

Got Rights? A study on whether memes can have copyrights

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Contents

Abstract	3
Introduction.....	3
The lifecycle of memes & its monetization	4
Can these memes enforce copyrights?	5
Conclusion	9

Abstract

This paper aims to look at the kind of rights that affect memes and what kind of protection they garner being the creative creation of their authors. Memes are an essential part of conversations online and are often used to increase relatability, strengthen friendships, engage followers and build brand images. Memes, thus, aids in the exploitation of creative creations with significant or no additional changes. It is important to recognize this and curb such changes and this paper engages in the argument whether such rights must be given to memes or not. It is also pertinent here whether it can be accurately gathered who owns a meme and whether plagiarism is a criterion to be considered or not. While largely focused on the Indian jurisdiction, the paper also provides for the analysis of cases tried in courts internationally.

Introduction

Memes need no introduction and are a now embedded part of social media and trend cycles. These cycles tend to change and evolve and have recall value as jokes and situational comedies. It is often a relatable feeling that is expressed through memes that makes it popular as and culturally relevant. Trends often change in speed and something that was relevant may not be thanks to the multiplicity or end of repetition. With memes claimed to have been around since 1921¹, they don't seem to be going away. They are a simple gif, image or even text that adds value to an image and conveys a complex idea in a ready manner. They are however expressions of a certain individual's intellect and thus copyrightable². Any artistic creation can evoke copyright as it is an intellectual creation and copyright, in its essence, prevents this work from being used and exploited by individuals or companies³. Thus, the art cannot be reproduced without the author's permission. Memes are in the grey zone of the IP and flourish even without these monopolistic rights offered by Intellectual property rights. This is known as negative spaces, which are usually fields that cannot be protected and creators choose to not engage seeking IP protection. An example being

¹ Gerken T, "Is This 1921 Cartoon the First Ever Meme?" (*BBC News* April 16, 2018) <<https://www.bbc.com/news/blogs-trending-43783521>> accessed November 12, 2022

² Lantagne S, "Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication" [2017] SSRN Electronic Journal

³ "Understanding Copyright and Related Rights" (WIPO) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf> accessed November 12, 2022

the tattoo industry that thrives on the lack of copyright protection⁴ interference as it is the effort of both the artist and the client. Thus, this paper looks at meme culture and its blooming creativity even when not safeguarded by IP laws⁵.

The lifecycle of memes & its monetization

Unlike tattoos, good memes are those that can be repeatedly tweaked and modified to the situation needed. They are often employed by the social media handlers for brands and institutions to engage followers and stay relevant. Trends fall into place when the meme goes viral or in a sense becomes a frequently shared post. It provides for instant creativity and unfortunately plagiarism because it is so easy to not credit the original author.⁶ With memes, the idea, behaviour, style and usage varies and can now range as a whole video as well. A more popular and rising form of content being meme reviews, where another comments on memes and reacts to whatever is being shown on screen. This is also seen as a new form of enjoying memes and gains monetary traction⁷. Memes are usually seen as a one-off picture or video that when once shared enough times goes out of use and is no longer enjoyed and can then be sent to the deleted graveyard of photo galleries. Seeing a meme that used to enjoy one's attention before is quite nostalgic but recovering its popularity is next to impossible in today's everchanging meme trend cycles.

⁴ Perzanowski A, "Tattoos and IP Norms" [2013] Minnesota Law Review

⁵ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92(8) VA. L. REV. 1687, 1689 (2006).

⁶ Statt N, "Fuckjerry Founder Apologizes for Stealing Jokes and Pledges to Get Creator Permission" (*The Verge* February 2, 2019) <<https://www.theverge.com/2019/2/2/18208446/fuckjerry-elliott-tebele-meme-joke-aggregator-repost-newpolicy-change>> accessed November 12, 2022

⁷ Palladino V, "The Science behind the Insane Popularity of 'React' Videos on YouTube" (*Ars Technica* April 3, 2016) <<https://arstechnica.com/gaming/2016/04/the-science-behind-the-insane-popularity-of-react-videos-on-youtube/>> accessed November 12, 2022

Can these memes enforce copyrights?

The making of a meme involved two things, the creation and the sharing of a meme⁸. Since memes are artistic, they would fall under the ambit of the Copyright Act, 1957 under section 2 (c). Copyright infringement as memes exist contemporarily would be under s.2(m)(i) ‘infringing copy. Copyright is defined under s.14 and as per sub clause (a) and (d), it provides for the copy of a such pictures. To look at s.52 which provides a comprehensive exception provision under clause (t) which is permanently available in a public place or any premises to which the public has access. Most social media is free and other than the user data being collected, memes are not hidden behind paywalls. In the case of *Civic Chandran v Ammini Amma*⁹, the copying of a copyrighted work is permissible when it is done in public interest and parodies are made in a manner that would have to copy the original to bear resemblance and for a reasonable man to understand the subject of the mockery. Similarly, the meme is such a copy of an original picture or video and edited to arouse thought. Thus, the meme would not be considered to infringe copyright under Indian laws.

If looked upon through the originality test as provided under *EBC v DB Modak*¹⁰, the meme is not considered an original artistic work because it essentially reshapes an idea which has been shared previously. A mere product of labour and capital should provide substantial creative judgement and needs to have skill involved. Viral memes are often pictures freely available on the internet and are do not involve much labour and capital. The idea behind tweaking it to suit a brand image is the skill, discretion and judgement of the social media handler but is not thoroughly sufficient to be considered as ‘originality’. Thus, popular memes cannot claim to meet standards of originality¹¹ and can potentially be sued for infringement of author’s right to compensation. In the

⁸ Agarwal D, “Keep Calm and Share – Copyright Not Being Infringed” (*SpicyIP* December 13, 2013) <<https://spicyip.com/2013/12/guest-post-keep-calm-and-share-copyright-not-being-infringed.html>> accessed November 12, 2022

⁹ 16 PTC 329

¹⁰ (2008) 1 SCC 1

¹¹ Verma S, “Are Memes Protected by Copyright Law?” (*The IP Press* July 14, 2022) <<https://www.theippress.com/2022/07/14/are-memes-protected-by-copyright-law/>> accessed November 12, 2022

Hindustan Pencil Pvt. Ltd. v Universal Trading Company case, the Court upheld a similar view where ‘slight changes’ were viewed as unoriginal artistic work and an infringement of copyright¹².

Here, it is important to understand the use of the meme to support the ‘fair use’ doctrine and justify its fairness to be used as in free domains. Nature of the copyright work can determine if there has been fair work and if the original author has exhausted their right of first public appearance, then the infringer can use this defence. Memes are only reshared or modified when there is substantial value or trendy-ness to it thus making this factor invalid. The amount and substantiality of the work is also gauged. If the original work is from a tv show or movie then the meme is not considered as an infringement but if the meme is a single photo or a video of the movie or show then it could constitute an infringement as it borrows content from another source. There is the usage for economic gain which is commercial exploitation and cannot take up defence of fair use which most brands are guilty of. Memes essentially rely upon memes to increase their recall value amongst younger audiences by piggybacking on viral memes. Memes are cheap and are essentially a reshared post, they are free and if tweaked to suit the brand image garner huge impacts¹³.

Berne Convention also provides an exception test under Article 9 which reads that reproduction is allowed in certain special cases where educational purposes are met, or where the reproduction does not conflict with the normal exploitation of the work and where the reproduction does not unreasonably prejudice the legitimate interest of the author. Memes are often used by social media handlers of big brands and corporates to help stay relevant and produce content to keep followers engaged. If authors of memes did enforce their rights, they could have earned a proper livelihood based on the viral factor of the meme. This would affect the final factor of the fair use doctrine as well which relates to the market of the infringed work which has been upheld by the Delhi High Court in the India TV v Yashraj Films case¹⁴. Thus, brands that use memes without prior use

¹² (1999) 19 P.T.C. 379

¹³ Khatabook, “What Is Meme Marketing? Explained with Best Meme Marketing Examples” (*Khatabook* February 11, 2020) <<https://khatabook.com/blog/meme-marketing/>> accessed November 12, 2022

¹⁴ 2013 (53) PTC 586 (Del)

infringe upon the livelihood that could potentially be earned¹⁵. An example of this would be when Warner Brothers were sued for having used memes of cats in their video game ‘Scribblenauts’ without prior permission or license to use these memes¹⁶. The memes have been entitled to statutory damages¹⁷. Another such scenario has been recognized in the when the Grumpy Cat meme had been used to market a coffee drink without consent. This lawsuit won when a California court ordered the infringer to pay out for damages.¹⁸ For content pages that repost memes that have been previously shared and monetize through sponsors, there have been instances where accounts that have massive follower-ship has had to apologize for unethically using content.¹⁹ Another popular example is where a German movie, Downfall (2004), was dubbed to make parodies in a scene that involved a frenzied Adolf Hitler ranting angrily to the staff around him. The film production that owned the movie pushed YouTube to take down thousands of videos under the justification of copyright infringement.²⁰ It is important to note, keeping in mind the EBC v DB Modak case, the court in the case of the North Jersey Media Group Inc. v. Pirro²¹ has penalized Fox news that used a meme with an enhanced caption that could engage with constituents in way

¹⁵ Banerjee A, “Memes and Copyright Protection - Copyright - India” (*Memes And Copyright Protection - Copyright - India* December 14, 2021) <https://www.mondaq.com/india/copyright/1141606/memes-and-copyright-protection#_ftn7> accessed November 12, 2022

¹⁶ Woollacott E, “Warner Brothers Sued for Infringing Cat Meme Copyright” (*Forbes* May 3, 2013) <<https://www.forbes.com/sites/emmawoollacott/2013/05/03/warner-brothers-sued-for-infringing-cat-meme-copyright/?sh=4eb8dcf92e34>> accessed November 12, 2022

¹⁷ *ibid*

¹⁸ Ma A, “Grumpy Cat Has Won \$710,000 in a Copyright Lawsuit over Coffee with Her Face on It” (*Business Insider* January 25, 2018) <<https://www.businessinsider.in/tech/grumpy-cat-has-won-710000-in-a-copyright-lawsuit-over-coffee-with-her-face-on-it/articleshow/62649834.cms>> accessed November 12, 2022

¹⁹ *Supra* 6

²⁰ “Hitler ‘Downfall’ Parodies Removed from YouTube” (*CBS News* April 22, 2010) <<https://www.cbsnews.com/news/hitler-downfall-parodies-removed-from-youtube/>> accessed November 12, 2022

²¹ 74 F. Supp. 3d 605 (S.D.N.Y. 2015).

to earn profits and making a commercial gain that no labour or effort has gone into differentiating the meme and was hit by the fair use doctrine²²²³.

The negative connotation to the enforceability of these right to monopolise the creation of memes would drain the entertainment and recreational value of these memes. It would essentially encroach upon the peoples' rights to free speech and their right to privacy and render creators inhibited from their right to life under Articles 19 and 21 respectively²⁴. Subsequently trademarking a meme would not be advisable if making it reshare-worthy²⁵. Section 54 of the copyright act which defines fair use also outlines for the nature of usage of the work also. To fall in the bracket of this defence, the creator must meet two criteria, to have no inappropriate use and no purpose to compete with the copyright owner. The improper usage of memes has been a subject of great debate as memes are often used a tool to troll personalities online. This has also resulted in the culmination of arrests and have been an infringement of freedom of speech.²⁶ The authors of the memes should quintessentially be able to enforce their moral rights in what context their meme is being displayed and whether it should be displayed in certain aspects. For example, to be used by political campaigns or not and whether the memes can be used to belittle other personalities online. This argument however, would not stand its ground as modification and tweaking of the memes would render the meme to become a parody of the original meme itself²⁷.

²² Supra 2

²³ "Fox Hurts America Yet Again, Losing Fair Use SJ Motion" (*Rebecca Tushnet* September 25, 2015) <<https://tushnet.com/2015/02/13/fox-hurts-america-yet-again-losing-fair-use-sj-motion/>> accessed November 12, 2022

²⁴ Bhatia G, "The Supreme Court and Memes" (*Indian Constitutional Law and Philosophy* May 22, 2019) <<https://indconlawphil.wordpress.com/2019/05/14/the-supreme-court-and-memes/>> accessed November 12, 2022

²⁵ Pran J, "Can You Own A Meme" (*M. Hamel-Smith & Co.* December 14, 2020) <<https://trinidadlaw.com/can-you-own-a-meme/>> accessed November 12, 2022

²⁶ Supra 22

²⁷ Maier R, "Not Always Irreconcilable: Meme and Copyright Law – Digital Society Blog" (*HIIG* February 20, 2019) <<https://www.hiig.de/en/not-always-irreconcilable-meme-and-copyright-law/>> accessed November 12, 2022

Conclusion

Mememes are a huge industry and with content creation becoming a new form of entertainment through short form videos, they must garner rights of their own. Apps like TikTok, YouTube, Instagram which have short form video entertainment understand that there is a possibility that their mediums help in the aiding of infringement of copyrights and thus have stringent take down policies as well²⁸. Understanding the necessities of such rights, many brands have taken to making mememes themselves in order to provide fresh perspective and content to an already tired and hungry market online. Indian courts have reacted adversely in the West Bengal meme case and even went to the extent to evoke an overturned provision of the Information Technology Act, s.66A, which had a ‘chilling effect’ of the censorial intention behind filing such a case²⁹. With plagiarism being a major problem with mememes, it is important to note that the real authorship of the meme can also become hard to discover.

In my opinion, mememes are a great way to build opinion and the best things in life are often free. When mememes are flourishing without the need for monopolising it, they can be allowed to thrive in negative spaces. Even if authors tend to argue on the market potential of mememes, it is important to note that their life cycles are short lived and getting to enforce these rights would only pull the plug on these mememes faster. However, mememes are evidence that we have evolved from the point of cave paintings to something more complex today to communicate with fellow sentient beings regardless of whether the medium is struck by copyrights and intellectual property rights or not.

²⁸ Gardoce R, “The Legal Side of TikTok: Music, Copyright and Ownership” (*Sprintlaw* January 7, 2022) <<https://sprintlaw.com.au/articles/tiktok-copyright-issues/>> accessed November 12, 2022

²⁹ Pinto S, “The Right to Meme: Walking on Legal Egg Shells?” (*Deccan Chronicle* May 19, 2019) <<https://www.deccanchronicle.com/nation/current-affairs/190519/the-right-to-meme-walking-on-legal-egg-shells.html>> accessed November 12, 2022

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