “based upon one or more preexisting works.” They necessarily take content from some prior-existing source, be it a protectable work or not.¹²² Moreover, many internet memes are likely to be derivative of other internet memes. If one internet meme is subject to copyright protection, a simple act such as adding or changing a caption could amount to infringement of the derivative-work right.

It is also worth noting that there is some overlap (and tension) between the derivative-work right and the reproduction right. Nonetheless, it should be clear that internet memes can satisfy a prima facie case for infringement of at least one of these rights. The inquiry would be more fact specific, but there is nothing operating to exclude internet memes categorically from satisfying a prima facie case for copyright infringement.

3. *Fair Use*.—Fair use is one of the most-commonly-invoked defenses to copyright infringement. It is also one of the most misunderstood by the public. According to § 107 of the Copyright Act, “[n]otwithstanding the [exclusive rights], the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”¹²³ That section provides four factors for courts to consider:

- (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.¹²⁴

Judicial decisions have shifted as to how these factors are to be weighed and applied. In 1984, the Supreme Court stated in *Sony Corporation of America v. Universal City Studios, Inc.* (the *Betamax* case)¹²⁵ that commercial use is presumptively unfair.¹²⁶ One year later, in *Harper & Row*,

121. 17 U.S.C. § 101 (2018). Note that the reproduction right and the derivative-work right often overlap.

122. See Schwabach, *supra* note 22, at 11.

123. 17 U.S.C. § 107 (2018).

124. *Id.*

125. 464 U.S. 417 (1984).

126. *Id.* at 448–51.

Publishers, Inc. v. Nation Enterprises,¹²⁷ the Supreme Court refused to find fair use of a copyrighted work—President Gerald Ford’s unpublished but forthcoming memoir—when the defendant had taken the “heart” of the work (the chapter on Ford’s pardoning of President Richard Nixon).¹²⁸ But in 1994’s *Campbell v. Acuff-Rose Music, Inc.*,¹²⁹ a unanimous Supreme Court changed course: it sharply limited the “*Sony* presumption” to the facts in *Sony*;¹³⁰ found fair use for a parody that took the “heart” of the plaintiff’s work;¹³¹ and instead focused on the effect on the potential market for the copyrighted work¹³² and whether the purpose and character of the use was “transformative.”¹³³ The first and fourth factors (transformativeness and effects on the market, respectively) under the fair-use statute remain the most important.

Fair use is a highly fact-sensitive inquiry. The purpose and character of use, for example, must be assessed with respect to the underlying work. An internet meme may be transformative of a copyrighted work in the sense that it acts to convey memetic information rather than fulfill the expressive or creative function of the original work. In this sense, it might be called “transformative in function.” However, an internet meme might not be transformative of another internet meme. The nature of the underlying work is also fact dependent and would affect the amount and substantiality of what was taken. An image meme, for example, might take the entirety of an underlying image. As to effects on the market, courts will only find this factor to weigh against fair use when the defendant’s use *usurps* (and not merely harms) the market for the plaintiff’s work.¹³⁴ Internet memes, which are created with no expectation of economic returns, do not usurp the market for a plaintiff’s original work.

The existing fair-use scheme does not sufficiently create the sort of categorical exclusion from liability that I argue is proper for internet memes. Fair use could hinge on whether the internet meme is used commercially. Moreover, the fair-use standard is inconsistent and can create uncertainties for potential defendants. In part, this is due to problems internal to the fair-use scheme itself, and not simply to new problems raised by internet memes. I discuss fair use more in section III(B)(1).

4. *Remedies.*—As with most civil lawsuits, the two forms of remedies available can be categorized as prospective and retrospective. As to

127. 471 U.S. 539 (1985).

128. *Id.* at 564–66, 569.

129. 510 U.S. 569 (1994).

130. *Id.* at 590–92.

131. *Id.* at 588–89.

132. *Id.* at 590–94.

133. *Id.* at 578–85.

134. *Id.* at 592.

prospective relief, the Copyright Act provides for two forms: injunctions and impoundment orders.¹³⁵ Though injunctions are provided for by statute, they are subject to the traditional, four-factor equitable test, as reaffirmed in *eBay Inc. v. MercExchange, LLC*¹³⁶: (1) irreparable harm; (2) no adequate remedy at law; (3) balance of hardships; and (4) service of the public interest.¹³⁷ Theoretically, a trial judge's equitable discretion would allow for a careful tailoring of prospective relief (if warranted at all).

One study by Jiarui Liu found no decrease in motions for copyright injunctions in the years after *eBay*, contrary to an expectation that a higher standard would have a deterrent effect.¹³⁸ Interestingly, Liu's study noted that more than half of the copyright-injunction litigation involved online infringement.¹³⁹ In the cases considered by Liu, motions for preliminary injunctions were granted 44.1% of the time, and permanent injunctions were granted in over 90% of the cases.¹⁴⁰ Liu also noted that a significant percentage of courts (37.3%) at the time still followed the traditional test that "a copyright plaintiff is entitled to a permanent injunction when liability has been established and there is a threat of continuing violations."¹⁴¹ While it is difficult to predict how these figures might apply to internet memes, they are nonetheless concerning given the degree to which internet memes may be subject to liability.

Damages are also concerning, and the concerns are more immediately apparent. The Copyright Act's statutory election-of-remedies provision allows a plaintiff to elect between seeking actual damages or statutory damages.¹⁴² Actual damages may be very hard to prove in suits against internet memes (because there may be none at all); in these cases, it is very likely that a plaintiff would elect to seek statutory damages. In most cases, a successful plaintiff is entitled to "a sum of not less than \$750 or more than \$30,000" per work infringed, "as the court considers just."¹⁴³ For cases of willful infringement, the ceiling rises to \$150,000, and for cases of demonstrably innocent infringement, the floor drops to \$200.¹⁴⁴ Thus, for

135. 17 U.S.C. §§ 502–503 (2018).

136. 547 U.S. 388 (2006).

137. *Id.* at 391.

138. Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215, 228–29 (2012).

139. *Id.*

140. *Id.* at 232, 237. Liu's study also questions whether courts are truly treating the four-factor test as a matter of equitable balancing, as opposed to a test of necessary factors. *See id.* at 240–41.

141. *Id.* at 236 (internal quotation marks omitted).

142. 17 U.S.C. § 504 (2018).

143. *Id.* § 504(c)(1).

144. *Id.* § 504(c)(2). Pamela Samuelson and Tara Wheatland note that the innocent-infringement reduction "is virtually never used." Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 452 n.49 (2009).

cases where an internet meme is found to infringe upon a protectable work, even on the most favorable facts and with the most favorable extent of the trial judge's discretion, the internet-meme maker could still be on the hook for at least \$750—*per work infringed*.¹⁴⁵

The nature of internet memes also inherently allows this number to multiply. Highly mutative memes may take content from a number of sources, exposing the maker to a multitude of liabilities. Additionally, an individual might make a series of memes following a common theme (e.g., taking content from different episodes of a television show). This would expose the meme maker to an assessment of statutory damages for each work (i.e., each episode) infringed. Since online communities often form around shared interests, simple acts that coincide with participation (making, sharing, or downloading memes) could open participants to a minefield of liability.

Statutory damages and strict liability make copyright infringement stand out among torts. The standard rationale for tort liability is deterrence of socially harmful conduct via the imposition of greater costs. Heavy-artillery deterrence may be justifiable to vindicate the author's *ex ante* costs in the standard copyright account, but it is not justifiable in the case of internet memes. Our existing copyright scheme would act as a heavy deterrent to the socially desirable conduct of producing new memetic information, free communication, and participation in online communities.

B. *Modern Solutions: Internet Memes and Copyright Reform*

The conversation on reforming copyright (and in many cases, *limiting* copyright) has long been in progress. Justice Stephen Breyer cautioned against copyright's expansion in his 1970 article, *The Uneasy Case for Copyright*.¹⁴⁶ In contrast, copyright protection has tended to expand.¹⁴⁷ Is the present state of copyright law the best state for the modern era? In this subpart, I look at three categories of reforms that have been part of the

145. The figures are often much higher than the statutory minimum. See *infra* notes 165–74 and accompanying text.

146. Breyer, *supra* note 31, at 350–51.

147. See, e.g., Copyright Act of 1976, Pub. L. No. 94-553, § 302, 90 Stat. 2572, 2572 (extending copyright terms from a maximum of fifty-six years to the author's life plus fifty years); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2872 (1998) (extending copyright term for future and existing works by twenty years); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (implementing certain international treaties, imposing liability for circumvention of digital anticopying mechanisms, and creating *sui generis* protection for the design of boat hulls); Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774, 1774 (increasing the floors and ceilings for statutory damages); see generally U.S. COPYRIGHT OFFICE, COPYRIGHT LAW OF THE UNITED STATES, at v–xii (2016) (cataloging amendments to the Copyright Act of 1976).

conversation, and how they might better comport with a world where internet memes are the norm.¹⁴⁸

I. A More Consistent Fair-Use Standard.—From an economic perspective, fair use can be understood as allowing a defendant's socially desirable conduct when it would not harm the plaintiff's incentives, but market conditions nonetheless fail to facilitate the transfer of rights.¹⁴⁹ Sometimes, the barrier to a market exchange is high transaction costs, especially when the transferee's expected profits are low.¹⁵⁰ Other times, market exchange is not possible because the market does not or cannot exist.¹⁵¹ Still other times, the transferor may refuse to license the rights despite market conditions suggesting that he should.¹⁵² The types of market failures suggested by Wendy Gordon may be applicable to internet memes. A creator of an internet meme stands to make no profit and may not be able to incur the costs of negotiating a license (let alone the cost of the license itself) in order to engage in her socially beneficial conduct. Given the degree of anonymity on the internet, it is particularly likely that a work sought to be used is an "orphan work,"¹⁵³ and this raises a potential user's search costs in seeking a license. The owner of the copyright might also be unwilling to or even hostile towards licensing for memetic use. Therefore, there is substantial value in exploring fair use as a mechanism for addressing copyright concerns for internet memes.

Fair use stands out among areas for copyright reform because it is particularly subject to judicial modification. A pair of relatively recent cases from the Second Circuit illustrate this. The issues in *Authors Guild, Inc. v. HathiTrust*¹⁵⁴ and *Authors Guild v. Google, Inc.*¹⁵⁵ revolved around Google's digitization of millions of copyrighted (as well as public-domain) books in partnership with a number of educational institutions and research libraries.¹⁵⁶ Google's scans were purposed with enabling users to locate information about the books (such as by searching for books containing certain terms) through its Google Books search engine.¹⁵⁷ The engine also

148. Of course, a solution might be for Congress to pass the "No Copyright in Internet Memes Act," but this is far-fetched and overlooks larger concerns about the Copyright Act.

149. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1614 (1982).

150. *Id.* at 1628.

151. *Id.* at 1630.

152. *Id.* at 1632–33.

153. An "orphan work" is a work for which the owner cannot be identified. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006).

154. 755 F.3d 87 (2d Cir. 2014).

155. 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016).

156. *Id.* at 208.

157. *Id.* at 209.

allowed users to view limited “snippets” of text from the books.¹⁵⁸ Notwithstanding, the Second Circuit concluded that Google’s repository was noninfringing fair use.¹⁵⁹ The weight of the court’s reasoning focused on how Google’s use was transformative: “the purpose of Google’s copying of the original copyrighted books is to make available significant information *about those books*.”¹⁶⁰ Even the snippet view “add[ed] importantly to the highly transformative purpose of identifying books of interest to the searcher.”¹⁶¹

Fair use suffers from imprecision and inconsistency. This is especially true where novel technology is involved. The Google Books cases sparked new conversations on how fair use might be modernized for the internet age. The lack of a concrete standard can curtail socially beneficial uses of copyrighted works, and in an era of mass participation in content creation, these small effects add up. One commentator stated the problem succinctly: “Inconsistency is expensive and chilling.”¹⁶² Given the unpredictability of the fair-use defense and the costs associated with litigating it, for many defendants, fair use may be “no defense at all.”¹⁶³ Another commentator concluded that the Supreme Court, in declining certiorari over the *Google* case, missed “the opportunity to provide more clarity on the definition of ‘transformative’ use in the context of technology, as well as to address the substantial discrepancy in what constitutes fair use.”¹⁶⁴

Potential litigants should be able to rely on a consistent fair-use doctrine. This goes both for users hoping to avoid liability and for copyright owners when deciding whether to enforce their rights. The problems with inconsistent fair-use jurisprudence are magnified in the context of internet memes, where the potential claims against users are many in number. And even if a fair-use defense is successful, the user’s cost of litigation is relatively high in comparison to what she gained from the use. Even though she may have won, she may have also lost.

2. *Reforming Statutory Damages.*—Another area in demonstrable need of reform is remedies, and in particular, statutory damages. Statutory damages allow a plaintiff to prove liability without proving (or even pleading) actual damages. In order to be eligible for statutory damages, the only additional requirement is that the work was registered with the Copyright Office at the time of infringement (or within three months of

158. *Id.* at 209–10.

159. *Id.* at 229.

160. *Id.* at 217 (emphasis in original).

161. *Id.* at 218.

162. Brian Sites, *Fair Use and the New Transformative*, 39 COLUM. J.L. & ARTS 513, 549 (2016).

163. *Id.* at 550.

164. Caroline E. Kim, Note, *Insta-Fringement: What Is a Fair Use on Social Media?*, 18 J. MARSHALL REV. INTELL. PROP. L. 102, 118 (2018).

publication).¹⁶⁵ For internet memes, where in most cases there will be no economic loss to the copyright owner, a plaintiff's right to elect statutory damages gives real teeth to litigation. The minimum award of \$750 per work infringed would impose a net cost on the internet user, who likely does not make any profit from her internet memes. The risk of liability can chill socially beneficial memetic activity.¹⁶⁶ And in reality, the harm to the internet-meme maker or user will be much higher when litigation costs are factored in. The mere *threat* of litigation could credibly be used to force internet-meme makers to settle, even when the threat is frivolous.

Pamela Samuelson and Tara Wheatland suggest that statutory copyright damages may, in some cases, be inconsistent with due process and with Congress's intent in enacting the provision.¹⁶⁷ They note a number of questionable practices, including courts' "jump[ing] straight to the statutory maximum, even when the infringement caused little or no actual harm . . . and brought the defendant little or no profit."¹⁶⁸ Moreover, they note that statutory-damages rulings have been inconsistent, especially in cases where infringing materials are posted on the internet.¹⁶⁹ But statutory damages can still serve a legitimate compensatory function, especially in cases where a plaintiff will have difficulty proving the compensation to which he is justly entitled.¹⁷⁰ How might this tension be resolved?

One option would be to provide more clear general guidance to courts. Samuelson and Wheatland suggest that courts should consider statutory damages with an eye to other compensatory remedies in the Copyright Act.¹⁷¹ They provide a number of guiding principles that courts and litigants should observe in determining awards of statutory damages.¹⁷² In addition, Samuelson and Wheatland suggest that "[c]ourts should also have the power to lower statutory damages below the current \$750 minimum when an award based on this minimum would be grossly disproportionate to the harm caused."¹⁷³ Congress might revisit the provision on statutory damages to provide this guidance to courts and increase their discretion.¹⁷⁴

Another possibility is to legislate changes to the statutory-damages framework to better comport with the special considerations for the internet

165. See 17 U.S.C. § 412 (2018) (establishing registration as a condition precedent to statutory damages and attorney's fees).

166. See Samuelson & Wheatland, *supra* note 144, at 443 (noting "the potential chilling effect" on individuals).

167. *Id.* at 480.

168. *Id.* at 481.

169. *Id.* at 485–86.

170. *Id.* at 499.

171. *Id.* at 498.

172. *Id.* at 501–09.

173. *Id.* at 509.

174. *Id.* at 509–10.

age.¹⁷⁵ Since 1976, Congress's changes to the statutory-damages provision have been limited to raising the floors and ceilings for awards.¹⁷⁶ The statutory-damages figures are twenty years old, and the framework applying them is over forty years old. Congress can revisit the Copyright Act in view of how society and technology have developed in the intervening years. As an example, Joe Donnini looks to the Audio Home Recording Act, where increased copyright protection in view of new technologies was compromised with an exception for "noncommercial use by a consumer."¹⁷⁷ He suggests that Congress might similarly give special consideration to the digital domain in the law of damages.¹⁷⁸ The expansion of the internet to its modern scale has brought about a massive change in societal expectations and behavior, and revision of the law's response is overdue.¹⁷⁹

3. *Revisiting Copyright Formalities.*—The United States resisted the trend of globalized copyright law for over 100 years. In 1886 in Berne, Switzerland, ten countries adopted the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The Berne Convention implemented a degree of comity in copyright law between signatory states. One important aspect of the Berne Convention was its distaste for "formalities," statutory prerequisites to copyright protection. The 1908 Berlin Revision of the Berne Convention provided that the enjoyment of copyright protection "shall not be subject to any formality."¹⁸⁰

In stark contrast, the U.S. Congress one year later adopted the Copyright Act of 1909, which imposed the strictest regime of formalities to date.¹⁸¹ Under the 1909 Act, a copyright owner who failed to place an adequate copyright notice on all publicly distributed copies would likely see the work

175. See Joe Donnini, *Downloading, Distributing, and Damages in the Digital Domain: The Need for Copyright Remedy Reform*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 413, 449 (2013) (suggesting "[a] carve out for non-commercial only downloading").

176. See Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774, 1774 (1999) (increasing the floors and ceilings each by 50%).

177. Donnini, *supra* note 175, at 446 (quoting 17 U.S.C. § 1008 (2011)). This in turn reflects the outcome of the *Betamax* case, where Sony was held not to be a contributory infringer, in part because home use of its VCRs to record programs for later viewing would constitute fair use. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454–56 (1984).

178. See Donnini, *supra* note 175, at 447 (suggesting that Congress and the courts revisit statutory damages in view of legal principles that have since developed around new technology).

179. See J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEXAS L. REV. 525, 558 (2004) (suggesting, in the context of peer-to-peer filesharing, that Congress should "adjust statutory punishments in light of new behaviors and norms").

180. Revised Berne Convention for the Protection of Literary and Artistic Works art. 4, Nov. 13, 1908, 208 Consol. T.S. 28.

181. See ROBERT A. GORMAN, *COPYRIGHT LAW* 85–89 (2d ed. 2006) (explaining the strict requirements of the 1909 Act).

fall into the public domain—the copyright death sentence.¹⁸² The 1976 Act relented somewhat and provided for steps to remedy inadequate notice.¹⁸³ Under both Acts, registration was not a prerequisite to a valid copyright, but was still a prerequisite to litigation.¹⁸⁴ In addition to *notice* and *registration*, a third principal formality, *deposit*, requires the copyright owner to submit two copies of each copyrighted work to the Library of Congress (but failure would not affect the validity of the copyright).¹⁸⁵

In 1988, copyright isolationism gave way to globalization. Congress passed the Berne Convention Implementation Act and, after 102 years, the United States became a Berne member.¹⁸⁶ The 1976 Act's formalities were blunted to comply with the Berne Convention: The requirement of registration before suit was limited only to domestic works and eliminated for works published in other Berne member countries.¹⁸⁷ Recordation of transfers as a prerequisite to suit was also eliminated.¹⁸⁸ And most drastically, notice was now optional.¹⁸⁹ What once spelled the certain death of many copyrights was gone. Under today's Copyright Act, protection vests with fixation and no more.¹⁹⁰

The issues surrounding internet memes illustrate why a lack of formalities may be problematic. It is extremely easy to obtain copyright protection—so easy that most people will not realize they are gaining legal rights through everyday actions. The lack of notice (in the broader sense) as to what may be copyrighted also means that most people will not realize when their everyday actions violate the legal rights of others. Internet memes compound these problems given their mutative nature, how easily and rapidly they are created, and the sheer number of them. The issue is not merely *if* an

182. *Id.* at 86. “If the wrong name was placed in the notice . . . , or if the year of publication was materially inaccurate, or if either of those elements was omitted or the notice was omitted altogether, the work would be thrust irretrievably into the public domain.” *Id.* Notice would come in the form of the familiar “©” symbol or the words “Copyright” or “Copr.,” along with the other specified information. *Id.* at 91.

183. *Id.* at 89.

184. *Id.*

185. *Id.* at 93–94.

186. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2, 102 Stat. 2853, 2853.

187. GORMAN, *supra* note 181, at 95. With timely registration, the registrant gets certain benefits, such as statutory damages and attorney's fees. *See* 17 U.S.C. § 412 (2018) (barring the award of statutory damages and attorney's fees unless the copyright owner has timely registered). Even if the copyright owner has not registered the copyright at the time of infringement, he may nonetheless register before filing suit and still recover for pre-registration actual damages, seek an injunction, or both. *See* 17 U.S.C. § 411 (2018) (authorizing suit after registration).

188. Berne Convention Implementation Act § 5 (striking the subsection on recordation as a prerequisite to suit entirely).

189. *See* GORMAN, *supra* note 181, at 91 (discussing the elimination of mandatory notice); *see also* Berne Convention Implementation Act § 7 (replacing “shall” with “may” and making other changes to eliminate mandatory notice).

190. GORMAN, *supra* note 181, at 95.

internet meme infringes a copyright, but rather *how many* copyrights it infringes and *to whom* those rights belong. And given the relatively anonymous nature of the internet, many internet memes and other online content will be orphan works from the start.¹⁹¹ One who wishes to create, share, or download an internet meme may face many questions that are impossible to answer.

Internet memes therefore have a place in the conversation about formalities. In recent years, the restoration of formalities has been suggested as a beneficial copyright reform. For one, formalities avoid the inefficiencies of requiring the public to trace ownership of copyright in a work.¹⁹² The owner of a copyright is in a better position to assume the costs of alerting the public as to her claims for protection.¹⁹³ Formalities can also ameliorate legal uncertainties and rights-clearance problems.¹⁹⁴ In particular, Stef van Gompel notes how these problems are exacerbated in the internet age, where “there is large demand for reusing copyright-protected content in mass-digitization, small-scale reuse, and other transformative uses, such as mixing and mashing.”¹⁹⁵ He also suggests that internet-age formalities would not necessarily be limited to traditional formalities such as notice, registration, deposit, and recordation.¹⁹⁶ Rather, modern formalities could include “metadata-tagging of digital works, the storage of rights management information in digital depositories, and virtually all digital tools that, in one way or another, create a link between right owners and their works.”¹⁹⁷

Scholars are not the only participants in the formalities conversation. During the Obama Administration, the U.S. Copyright Office took the position that more formalities may be beneficial.¹⁹⁸ More surprisingly, a committee of the European Commission concluded in a 2011 report that “[s]ome form of registration should be considered as a precondition for a full exercise of rights” to avoid the orphan works problem.¹⁹⁹ Even the U.S.

191. U.S. COPYRIGHT OFFICE, *supra* note 153, at 3.

192. See Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 342 (2010) (“The creator is better able to assume the costs of notification than the public is to incur the costs of tracing rights holders.”).

193. *Id.*

194. Stef van Gompel, *Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing*, 28 BERKELEY TECH. L.J. 1425, 1431–32 (2013).

195. *Id.* at 1431.

196. *Id.* at 1435.

197. *Id.* at 1436.

198. See Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1418–22 (2013) (suggesting increased registration and recordation requirements). Pallante was the Register of Copyrights and Director of the U.S. Copyright Office and delivered the keynote address at the *Berkeley Technology Law Journal’s* 2013 Symposium, *Reform(aliz)ing Copyright for the Internet Age?* *Id.* at 1415 n.†.

199. COMITÉ DES SAGES, *THE NEW RENAISSANCE* 20 (2011). The EU’s response was more controversial. Its Directive on Copyright in the Digital Single Market, which shifts responsibility for policing infringement to online platforms, has been popularly criticized as a “meme ban.” See

Supreme Court has addressed formalities recently, unanimously resolving a circuit split in favor of more stringent presuit registration.²⁰⁰ In *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*,²⁰¹ the Court held that “registration” as a prerequisite to suit is only satisfied when the Copyright Office acts on the application for registration and not merely when the application is submitted.²⁰²

After *Fourth Estate*, copyright litigants will have the evidentiary benefit of the Copyright Office’s opinion on copyrightability. This may result in fewer suits being filed that do not belong in litigation. One small but immediate effect of the ruling was that Ribeiro’s lawsuit against Epic Games had now been filed prematurely.²⁰³ Now that the Copyright Office has weighed in and concluded that the Carlton Dance is not protectable as choreography, Ribeiro must decide whether to refile his meme lawsuit and challenge the Copyright Office’s decision in federal court.

Conclusion

Internet memes can present difficult problems for copyright law, both analytically and in practice. Internet memes are a net good for society in terms of how they facilitate efficient communication of information and new modes of expression. In the modern internet era, memes are an increasingly regular and expected presence. At this point, they are here to stay.

The interests that copyright law seeks to vindicate are different from what internet memes bring to the table. Despite the vast expansion of copyright law over the years, it must be remembered that copyright’s central premise is providing *ex ante* incentives to create works. Internet memes, which bear no expectation of economic profit, neither require incentivization nor undercut the incentives of others. Despite internet memes having facial similarities to the stuff of copyright, the best way to treat them is as belonging outside of the copyright framework.

No system of law is perfect, and I do not go as far as saying that internet memes necessitate a structural overhaul of copyright law. However, it is

Matt Reynolds, *What Is Article 13? The EU’s Divisive New Copyright Plan Explained*, WIRED (May 24, 2019), <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban> [<https://perma.cc/3L5S-E2CR>] (explaining the view that the Directive is a “meme ban”). The Directive has been opposed by many prominent academics and professionals in law and computer science, including Sir Tim Berners-Lee, inventor of the World Wide Web. Letter from Sir Tim Berners-Lee et al. to Antonio Tajani MEP, President of the European Parliament (June 12, 2018), <https://www.eff.org/files/2018/06/13/article13letter.pdf> [<https://perma.cc/AVC4-6FSZ>].

200. See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019) (interpreting the Copyright Act’s requirement of registration as a prerequisite to litigation).

201. 139 S. Ct. 881 (2019).

202. *Id.* at 892.

203. See Donahue, *supra* note 11 (noting Ribeiro’s dismissal of his lawsuit after the *Fourth Estate* ruling).

important to assess how the law interacts with the everyday acts of regular people—in particular, acts which were not foreseen when the law was adopted. Can the Copyright Act stand to be updated? Technological developments over the last forty-plus years certainly suggest so, and I believe internet memes add weight in favor of reform. In this Note, I have suggested three potential areas of reform that might benefit a society where technological developments rapidly become the norm. While we are yet to see the full extent of how internet memes might interact with the law, the responsible position is to keep a watchful eye as they develop together. And when a problem arises, we must be sure to recognize it as a distinctly modern problem and respond to it with a modern solution.