

Extra Legal

Copyright and Social Media: What Does it Meme?

*By Maya Fe Holzhauer**

I. INTRODUCTION

Internet memes, pictures with juxtaposed text which evolve through imitation, reproduction, and mutation, have become a widespread phenomenon with millions of memes being created and shared daily. Memes influence modern communication and culture, and are used as a form of entertainment, as business and marketing tools, and as a method for making social commentary. The ease with which memes can be created and shared has led to a vibrant social internet culture. Meme creators are usually not the copyright owners in the underlying work: surprisingly, however, there has been little litigation on this issue. This article examines why legal claims based on copyright infringement are unlikely to succeed in the meme context.

According to a recent survey by the Pew Research Center, in 2016 “[o]n a total population basis (accounting for Americans who do not use the internet at all), 68% of all U.S. adults are Facebook users, while 28% use Instagram, 26% use Pinterest, 25% use LinkedIn and 21% use Twitter.”¹ Of the Facebook

* Candidate for Juris Doctor, 2019, Northeastern University School of Law.

¹ See Shannon Greenwood, Andrew Perrin & Maeve Duggan, *Social Media Update 2016*, PEW RESEARCH CTR., 3 (Nov. 2016), <http://assets.pewresearch.org/wp->

users, 76% report that “they visit the site on a daily basis.”² Instagram use is especially high among younger adults, with roughly 59% of online adults ages 18-29 using Instagram.³ “Roughly half (51%) of Instagram users access the platform on a daily basis, with 35% saying they do so several times a day.”⁴ Although memes can be accessed on a variety of social media platforms including Facebook, Twitter, and Pinterest, this article will primarily focus on memes as they are used on Instagram.

II. AN OVERVIEW OF INSTAGRAM

Instagram allows users to instantly share photos with their friends and followers. Once a user has created an account with Instagram, they are able to “post” pictures to their feed.⁵ With the swipe of a finger, Instagram posts can also be shared on a user’s linked Facebook, Twitter, and Tumblr accounts. Users can “follow” other accounts, which could be, for example, friends, acquaintances, brands, celebrities, political officials, accounts devoted to posting pictures of puppies/cities/cupcakes etc. There are also accounts which post strictly humorous content, which often includes memes.⁶

To create an account a user must accept Instagram’s Terms of Service. The Terms of Service is a “contract of adhesion” which “offer[s] no room for negotiation – the user’s only options are to take it or leave it.”⁷ Instagram does not claim ownership of any content that users post: however, users do grant Instagram “a non-exclusive, fully paid and royalty-free, transferable, sub-

content/uploads/sites/14/2016/11/10132827/PI_2016.11.11_Social-Media-Update_FINAL.pdf (among a national sample of 1,520 adults, 18 years of age or older).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ The following description is based on the author’s personal experience with Instagram.

⁶ See, e.g., the following accounts: meme.w0rld (@meme.w0rld), INSTAGRAM, <https://www.instagram.com/meme.w0rld/?hl=en> (last visited May 12, 2017); Elliot Tebele (@fuckjerry), INSTAGRAM, <https://www.instagram.com/fuckjerry/?hl=en> (last visited May 12, 2017); Claudia Oshry (@girlwithnojob), INSTAGRAM, <https://www.instagram.com/girlwithnojob/?hl=en> (last visited May 12, 2017).

⁷ See Adam Remsen, *A Lawyer Digs Into Instagram’s Terms of Use*, PETAPIXEL (Dec. 7, 2016), <https://petapixel.com/2016/12/07/lawyer-digs-instagram-terms-use/>.

licensable, worldwide license to use the Content that [is] post[ed] on or through the Service.”⁸ Users represent and warrant that they own the Content which they post.⁹

In addition, users represent and warrant that their postings “do[] not violate, misappropriate or infringe on the rights of any third party, including, without limitation, privacy rights, publicity rights, copyrights, trademark and/or other intellectual property rights.”¹⁰ Users also agree to pay any royalties, fees or money owed for the content that they post.¹¹ Finally, users agree that content posted to Instagram is not confidential, and agree not to hold Instagram liable “for any use or disclosure of any content ... provide[d].”¹² Instagram does provide a “copyright report form” which allows users to report content that they believe infringes on their copyright.¹³ If a user repeatedly infringes on other people’s intellectual property rights, Instagram will disable the users account “when appropriate.”¹⁴

III. MEMES

According to Merriam Webster, a meme is “an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media.”¹⁵ “A meme typically consists of a photograph, brief animation or snippet of video accompanied by a single quip (often in bold white text) appearing at either the top or bottom of the image. When analogizing a meme to a traditional joke, one

⁸ *Terms of Use*, INSTAGRAM, <https://help.instagram.com/478745558852511> (last visited May 11, 2017).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Copyright Report Form*, INSTAGRAM, <https://help.instagram.com/contact/552695131608132> (last visited May 12, 2017).

¹⁴ *Terms of Use*, INSTAGRAM, <https://help.instagram.com/478745558852511> (last visited Sept. 30, 2017).

¹⁵ *Meme*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/meme> (last visited May 11, 2017).

could say that the picture typically serves as the setup, and the accompanying text serves as the punchline.”¹⁶

It is useful to break memes into two categories: static memes, and mutating memes. Static memes are “visual images that are mere reproductions of an image without altering it any way or imbuing it with any new meaning.”¹⁷ “Nothing of recognizable value” has been added to the image in a static meme.¹⁸ Take for example, the use of a photo of firefighters raising an American flag near the ruins of the World Trade Center on the anniversary of the September 11, 2001 terrorist attacks. On the anniversary of September 11, 2001, this image was posted on social media with the added hashtag¹⁹ #neverforget.²⁰ The use of the photo in this way adds “nothing to the photograph itself; it is the use of the photograph in the way that it has been intended.”²¹

Mutating memes are “visual images that have morphed beyond their origin to act as their own form of communicative shorthand.”²² These mutating memes are the focus of this article. Once a meme is created, it can then be taken by derivative authors who create new posts that are similar, but slightly different from the original. In fact, there are entire websites which allow anyone to easily create their own meme.²³ Some mutations of the meme

¹⁶ Alexander Ziccardi, *When Grumpy Cat Becomes Grumpy Plaintiff: Memes In Court*, LAW 360 (Mar. 9, 2017), <https://www.law360.com/articles/889794/when-grumpy-cat-becomes-grumpy-plaintiff-memes-in-court>.

¹⁷ Stacy M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, SSRN, 3 (Apr. 1, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944804.

¹⁸ *Id.* at 3.

¹⁹ See Rebecca Hiscott, *The Beginner’s Guide to the Hashtag*, MASHABLE (Oct. 8, 2013), <http://mashable.com/2013/10/08/what-is-hashtag/#QsxptCevIPqT> (providing that a hashtag is a word or group of words preceded by pound sign (#) which creates a searchable link).

²⁰ *N. Jersey Media Grp., Inc. v. Jeanine Pirro & Fox News Network, LLC*, 74 F. Supp. 3d 605 (S.D.N.Y. 2015).

²¹ Lantagne, *supra* note 17, at 4.

²² *Id.*

²³ See, e.g., MAKE A MEME, <https://makeameme.org/> (last visited May 11, 2017); *Meme Generator*, IMGFLIP, <https://imgflip.com/memegenerator> (last visited May 11, 2017).

will build “in the general direction of the meme and its previous versions, while others change the meme drastically.”²⁴ All the strands of memes are ultimately connected to the original meme.²⁵

IV. COPYRIGHT

“Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²⁶ Under the Copyright Statute, a copyright holder of a photo has the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work, and to display the work publically.²⁷

Copyright protection arises upon the creation of a work²⁸ and no formalities are required. However, registration with the Copyright Office (which requires filing an application, paying the required fee, and depositing copies with the Copyright Office)²⁹ is a relatively simple process that can be done online, and offers statutory benefits to the copyright holder. Registration is a pre-condition to filing suit for infringement and obtaining statutory damages and attorney’s fees for all works. Owners of registered copyright can be awarded a “sum of not less than \$750 or more than \$30,000” for each infringement.³⁰

This may be one reason why copyright infringement in the form of internet memes are not heavily litigated. Although copyright protection arises upon the creation of the work, most people who snap a photo on their phone

²⁴ Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 250 (2013).

²⁵ *Id.*

²⁶ 17 U.S.C. § 102(a).

²⁷ 17 U.S.C. § 106.

²⁸ 17 U.S.C. § 302(a).

²⁹ 17 U.S.C. § 408(a).

³⁰ 17 U.S.C. § 504(c)(1).

and upload it to Instagram do not register it with the Copyright Office first. In addition, internet memes might rise and fall in popularity before a copyright holder has even considered registering for copyright protection. Unless an image has already been registered with the Copyright Office, it may not be financially feasible or practical to pursue a claim of copyright infringement. Take for example the meme known as “Salt Bae.”³¹ Salt Bae is the nickname given to chef Nusret Gökçe after a video of him “flamboyantly sprinkl[ing] salt on a carved steak” went viral.³² Within 48 hours of uploading the video, it had over 2.4 million views and 8,700 comments.³³ The still image was reposted as a meme on social media sites with a wide variety of captions such as “When you’re losing an argument so you bring up personal shit to crush his soul”³⁴ and “When you can’t think of any more examples and write etc at the end.”³⁵

Hypothetically, if Gökçe owned the valid but unregistered US copyright in his photo, and did not want the photo to be reposted with various captions it would be impractical for him to sue for copyright infringement. To do so would be very costly, and the actual damages and lost profits would be difficult to prove. In addition, Gökçe would have to pay for the legal fees involved with the lawsuit, which could easily amount to much more than any potential damages. If, however, Gökçe had registered his work within three months of the first publication, or before the defendant’s infringing activity had begun, he would be eligible for statutory damages for each infringement of each work and attorney’s fees.³⁶ This might incentivize an attorney to take his

³¹ Bae is an informal name or address for a person’s significant other. *See Bae*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/bae> (last visited May 11, 2017).

³² *Salt Bae*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/salt-bae> (last visited May 11, 2017).

³³ *Id.*

³⁴ Logan Gorg, *31 Salt Bae Memes Worth The High Cholesterol*, RUNT (Jan. 22, 2017), <http://runt-of-the-web.com/salt-bae-memes#6>.

³⁵ *Id.*

³⁶ 17 U.S.C. § 412.

infringement case on a contingency basis, resulting in little cost to Gökçe up front.

V. **FAIR USE**

Section 107 of the Copyright Statute provides that “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.”³⁷ Fair use is the largest exemption for copyright infringement and attempts to balance the rights of a “copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry.”³⁸

When determining whether or not a use is fair, courts consider the following factors: “(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.”³⁹

Take for example the Socially Awkward Penguin meme.⁴⁰ The original image was taken for the National Geographic and licensed to Getty Images. The classic meme shows an off-balance penguin with a blue background and accompanying funny text which “typically narrates uncomfortable life situations, highlighting an exceptionally clumsy or inelegant response.”⁴¹

³⁷ 17 U.S.C. § 107.

³⁸ *Meeropol v. Louis Nizer*, Doubleday & Co., 560 F.2d 1061, 1068 (2d Cir. 1977).

³⁹ 17 U.S.C. § 107.

⁴⁰ *Socially Awkward Penguin*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/socially-awkward-penguin> (last visited May 12, 2017).

⁴¹ *Id.*

The Socially Awkward Penguin was widely popular, and eventually morphed into derivative memes including the “Socially Average Penguin” and “Socially Awesome Penguin.”⁴² Getty Images began quietly pursuing and settling multiple infringement cases involving the Socially Awkward Penguin.⁴³ Getty Images charged a blog approximately \$900.00 in licensing fees and asked the blog not to reveal their request.⁴⁴ In response, the blog posted Getty’s letter online.⁴⁵ The internet backlash was massive, and news articles went on to report that in the time that Getty had allowed the meme to flourish it had “far transcended” the original photo.⁴⁶

When assessing the Socially Awkward Penguin under the fair use analysis, the first factor, whether or not the work is transformative, would likely weigh in favor of a finding of fair use. The audience for the two works are not the same: one is for educational purposes/nature photography of the National Geographic, the other is for humorous commentary on awkward life situations. Further, it is arguable that a “reasonable observer” would view a meme as a transformation of the original photo.⁴⁷ The second factor, the nature of the underlying work, would likely weigh against a finding of fair use because the underlying work was a photograph which courts tend to regard as original in three respects: rendition, timing, and creation of the subject.⁴⁸ Factor three, the amount and substantiality of the underlying work, may weigh in favor against a finding of fair use. Here, although the meme creators could argue that they did not take the entire photo (because the image of the penguin

⁴² *Id.*

⁴³ Caitlin Dewey, *How copyright is killing your favorite memes*, WASH. POST (Sept. 8, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/?utm_term=.cb4ee3cf261d.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013) (stating, “What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”).

⁴⁸ *See generally* *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2006).

has been cut and pasted on a blue background), the copyright owner would argue that they nonetheless took the heart of the work. This argument could be made by showing the penguin was the focus of original photo. The effect of the use upon the potential market, factor four, would likely weigh in favor of fair use, because a meme does not affect the original market of the nature photograph. However, National Geographic could potentially counter this argument by showing that there is a market for them to license photographs to meme creators.

VI. **CONCLUSION**

Memes are consistent with copyrights goal to promote the progress of science and useful arts. As a final example, consider the recent Kendall Jenner for Pepsi commercial.⁴⁹ This commercial depicts model Kendall Jenner joining a protest and defusing the tension with police officers by handing one a can of Pepsi. Social media users used memes to mock the ad by “inserting cans of Pepsi into famous pictures of protests and instances of police brutality.”⁵⁰ Pepsi pulled the add after less than 48 hours after this backlash from social media.⁵¹

In conclusion, it would likely be futile to attempt to prevent the creation of memes through copyright law. Although Instagram users could register every photo that they post, this would be burdensome, and directly conflict with the “instant” nature of Instagram. Even if a photo was registered, litigation would be time consuming and potentially result in negative backlash from internet users in the form of narration and commentary.

⁴⁹ Kendall and Kylie, *Kendall Jenner for PEPSI Commercial*, YOUTUBE (Apr. 4, 2017), <https://www.youtube.com/watch?v=dA5Yq1DLSmQ>.

⁵⁰ *Kendall Jenner's Pepsi Ad*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/events/kendall-jenners-pepsi-ad> (last visited May 18, 2017).

⁵¹ Alexander Smith, *Pepsi Pulls Controversial Kendall Jenner Ad After Outcry*, NBC NEWS (Apr. 5, 2017, 6:15 PM), <http://www.nbcnews.com/news/nbcblk/pepsi-ad-kendall-jenner-echoes-black-lives-matter-sparks-anger-n742811>.
