ARTICLES

MEMES ON MEMES AND THE NEW CREATIVITY*

Amy Adler† & Jeanne C. Fromer‡

† Emily Kempin Professor of Law, New York University School of Law.
‡ Professor of Law, New York University School of Law; Faculty Co-Director, Engelberg Center on Innovation Law & Policy. We thank Cynthia Adler, Arnaud Ajdler, Audrey C. Ajdler, Eric S. Ajdler, Olivia E. Ajdler, Rachel E. Barkow, Sunneal Bedi, Barton C. Beebe, John Berton, Mala Chatterjee, James M. Chen, Kevin E. Davis, Charles Duan, Brian L. Frye, Kristelia A. García, Clayton P. Gillette, Patrick Goold, Laura A. Heymann, Samuel Issacharoff, Amy L. Landers, Stacey M. Lantagne, Mark A. Lemley, Florencia Marotta-Wurgler, Michael Meurer, Peter Nicolas, Sean A. Pager, Amanda Reid, Harry A. Robbins, Elizabeth L. Rosenblatt, Jennifer E. Rothman, Matthew Sag, Pamela
Memes are the paradigm of a new, flourishing creativity. Not only are these captioned images one of the most pervasive and important forms of online creativity, but they also upend many of copyright law’s fundamental assumptions about creativity, commercialization, and distribution. Chief among these assumptions is that copying is harmful. Not only does this mismatch threaten meme culture and expose fundamental problems in copyright law and theory, but the mismatch is even more significant because memes are far from an exceptional case. Indeed, memes are a prototype of a new mode of creativity that is emerging in our contemporary digital era, as can be seen across a range of works. Therefore, the concern with memes signals a much broader problem in copyright law and theory. This is not to say that the traditional creativity that copyright has long sought to protect is dead. Far from it. Both paths of creativity, traditional and new, can be vibrant. Yet we must be sensitive to the misfit between the new creativity and existing copyright law if we want the new creativity to continue to thrive.

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INTRODUCTION

Dating back centuries to its earliest enactments, copyright law has longstanding, built-in notions about creativity, commercialization, and distribution of creative works that memes turn on their head in critical ways. Copyright law is constructed on many assumptions flowing from its base premise that copyright’s exclusive rights to authors can encourage them to create and distribute socially valuable creative works by preventing third-party copying of these works.\(^1\) Central among them are the assumptions that people can generally create desirable works without much copying, that authors want their works not to be copied without their permission because otherwise they will be harmed and disincentivized to create, and that authors can make money directly off their creative works by exercising their exclusive rights. Additionally, copyright law dictates that expression should be protected and ideas should be freely available for reuse, presuming that idea and expression are distinct. The law also is predicated on the view that authors will have a long period over which to recoup value for their works, and these works can be valuable for a very long time. Copyright law also supposes that authors can and should decide which third parties get to use their works and when and whether to enforce their rights against third parties who have copied. Finally, copyright law assumes that authors can easily be identified

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\(^2\) See infra Part I.
and are central figures who deserve to get the copyright reward for a work.

Yet in the context of memes spread over the internet, these assumptions break down in significant ways. For one thing, not only do meme creators typically want to be copied as much as possible, they also usually want their works to be transformed by third parties in untold ways. The copying of memes tends to create significant value for, rather than detract from, the underlying works on which they are based. Memes also shatter copyright’s assumption that creative works are directly monetizable, as memes are usually indirectly monetizable. The world of memes transcends the line between commercial and noncommercial activity, while copyright law treats these realms as distinct. Additionally, memes expose that expression in one context can become idea in another context, breaking down copyright law’s distinct categories of unprotectable idea and protectable expression. Also characteristic of memes is an exponential scale and pace of copying, which concomitantly expedites the staleness of existing works and the pace of creation of new works. Moreover, the selective enforcement that copyright law assumes is turned on its head by the broad scale of permitted or tolerated copying, as almost all can copy a work and only a very select few are denied permission to use the underlying work. Finally, whereas copyright law assumes the centrality of the author, in meme culture the work itself takes on a primary role over the author, who often cannot even be easily identified. These features of memes reflect a new creativity that has progressed far beyond the creativity analyzed at the beginning of the twenty-first century for user-generated content.

Although memes are often designed to be eye-catching and funny, they are serious and important in today’s world as one of the most frequently created and shared categories of creative works on the internet, especially on social media. As such, the fact that they upend so many of copyright law’s central assumptions of creativity, commercialization, and distribution is worthy of attention. If meme culture is worth safeguarding, attempts to enforce copyright law as is with regard to memes are inappropriate given the substantial disconnection between memes and copyright law’s assumptions. Therefore, cop-

Copyright law and theory must either be left to the wayside or refashioned to account for memes.

But the problem goes well beyond memes. Indeed, memes herald a much larger shift that is underway in contemporary creativity across a range of areas, including music, dance, and visual art. As we show, the problems that memes present are of increasing and widespread significance to contemporary creators. This emerging creativity shares multiple characteristics of memes and similarly defies copyright’s core assumptions. By mapping out the dramatic disconnect between memes—a paradigm of contemporary creativity—and copyright law and theory, we can reflect back on the increasing outdatedness of copyright’s core. We conclude by observing that there now seems to be two paradigms of creativity—the traditional model and what we call the “new creativity”—that can both remain extant, vibrant, and distinct, even though they are interconnected and influence one another. Copyright law better fits with the traditional model but is a misfit to the new creativity.

This Article explores these issues, organizing itself around a series of memes we created that themselves reflect on memes. Part I sets forth the basic tenets of copyright law on creativity, commercialization, and distribution. Part II offers an overview of memes, presents an argument for their significance, and outlines their current treatment under copyright law. In Part III, we show how memes pose a fundamental challenge to copyright law and theory by violating the central copyright principles of creativity, commercialization, and distribution. Having established the disconnect between copyright law and memes, Part IV considers whether and how copyright law could be modified to account for memes. In Part V, we argue that memes are far from a sui generis exception to the premises of copyright law. Instead, memes are a prototype of a new mode of creativity that is emerging in our contemporary digital era, as can be seen across a range of works. Therefore, the concern with memes signals a much broader problem in copyright law and theory.

4 The memes in this Article were made using Meme Generator, IMGFLIP, https://imgflip.com/memegenerator [https://perma.cc/73D4-S4TF]. Each meme in this Article is captioned with a corresponding section heading and footnoted with a source documenting the meme’s background.
We launch our exploration of memes with background on copyright law’s deep-rooted assumptions of creativity, commercialization, and distribution. These assumptions stem from copyright law’s overarching goal of encouraging the creation and distribution of expressive works deemed to be socially valuable by providing their authors with exclusive rights against copying.

In particular, American copyright law protects “original works of authorship fixed in any tangible medium of expression,” including literary works, visual works, sound recordings, and movies. A copyright holder receives, among other things, the exclusive right to reproduce the work, distribute copies, and prepare derivative works, typically until seventy years after the author’s death. Copyright protection extends to the expression of particular ideas rather than to the ideas

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7 *Id.* § 106.
8 *Id.* § 302(a).
themselves.9 Yet protection reaches well beyond the actual work to works that are copied and substantially similar,10 “else a plagiarist would escape by immaterial variations.”11

Utilitarianism is the dominant theory underpinning American copyright law.12 According to this theory, copyright law provides authors the incentive of exclusive rights for a limited duration to motivate them to create and distribute culturally valuable works.13 Without this incentive, the theory goes, authors might not invest the time, energy, and money necessary to create and distribute these works because they might be copied cheaply and easily by free-riders, eliminating the ability of authors to profit from their works.14

Pursuant to utilitarian thinking, copyright law confers rights that are designed to be limited in time and scope.15 If the rights provided are excessive, social welfare would be diminished.16 For one thing, exclusive rights in intellectual property can diminish competition by allowing a rightsholder to charge a premium for access and ultimately limit these valuable works’ diffusion to society at large.17 For another, given that knowledge is frequently cumulative, society benefits when creators are permitted to build on previous artistic creations to generate new works.18 For these reasons, copyright law ensures both that the works it protects fall into the public domain in due course and that third parties are free to use protected works for certain socially valu-

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9 Id. § 102(b); see, e.g., Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (explaining that creators do not have a property right in ideas that exist “apart from their expression”).
10 Corwin v. Walt Disney Co., 475 F.3d 1239, 1253 (11th Cir. 2007).
11 Nichols, 45 F.2d at 121.
14 Id. at 1204.
16 See id. at 996–97.
17 Id.
18 Id. at 997–98; see also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575–76 (1994) (discussing the policy benefits of the fair use doctrine, which limits a copyright holder’s exclusive rights for certain socially beneficial uses).
able purposes.\textsuperscript{19} In this way, a utilitarian theory of copyright law rests on the premise that the benefit to society of creators crafting valuable works in exchange for legal incentives offsets the social welfare costs.\textsuperscript{20}

In recent years, scholars have questioned whether the copyright incentive is necessary in the first instance to motivate people to create expressive works. Some scholars have explored the vibrant expressive activity occurring outside the realm of copyright, such as in cuisine, stand-up comedy, and magic.\textsuperscript{21} Others argue that in certain markets, copyright law is unnecessary because the social norm of authenticity incentivizes creativity.\textsuperscript{22} Some scholars hypothesize that people would create works absent copyright incentives, owing to intrinsic motivation to do so.\textsuperscript{23} Yet others think this skepticism is wrong or incomplete, arguing that copyright’s incentive does encourage both creation and distribution of works.\textsuperscript{24} Indeed, rightly or wrongly, copyright’s incentive theory remains front and center in copyright as currently implemented.

With this background, we now explore how traditional copyright theory and doctrine interrelate with the many assumptions copyright law makes about creativity, commercialization, and distribution.

\textsuperscript{19} See Lemley, supra note 15, at 999.
\textsuperscript{20} Id. at 996–97.
\textsuperscript{22} See Amy Adler, Why Art Does Not Need Copyright, 86 GEO. WASH. L. REV. 313, 329–30 (2018) [hereinafter Adler, Why Art Does Not Need Copyright] (arguing that even if we accept the utilitarian account of creativity, the necessary incentive for the creation of visual art stems from the art market’s rigid norm of authenticity, and not at all from copyright law).
\textsuperscript{24} See Buccafusco, Burns, Fromer & Sprigman, supra note 23, at 1976, 1978–79; see also Julie E. Cohen, Copyright as Property in the Post-Industrial Economy: A Research Agenda, 2011 WIS. L. REV. 141, 143 (embracing the idea that creativity is not motivated by copyright protections, but arguing that copyright is necessary for the efficient exploitation of creative work by industry).
A. Creativity Without Copying

Copyright law is premised on authors producing creative works without copying. Even though copyright law sometimes condones copying, in the main it is antagonistic to copying because of copyright’s goals.

Two of copyright law’s central requirements underscore the law’s rejection of creativity through copying. Consider first copyright’s originality requirement, which is a prerequisite for copyright protection. The Supreme Court has held that work is original so long as it “was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” A work must merely evidence “intellectual production, . . . thought, and conception.” Originality does not necessarily require true novelty; a minimally creative work is protectable even if there is a nearly identical work, so long as the other work was not copied. As Judge Learned Hand observed, “[I]f by some magic a man who had

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26 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”).
28 *Id.* at 362 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59–60 (1884)).
29 *Id.* at 345–46.
never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”

The originality requirement as a threshold for copyright protection is thus premised on an author’s independent creation of a work without copying.

Now consider copyright law’s rule for infringement. A defendant’s acts can be condemned as infringing only if the defendant actually copied the plaintiff’s copyrighted work in some capacity. Hence, a defendant’s independent creation is a full defense to an infringement claim. That said, not all copying is ultimately forbidden. As the Ninth Circuit has explained, “To infringe, the defendant must . . . copy enough of the plaintiff’s expression . . . to render the two works substantially similar.”

Both copyright protection and infringement liability are accordingly grounded in the notion that copying is harmful, something to be avoided and condemned. One cannot garner copyright protection in the first place by creating a work that copies from a preexisting work, and one might be condemned to infringement liability if one has copied, particularly if one has copied too much.

Both of these crucial aspects of copyright law underpin its thinking about creativity: Copyright law seeks to and will encourage creativity, but only that which occurs without much copying, if any. That is, copyright law assumes that the socially valuable works it seeks to encourage should occur without copying from others and will not be considered infringing if they are not copied. One might understand this as a financial matter: It makes little sense to provide copyright’s incentives to someone who copies an existing work or to condemn a third party who has not actually copied from an existing work. Otherwise, if copiers were granted the privileges of copyright, the copyright incentive would be blunted by allowing secondcomers to copy from and undercut the copyright incentive provided to the firstcomer. This antipathy toward copying can also be understood

30 Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).
31 See Design Basics, LLC v. Signature Constr., Inc., 994 F.3d 879, 887 (7th Cir. 2021).
32 See Skidmore v. Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020).
33 Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018) (citing Mattel, Inc. v. MGA Ent., Inc., 616 F.3d 904, 913–14 (9th Cir. 2010)) (internal marks omitted).
36 See id. at 87–91.
morally: Copyists are culpable—such as for appropriating someone else’s creative labor—and ought to be discouraged.\textsuperscript{37}

Yet copyright’s reality is more complex. Copyright law sometimes condones copying, most notably with regard to fair uses of a work.\textsuperscript{38} The fair use doctrine is thought to stimulate the production of creative works that do not undercut the value of the original copyrighted work too much.\textsuperscript{39} It does so by enabling third parties to create culturally valuable works that must copy from the original work in some capacity in order to succeed, often transforming it.\textsuperscript{40} As suggested by the statutory directive on fair use\textsuperscript{41} and elaborated in case law, some prototypical cases include news reporting, critical reviews, and parodies.\textsuperscript{42} Wendy Gordon has theorized that “fair use [has been used] to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market.”\textsuperscript{43} Examples include parodies that might cast an unfavorable light on an original work or uses for which high transaction costs would discourage licensing arrangements with the copyright owner.\textsuperscript{44}

This particularized authorization of some copying coincides with scholarly recognition that copying can encourage creativity. For one thing, scholars appreciate that artists may create by building on others’ work or learn from existing works to create new work.\textsuperscript{45} More directly, scholars and courts recognize how important copying can be to creating important new works, whether it be contemporary art like Richard Prince’s, \textit{Star Trek} fan fiction, or a new software implementa-


\textsuperscript{38} See 17 U.S.C. § 107 (listing circumstances in which “the fair use of a copyrighted work . . . is not an infringement of copyright”); \textit{supra} note 18 and accompanying text.


\textsuperscript{40} See Pierre N. Leval, \textit{Commentary, Toward a Fair Use Standard}, 103 HARV. L. REV. 1105, 1111–16 (1990) (arguing that whether or not the use of copyrighted material is justified often depends on the extent to which the use of that material is transformative).

\textsuperscript{41} See 17 U.S.C. § 107 (listing non-exclusive factors to motivate a determination of fair use).


\textsuperscript{44} \textit{Id.} at 1633 (giving as one instance “the owner of a play [being] unlikely to license a hostile review or a parody of his own drama” (footnote omitted)).

\textsuperscript{45} See, e.g., Fromer, \textit{A Psychology of IP}, \textit{supra} note 34, at 1461–62.
tion of the Java application program interface.\textsuperscript{46} Moreover, as we have previously observed, in light of today’s internet age, “as the entire archive of past creative works becomes more accessible, creators will have access to more past works to build on and copying will likely play an even more significant role in creativity.”\textsuperscript{47}

Despite this scholarly recognition that fair use exists as one among several important statutory exceptions to copyright infringement,\textsuperscript{48} the “exemption” framework implicitly makes default the assumption that creativity must be without copying. Copying sometimes can be condoned and important in copyright law, but it is the exception rather than the norm.\textsuperscript{49}

\section*{B. Morality and Economics of Copying\textsuperscript{50}}

Copyright law’s antipathy toward copying raises the question of why copying is not condoned as a general matter. Copyright law takes


\textsuperscript{48} See 17 U.S.C. §§ 107–122 (including, among others, reproductions by libraries and archives (§ 108), ephemeral recordings (§ 112), and noncommercial broadcasting (§ 118)).

\textsuperscript{49} Cf. Shyamkrishna Balganesha, \textit{The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying}, 125 Harv. L. Rev. 1664, 1666–74 (2012) (showing that “much of copyright’s analytical work is done through its creation and maintenance of a ‘duty not to copy’”).

the position that copying someone’s creative work is generally harmful, both economically and morally. For one thing, copying is thought to be economically harmful in that it undermines the incentive of creators to make valuable works.\(^{51}\) Under this thinking, third parties’ unauthorized copying undermines the original author’s exclusive rights by allowing copiers to make the same work at a marginal cost by avoiding the costs of creation.\(^{52}\) Moreover, copying others’ work is condemned by some courts as lazy\(^{53}\) and by some scholars as immoral.\(^{54}\)

C. Profiting from Copyright\(^ {55}\)

If copyright is thought to serve as an incentive to create, it functions by awarding exclusive rights such that authors may directly profit off their creative works. That is, authors can invoke copyright to stop others from exercising any of copyright’s exclusive rights, including reproducing, distributing, and publicly performing a work.\(^ {56}\) Authors can exercise these rights themselves,\(^ {57}\) thereby selling access to their works in various ways. Because these rights are exclusive,


\(^{52}\) Id.

\(^{53}\) See, e.g., Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 759 (7th Cir. 2014) (“The fair-use privilege . . . is not designed to protect lazy appropriators.”); cf. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994) (observing that a fair use claim is less strong when “the alleged infringer merely uses [the underlying work] to get attention or to avoid the drudgery in working up something fresh”).


\(^{57}\) Id.
authors can typically sell their works at higher prices than they would be able to without them.\footnote{See Pamela Samuelson, Allocating Ownership Rights in Computer-Generated Works, 47 U. PITT. L. REV. 1185, 1224–25 (1986).} Again, copying may interfere with an author’s profits from these exclusive rights, thereby inflicting economic (and moral) harms. By privatizing what would otherwise be a freely copyable public good through the operation of law, copyright makes protectable works monetizable.


Beyond creativity and copying, copyright law has further rules about what material is and is not protectable. In particular, copyright law extends protection only to the expression of ideas; ideas themselves remain in the public domain.\footnote{See supra note 9 and accompanying text.} For example, the expression in a play about star-crossed lovers would be copyrightable, but the idea of star-crossed lovers would not.\footnote{See Nichols v. Universal Pictures Corp., 45 F.2d 119, 121–22 (2d Cir. 1930).} As the Supreme Court has explained, ideas are excluded from the scope of copyright protection so that they can be left free for all to use as building blocks to create further expression.\footnote{See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991).} Courts attribute this principle to protecting First Amendment values.\footnote{See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985); cf. Jeanne C. Fromer, An Information Theory of Copyright Law, 64 EMORY L.J. 71, 97–102 (2014) [hereinafter Fromer, Information Theory] (“[T]he basic building blocks of expression ought to be left freely available . . . . It would be both inefficient and unfair to grant rights in these basic components . . . just because one person happened to employ them first. Doing otherwise would ultimately be detrimental to generating a robust body of authored works.” (footnotes omitted)).}
Courts and scholars find it hard to distinguish between idea and expression. As Learned Hand influentially set up the analysis:

Upon any work, . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what [a work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.

Judge Hand then concludes, “Nobody has ever been able to fix that boundary, and nobody ever can.” Even so, courts have established a doctrinal framework of abstraction and filtration to distinguish idea from expression.

Despite the difficulty of distinguishing between the two categories, copyright law understands the categories to be distinct: one protectable, the other not. Star-crossed lovers are always an unprotectable idea, whereas the words in a play about star-crossed lovers are always expression and thus potentially protectable.

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64 See, e.g., Nichols, 45 F.2d at 121 (developing a framework for determining infringement when no actual expression of the copyrighted work is taken and used in the allegedly infringing work); see also Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 YALE L.J. 283, 304 (1996) (“[W]hile the idea/expression dichotomy makes sense in principle, it is notoriously malleable and indeterminate.”).

65 Nichols, 45 F.2d at 121.

66 Id.

67 See id. at 121–23 (breaking down the structure and different elements of the defendant’s allegedly infringing work (abstraction) to separate protectable expression from an unprotectable idea (filtration), and holding, based on only the unfiltered elements that were expression, that the defendant’s motion picture did not infringe the plaintiff’s play); see also Comput. Assocs. Int’l, Inc. v. Altai, Inc., 982 F.2d 693, 706–10 (2d Cir. 1992) (using the abstraction-filtration framework to determine whether the nonliteral elements of two computer programs were substantially similar).

68 Even while explicitly recognizing the interconnection between expression and idea, copyright’s merger doctrine nevertheless assumes a distinction. According to this doctrine, when there are only a very limited number of ways to express an idea, idea and expression are thought to have merged, rendering the expression just as uncopyrightable as the idea. See Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967). The expression in such cases is not protectable because were it otherwise, copyright law would effectively be providing protection to the idea. See id.
E. The Long Duration of Copyright\footnote{This Meme Is from the Future, \textit{Know Your Meme}, https://knowyourmeme.com/memes/this-meme-is-from-the-future [perma.cc/ES49-32CU].}

If a work meets the various protectability requirements just discussed, it is typically protected by copyright law for a long time: generally, an author’s lifetime plus seventy years.\footnote{See supra text accompanying note 8.} As a policy matter, duration is premised on the period of time over which an author can recoup value for their work.\footnote{See \textit{Eldred v. Ashcroft}, 537 U.S. 186, 205–08 (2003).} As one of us has explained, Congress has repeatedly extended copyright duration, asserting that it was doing so to “account[] for increased average life expectancies for authors and for the longer commercial life of works,” among other reasons.\footnote{Fromer, \textit{Expressive Incentives}, supra note 12, at 1799–1800.} In fact, this duration can be so long that technologies of dissemination and markets—such as the internet, social media, and video cassettes—can develop in a way unforeseen to authors a century or more ago when they first created their work.\footnote{See, e.g., Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., 145 F.3d 481 (2d Cir. 1998) (interpreting contract when the composer’s original piece was licensed for a movie’s use in theaters but was later released on video cassettes); Rey v. Lafferty, 990 F.2d 1379 (1st Cir. 1993) (construing contract terms when a television program based on a series of book was later released on video cassette). For an argument that copyright law should not protect unforeseeable markets, see generally Balganesh, \textit{supra} note 12.}
Some argue that copyright protection lasts too long in ways that undermine copyright’s goals, particularly because the commercial value of works is not long enough to justify the increased costs that copyright protection imposes on society. For example, Justice Breyer expresses worry that too-long copyright duration imposes the cost of “higher prices that will potentially restrict a work’s dissemination” on society when “after 55 to 75 years, only 2% of all copyrights retain commercial value.”74 Similarly, Kristelia García and Justin McCrary find in an empirical study that “for the average musical work, sales drop sharply soon after release.”75 Therefore, “for the average work, the societal cost of strong copyright protection that goes beyond the point of commercial viability outweighs the benefit to both creators and consumers as the marginal return on this protection decreases sharply.”76 That said, the trend in copyright law since its earliest years has been for copyright duration to be extended, never shrunk.77

F. Choosing Third Parties as Licensees78

Copyright law enables authors to transfer or license all or parts of

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74 Eldred, 537 U.S. at 248, 254 (Breyer, J., dissenting) (citing Brief for Petitioners at 7, Eldred, 537 U.S. 186 (2003) (No. 01-618); Edward Rappaport, Cong. Rsch. Serv., Copyright Term Extension: Estimating the Economic Values, Congressional Research Service Report for Congress 8, 12, 15, 16 (1998)).

75 Kristelia A. García & Justin McCrary, A Reconsideration of Copyright’s Term, 71 Ala. L. Rev. 351, 356 (2019).

76 Id.


their exclusive rights to third parties. The law also permits copyright owners to enforce their rights by bringing an action for copyright infringement. These two aspects of copyright law imply that copyright owners get to decide which, if any, third parties can use their works and when and whether to enforce their rights against third parties who have copied their works without permission. Indeed, courts have espoused the view that this is the copyright holder’s ultimate choice. For instance, the Second Circuit has stated that copyright law “must respect [the copyright holder’s] creative and economic choice” to not exploit an aspect of their exclusive rights.

The copyright owner can grant a select few licenses that they deem to be efficient. For example, an author of an English-language book may grant a license to a particular translator to create a French-language version of the book. This is understood to be part and parcel of the copyright incentive in the first instance, as a way to control who else, if anyone, can make works that might interfere with or enhance the copyright holder’s market. Moreover, even without granting third parties permission to use a work, copyright owners may tolerate infringing uses. They might do so, as Tim Wu puts it, due to “laziness or enforcement costs, a desire to create goodwill, or a calculation that the infringement creates an economic complement to the copyrighted work.”

79 17 U.S.C. § 201(d) (“Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by [17 U.S.C. § 106], may be transferred . . . and owned separately.”).
80 Id. § 501(b).
81 Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc., 150 F.3d 132, 146 (2d Cir. 1998) (making this observation in a case in which the copyright holder of the Seinfeld television series sued the maker of a trivia book about the series).
82 See Paul Goldstein, Derivative Rights and Derivative Works in Copyright, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 227 (1983) (“[B]y securing exclusive rights to all derivative markets, [17 U.S.C. § 106(2)] enables the copyright proprietor to select those towards which it will direct investment.”).
85 Id. at 619.
G. The Author’s Centrality

A final assumption on which copyright law is premised is that the author is central and can generally readily be identified to get their copyright reward. Copyright law situates initial protection in a work’s author, be the work a single-authored work, a joint work, or a work made for hire. This grant follows from the constitutional grant of power to Congress to confer copyright protection on authors for their writings.

An abundance of critical scholarship attacks the assumption that the author ought to be the central figure in copyright law deserving of the reward, particularly when there are many others, including editors and audiences, who contribute to a work and its value. Stewart Sterk goes further to underscore how rhetoric of the author’s centrality to works has helped create and expand copyright rights, even beyond what is necessary to achieve copyright’s goals.

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87 17 U.S.C. §§ 201(a)–(b).

88 U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have 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.”).


90 Sterk, supra note 13, at 1197–98; accord Bracha, supra note 89, at 265–66.
Others accept the author’s centrality and seek to explain what should qualify someone as an author. For example, Chris Buccafusco theorizes that “to be an author of a writing, one must intend to produce some mental effect in an audience,” leading him to conclude that garden designers, computer programmers, and others might be authors.\footnote{Christopher Buccafusco, \emph{A Theory of Copyright Authorship}, 102 VA. L. REV. 1229, 1232–33 (2016).} Jane Ginsburg and Luke Budiardjo understand authorship to be the conjunction of devising a creative plan for a work and physically executing the work.\footnote{Jane C. Ginsburg & Luke Ali Budiardjo, \emph{Authors and Machines}, 34 BERKELEY TECH. L.J. 343, 346 (2019) (applying that concept to assess when the human participants who interact with artificially intelligent machines might be considered authors).}

Right or wrong, the author is copyright law’s central figure. With these assumptions explored, we now turn to discuss memes.

In this Part, we introduce the surprisingly elastic and imprecise definition of the term “meme,” laying bare the centrality of copying to this category. We then consider the importance of memes by briefly

\footnote{\textit{Draw 25}, \textsc{Know Your Meme}, https://knowyourmeme.com/memes/draw-25 [https://perma.cc/7UHU-FUX8].}
exploring their critical role in contemporary creativity, expression, and political discourse.

“A. Overview”

“Meme” is a remarkably imprecise and elastic term. The scientist Richard Dawkins coined the word in his influential 1976 book, *The Selfish Gene*, to describe a “unit of cultural transmission” that replicates and stays alive by “leaping from brain to brain.” The term’s origins stem from the conceptual analogy Dawkins drew between cultural and biological evolution; Dawkins chose the word to sound like “gene.” But Dawkins’s neologism also had a second root that signaled a second conceptual pillar of his theory: the central role of copying. He chose the term “meme” to reference the Greek word “mimeme,” meaning “imitation.”

Since its invention, the term “meme” has mutated in meaning. Dawkins used the term broadly to include things that propagate, survive, and ultimately penetrate cultures, such as “catch-phrases, clothes

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94 *Is This a Pigeon?, Know Your Meme*, https://knowyourmeme.com/memes/is-this-a-pigeon [https://perma.cc/8PBP-424X].
96 *Id*. Note that there are widespread debates in the field of memetics about this genetic analogy, including questions it raises about the role of human agency in cultural memes. See Limor Shifman, *Memes in Digital Culture* 10–12 (2013). We return to this debate below in Section III.H, where we discuss the complexity of authorship in meme culture.
97 Dawkins, *supra* note 95, at 249.
fashions, ways of making pots or of building arches,” and even the idea of God.\textsuperscript{98} Debates about the definition and nature of memes have entered multiple disciplines, including psychology, communications, linguistics, anthropology, and philosophy.\textsuperscript{99} Scholars routinely note the word’s imprecision.\textsuperscript{100}

The colloquial usage of the term has shifted in the digital era to become inextricably associated with the internet and digital life.\textsuperscript{101} But even in this realm, the word is imprecise. In its broadest contemporary usage, “meme” applies to any viral sensation online, such as trending hashtags or viral videos, or even to viral offline behaviors that are spread by digital culture. Thus, innocuous (if sometimes nonsensical) fads, like the plank trend\textsuperscript{102} or TikTok dances,\textsuperscript{103} have been called “memes,” as have real-world fashion trends that initially spread online, such as the alt-right fad of wearing Fred Perry shirts or the Boogaloo Boys’ wearing of Hawaiian shirts.\textsuperscript{104} The term has even penetrated the stock market, where the term “meme stock” refers to stocks such as GME (Gamestop) that see “sudden and dramatic surges thanks to social media hype” while at the same time being considered “merely a joke.”\textsuperscript{105} Indeed, some sources use the phrase “meme culture” as a synonym for internet culture more broadly.\textsuperscript{106}

\textsuperscript{98} Id. at 249–50.
\textsuperscript{100} See sources cited supra note 99.
\textsuperscript{102} See Planking, Know Your Meme, https://knowyourmeme.com/memes/planking [https://perma.cc/77EZ-ZV4V].
\textsuperscript{103} See infra Section V.B.
\textsuperscript{105} Brandon Michael, Top Meme Stocks to Buy Right Now? 5 In Focus, NASDAQ (July 7, 2021), https://www.nasdaq.com/articles/top-meme-stocks-to-buy-right-now-5-in-focus-2021-07-07 [https://perma.cc/6PLK-BH5Q].
Other sources, however, reserve the word “meme” for a narrower subset of digital life: digital images that are created and recreated by continually “pasting captions onto other people’s photos,” by mixing images together, or by referring, sometimes obliquely, to previous images. Meme scholar Limor Shifman emphasizes the intertextual quality of such memes, defining them as “created with awareness of each other, and . . . circulated, imitated, and/or transformed via the Internet by many users.” Note the visual nature of memes in this narrower definition. Stacey Lantagne, for example, describes memes as mutating “visual images that have morphed beyond their origin to act as their own form of communicative shorthand.” Typically for digital memes of this sort, the visual image remains relatively constant, and users change its meaning through new text or juxtaposition with other images.

While we recognize the term’s imprecision, our focus here is on this narrower subset of memes: viral visual images continually remixed by multiple users, juxtaposed with text, or mixed with other images, that ultimately become their own shorthand for meaning. We consider this definition to be the most commonly used meaning of the term in popular discourse—at least for now. The reader will note that this Article’s illustrations are all examples of this core meaning of the term.

Despite the term’s elasticity, one common thread runs through all the various definitions, including ours: Memes are about copying, on a large and widespread scale. Dawkins’s reference to “mimeme” or imitation has persisted at the concept’s core. Whatever else a meme is, an image (or phenomenon) becomes a meme only if it is widely copied. Thus, as we explore in Part III, the challenge memes pose to copyright law could not be starker or more fundamental: Copyright

108 For example, the Bernie Sanders mittens meme that spread like wildfire after the 2021 presidential inauguration typically involved dropping the image of Sanders into new settings, frequently without text. See infra notes 152–55 and accompanying text and images.
109 SHIFMAN, supra note 96, at 41.
110 Lantagne, supra note 107, at 391.
112 See SHIFMAN, supra note 96, at 2–6.
law at its core views unauthorized copying as a threat to creativity. Yet memes, a paradigm of contemporary creativity,\textsuperscript{114} owe their very existence to limitless, unauthorized, viral copying. These fundamental differences lead to numerous disconnects between the use of memes and traditional copyright law, which we explore in Part III.

\begin{center}
\includegraphics[width=0.5\textwidth]{memes.png}
\end{center}

\textbf{B. Why Memes Matter}\textsuperscript{115}

It may be tempting for academics to dismiss meme culture.\textsuperscript{116} When you think of the prototypical meme user, you may picture a Gen-Z teenager in a Reddit chatroom making inconsequential, puerile jokes about pop culture. And unless you spend your life online, memes frequently seem impenetrable, their meaning dependent on multiple references to other memes and to (often trivial) shards of pop culture.\textsuperscript{117} Worse, if you invest time trying to puzzle out a meme’s meaning, by the time you “get it,” it may already be old news, and so many new ones have sprung up that your time spent decoding may feel futile.

Despite this, we argue that legal scholars should take memes seriously. Whether viewed from the perspective of copyright law (the focus here), which values creativity, or First Amendment law, which prizes a robust marketplace of ideas and political discourse, memes

\textsuperscript{114} See infra Section II.B.
\textsuperscript{116} See SHIFMAN, supra note 96, at 2 (noting that the meme concept “has been the subject of constant academic debate, derision, and even outright dismissal.”).
\textsuperscript{117} For discussion of the lo-fi aesthetic and the absurdist, ironic tone of meme culture, as well as its origins on 4chan and later Reddit and Tumblr, see Lewis, supra note 106.
matter. We view them as a paradigm of contemporary creativity and a powerful form of contemporary speech, often with significant political consequences.118

We see memes as paradigmatic of contemporary cultural expression because of the fundamental role copying plays in their production (going back to the “mimeme” root of the word). As we have previously argued, while “creativity has always relied to some extent on copying, the role of copying has taken on much greater urgency in our contemporary digital culture.”119 Thus, scholar Limor Shifman writes that the “the meme concept encapsulates some of the most fundamental aspects of contemporary digital culture.”120

A second aspect of memes also makes them paradigmatic for us: They are primarily visual in nature. In most memes (but not all), an image stays constant as the shortcut for meaning, but users continually swap in new text. This reliance on the visual image also makes memes emblematic of a larger shift through which “the image has surpassed the word as the dominant mode of communication,” as one of us has previously argued.121 Indeed, Martin Gurri has observed of digital culture: “What is usually referred to as new media really means the triumph of the image over the printed word.”122

Moreover, memes matter because they are wildly popular and one of the most commonly created, shared, and consumed types of expression. As Fortune put it in 2016, “[f]or the first time ever, memes are more popular than Jesus,” as “memes” became the most popular Google search, beating “Jesus”—the most popular search term since


119 Adler & Fromer, supra note 47, at 1529.

120 SHIFMAN, supra note 96, at 4.

121 Amy Adler, The First Amendment and the Second Commandment, 57 N.Y.L. SCH. L. REV. 41, 42 (2013) [hereinafter Adler, First Amendment]; see also id. at 42–45 (discussing how images have the power, unlike text, to be equated with what they represent, and comparing the contemporary fascination with visual media to a “bewitching pull of images” felt in ancient times).

2011. Not only are they searched for, but they are created and shared constantly: Over one million meme posts were made by Instagram users daily in 2020. As Kaitlyn Tiffany explains, “[m]emes and pop culture go hand-in-hand now. They don’t sit in sub-forums and subreddits; they crop up in group chats and on your local diner’s Instagram account.”

We return to these themes in Part V, but for now we note that given the rising importance of copying to creativity, the move to an image culture, and the extraordinary popularity of memes, memes matter because in many ways they represent a paradigm case of a more general aspect of contemporary speech and creativity.

In this Section, we explore the numerous ways that memes contribute to society: principally newness, creation of common ground, participatory culture, and providing ways to attract the scarce commodity of attention in our current world. We consider not only the contributions memes make but also the dangers they pose to society.

1. Newness

As observed in Part I, the overarching goal of copyright is to stimulate new works and to “create and disseminate ideas.” Here we briefly explore various ways in which memes fulfill this goal.


125 Tiffany, supra note 118.


a. New Content

One thing memes do is contribute new content by copying. Though that sounds paradoxical, consider the meme above, which takes its image from a Dos Equis beer commercial featuring the pictured actor as “the most interesting man,” in which he says, “I don’t always drink beer, but when I do, I prefer Dos Equis.” The image was copied and memed by combining it with a similarly structured phrase to convey what the Know Your Meme reference website describes as a “highly charismatic and well-traveled gentleman with refined tastes in many things” might say. In less than three years, one meme webpage collected more than 96,000 distinct submissions of this meme and one Facebook page garnered 243,000 likes for the meme. The meme’s copying and spread facilitated new content itself that was consumed widely.

129 Id.
130 Id.
131 Id.
b. Recontextualization

Another way memes create new expression and meaning is by recontextualizing existing works. The meme above is an example. The painting, owned by the Louvre, is a self-portrait by the eighteenth-century portraitist Joseph Ducreux. In its life as a meme, the image has become a template on which users superimpose “archaic reinterpretation[s]” of popular rap lyrics. Although there are extensive variations, we include the image above because it is a version of the opening line to Roy Orbison’s iconic song *Oh, Pretty Woman*—“Pretty woman, walking down the street”—the subject of the Supreme Court’s seminal copyright decision in *Campbell v. Acuff-Rose Music, Inc.*

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133 *Id.*
c. Combinations

Memes sometimes add new meaning to existing images by combining works to make a mashup that then becomes a new meme of its own with new meaning; the resulting combination might be called a “supermeme.” For example, the reader may recognize the popular supermeme pictured above, which is a remix of two preexisting memes, one a still from a television episode of *The Real Housewives of Beverly Hills*, and the other, a “confused cat at dinner” meme.\(^{136}\) A Twitter user combined these memes into a new image and shared it online, remarking “[t]hese photos together [are] making me lose it.”\(^{137}\) The combination of these two images became so wildly popular in 2019 that it became its own meme, Woman Yelling at a Cat, which has been frequently copied as a template for new expression.\(^{138}\) The combined meme was even given a visual (fake) backstory of what happened to the woman and the cat.\(^{139}\)

\(^{135}\) Woman Yelling at a Cat, Know Your Meme, https://knowyourmeme.com/memes/woman-yelling-at-a-cat [https://perma.cc/P6GY-6FMA].

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) Id.; see also Is This a Pigeon?, supra note 94 (providing another example of a supermeme).

2. Common Culture, Common Ground

Memes also help forge a common culture by giving individuals works through which they can connect with one another. Just as one might share an aspect of Cinderella to communicate something about evil stepmothers or princess fantasies, an individual can invoke a widely shared meme to communicate a certain point, as well as to signal that the speaker and the listener speak the same language. In light of this aspect of memes, linguists James Willmore and Darryl Hocking call memes “fundamentally conversational in nature.” They explain that “the locus of this conversational capacity lies in the way that Internet memes employ the type of demotic creativity, including repetition, pattern reformulation, punning, morphological inventiveness, invented phrase, and figures of speech, that . . . are common to everyday conversational language.”

Not only do memes contribute to common culture, but they also draw on it. As communications scholar Rebecca Ortiz observes, “[m]emes are only shareable when there’s something about them that


141 Cf. Cohen, supra note 24, at 147–48 (analyzing how copyright law plays a significant role in producing as well as enabling access to a common culture, both directly and indirectly); Rebecca Tushnet, Domain and Forum: Public Space, Public Freedom, 30 Colum. J.L. & Arts 597, 603 (2007) (“Like a shopping mall, Gone with the Wind is part of our collective experience, even though it is also a private possession used to generate revenue.”).


143 Id.
. . . a select group of people can understand.”\textsuperscript{144} A meme might include an image from a popular children’s television show or use a catchphrase uttered by a politician, and to be successful, it helps to draw on common ground.

By both drawing on and contributing to common culture, memes create what Ortiz describes as “an in-group connection.”\textsuperscript{145} As she elaborates, it might be “a group of billions” or more niche, but either way, memes can help people “connect with somebody through these shared meanings and cultural references” and “feel . . . special for understanding it.”\textsuperscript{146} Wilmore and Hocking further reflect that memes “facilitate a sense of communal belonging and ideological alignment; they are fun, spirited, and spontaneous; and they can also provoke wider sociopolitical dialogue.”\textsuperscript{147}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{meme.png}
\caption{Meme Image}
\end{figure}

3. \textit{Participatory Culture}\textsuperscript{148}

Somewhat relatedly, meme culture is not top-down, with society being fed expressive works and passively consuming them. Anyone with a digital device and an internet connection can readily participate in making and sharing memes. Rebecca Ortiz elaborates:


\textsuperscript{145} Id.

\textsuperscript{146} Id.

\textsuperscript{147} Willmore & Hocking, supra note 142, at 163.

Anybody can be a producer, and that’s one key piece to this. Because they’re not meant to be high production quality and because they’re meant to be quickly thrown together in response to what’s happening in the culture at that moment, it allows people to become these media producers very quickly and very easily without needing all the fancy knowledge or the fancy production quality.\(^{149}\)

Free online meme generators help users craft and adapt memes to share, which they can easily do on a myriad of social media platforms.\(^{150}\) As one artist writes, memes “are the democratizing medium of our collective digital present.”\(^{151}\)

Bernie Sanders Wearing Mittens Sitting in a Chair Meme\(^{152}\)

As just one example of the participatory culture fostered by meme creation and sharing, consider the meme Bernie Sanders Wearing Mittens Sitting in a Chair (shown above), widely spread and transformed following the 2021 presidential inauguration of Joe Biden. The image attracted attention in large part because Sanders’s dress was less formal than that of others and was taken to convey that Sanders would rather not have been there.\(^{153}\) The initial tweets of this image spread like wildfire\(^{154}\) and in no time, others were placing

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\(^{149}\) Zemler, supra note 144 (quoting Ortiz).

\(^{150}\) See David Nield, 6 Easy Ways to Make Your Own Memes, WIRED (May 30, 2021), https://www.wired.com/story/6-easy-ways-make-memes [https://perma.cc/QR3T-LHU2] (describing various online platforms which allow users to generate memes).

\(^{151}\) Alice Bucknell, What Memes Owe to Art History, ARTSY (May 30, 2017), https://www.artsy.net/article/artsy-editorial-memes-owe-art-history [https://perma.cc/NW7X-M5L6] (arguing that memes, similar to 1960s performance art, “offer a highly accessible and interactive platform of production that is ripe for challenge and dissent, with disagreements and controversy only fueling the fire of a successful meme truly going viral”).


\(^{153}\) See id.

\(^{154}\) Id. (explaining that, for example, one reporter’s post about the photo was retweeted 46,000 times within twenty-four hours).
Sanders in all sorts of other settings—be they historic periods, paintings, or other memes (some of which are sampled below).

Subsequent Variations of Bernie Sanders Wearing Mittens Sitting in a Chair Meme\(^{155}\)

4. The Attention Economy

Memes are also particularly valuable in contemporary culture because they allow creators to draw attention to their ideas in a world in which attention is scarce and speech is cheap. As the internet has dramatically reduced the costs of producing and disseminating works, we are now drowning in information. The real barrier for creators is no longer what it costs to create and distribute work, but instead the problem of how to gain anyone’s attention in a world of information overload. We posit that memes are perfect modes of expression for speakers in our attention-scarce world. Immediately recognizable, funny, and attention-grabbing, memes can be consumed almost instantaneously by viewers suffering from shorter and shorter

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158 See, e.g., Adler, Fair Use, supra note 46, at 572 (arguing that we are now “drowning” in a “sea of images”); Julie E. Cohen, The Regulatory State in the Information Age, 17 Theoretical Inquiries L. 369, 384 (2016) (using the term “infoglut” to describe how sophisticated speakers can create confusion and undermine certainty by overloading the public with speech); Tim Wu, Is the First Amendment Obsolete?, 117 Mich. L. Rev. 547, 554–56 (2018) (discussing three technological and economic developments which have led to a flood of information, and positing that “[i]f it was once hard to speak, it is now hard to be heard”).

159 See Felix Salmon, The Musk Meme Economy, Axios (Feb. 9, 2021), https://www.axios.com/meme-economy-tesla-elon-musk-c1e9c225-d8e2-4953-a591-0a29dacf2d4a.html [https://perma.cc/ELM6-VDEB] (“Attention is a commodity, which means that memes—a way of focusing and scaling attention—are a way to create value.”).
The visual nature of memes facilitates this quickness; as the Supreme Court observed long ago, visual images can be “a short cut from mind to mind.” As the Senior Editor of meme reference site Know Your Meme states:

The best memes are able to get a very specific idea across using very few words and a clear photograph or video. Based on how well those ideas are communicated, other people share them. There are other factors involved—who is sharing it, their follower count, who sees it, what platform it’s on—but if you boil it all down, it’s about that economy.

Indeed, mathematical studies of memes show how they compete, often effectively, for limited user attention.

In the First Amendment context, Tim Wu and others have famously observed that the digital age has ushered in a new “attention economy” in which it is no longer speech that is scarce, but rather listeners’ attention. While Wu focuses on the rise of “attention merchants”—businesses like Facebook and others that exploit and resell our limited attention (and privacy)—here we consider the relevance of the attention economy to individual speakers rather than platforms. Communicating by meme is a hack that gives individual speakers a fighting chance to be heard in our attention-scarce world.

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160 We hope we have grabbed your attention by organizing this Article around memes. We could have written this Article without them, but would you have read until this point?


162 Zemler, supra note 144 (quoting Matt Schimkowitz).

163 See generally James P. Gleeson, Kevin P. O’Sullivan, Raquel A. Baños & Yamir Moreno, Effects of Network Structure, Competition and Memory Time on Social Spreading Phenomena, 6 PHYS. REV. X 021019 (2016) (distinguishing the roles of two factors affecting meme popularity: the memory time of users and the connectivity structure of the social network).


5. The Dangers of Memes

Memes, as a medium of communication, are not inherently good or bad. But it is inescapable that in recent years, in addition to spreading fun jokes and pictures of cats, memes have also been leveraged by extremist groups to spread propaganda, hate, and disinformation. One prominent example comes from the fringe alt-right’s use of sites like 4chan to weaponize hateful, racist, and antisemitic memes and to spread them into mainstream politics. For example, the neo-Nazi site The Daily Stormer holds a weekly “Memetic Monday” in which they post image macros for memes designed to be shared on Facebook and Twitter. One scholar argues that the fringe alt-right is so masterful at using memes to spread its views that it actually “memed Donald Trump into office.” The alt-right’s mastery of the

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167 Marked Safe, SLANGLANG, https://www.slanglang.net/memes/marked-safe [https://perma.cc/7HK2-KJX6].

168 A high-profile example comes from the Pepe the Frog meme, discussed below in Section II.C.1. Even if the alt-right has been adept at leveraging memes, they can be marshalled in any political direction. That does not erase, however, their ability to coarsen and polarize our discourse, to spread disinformation, and, in doing so, to create threats to our national security. See generally Donovan, supra note 118.

169 See Alice Marwick & Rebecca Lewis, Data & Soc’y Rsch. Inst., Media Manipulation and Disinformation Online 36 (2017), https://datasociety.net/pubs/oh/DataAndSociety_MediaManipulationAndDisinformationOnline.pdf [https://perma.cc/R8GV-FQZN] (discussing the alt-right’s use of memes as propaganda); see also Emiliano De Cristofaro, Memes Are Taking the Alt-Right’s Message of Hate Mainstream, Conversation (Dec. 12, 2018), https://theconversation.com/memes-are-taking-the-alt-rights-message-of-hate-mainstream-108196 [https://perma.cc/8FNC-9XHA] (describing a study finding that the alt-right web communities, such as 4chan’s “Politically Incorrect” board (/pol/), generated “a wide variety of racist, hateful, and politically charged memes” and spread them to other parts of the internet). See generally Angela Nagle, Kill All Normies: Online Culture Wars from 4chan and Tumblr to Trump and the Alt-Right (2017) (exploring the alt-right’s culture in 4chan and other communities).

170 Marwick & Lewis, supra note 169, at 36.

meme genre is captured by a meme itself: the alt-right insult meme called “The Left Can’t Meme.”

Perhaps this should come as no surprise. The power of memes, as described above, is also their danger: their ability to virally spread quickly consumed, potently distilled messages that can grab attention in our attention-scarce world. That memes foster in-group sense of belonging and are often funny only adds to their power. It is no wonder that memes can be forceful tools of radicalization and polarization. Yet even if the alt-right or other political groups have been adept at leveraging memes, they have also been marshalled in other political directions, and of course in non-political ones, as most of the memes we share in this Article illustrate.

What can we make of this dangerous capacity of memes from the perspective of copyright law, the primary focus of this Article? Copyright law is famously value-neutral about the creative works it promotes. And to the extent copyright law is thought to embody First Amendment values, First Amendment law is also famously content-neutral about speech (while of course shot-through with exceptions).

94N9-2ZDH] (discussing the Pepe the Frog meme as a symbol for why young men voted for Trump).

172 See The Left Can’t Meme, KNOW YOUR MEME, https://knowyourmeme.com/memes/the-left-cant-meme [https://perma.cc/W8RC-DRZV] (documenting this alt-right insult for the perceived failure of the left to use memes effectively).


174 See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.”). See generally Barton Beebe, Bleistein, The Problem of Aesthetic Progress, and the Making of American Copyright Law, 117 COLUM. L. REV. 319 (2017) (analyzing copyright law’s struggle with the notion of aesthetic progress).

and generally urges “more speech” as the solution to dangerous speech unleashed in our free-for-all marketplace of ideas.\textsuperscript{176}

While memes are not inherently left- or right-leaning and while they can be marshalled for good or for ill, they do exemplify a change in the nature of online discourse itself. In an earlier digital era, popular and legal discourse tended to view the explosion of online speech as a tool of liberation and democratization.\textsuperscript{177} Yet we are now in the midst of a reckoning about the threats that our online information ecosystem poses to democracy, public debate, and other urgent social issues.\textsuperscript{178} As an emerging wave of First Amendment scholars grapples with the dangers of online communication (primarily focused on platforms),\textsuperscript{179} we think memes deserve close scrutiny in this conversation.\textsuperscript{180}

\textsuperscript{176} See, e.g., Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (stating that in all but the most severe of emergencies, “more speech,” and not “enforced silence,” is the remedy).

\textsuperscript{177} In 1998, Kathleen Sullivan called the internet “First Amendment manna from heaven.” Kathleen M. Sullivan, First Amendment Intermediaries in the Age of Cyberspace, 45 UCLA L. REV. 1653, 1669 (1998). A year earlier, the Supreme Court marveled at the internet’s utopian potential, observing that it enabled “tens of millions of people to communicate with one another and to access vast amounts of information from around the world.” Reno v. ACLU, 521 U.S. 844, 850 (1997); accord Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (describing the “vast democratic forums of the Internet” (quoting Reno, 521 U.S. at 868)).

\textsuperscript{178} E.g., Heather Suzanne Woods & Leslie A. Hahner, Make America Meme Again: The Rhetoric of the Alt-Right 2 (2019) (arguing that alt-right meme discourse “became a regressive force on public culture, ultimately stultifying exchange”); Donovan, supra note 118 (recognizing the serious threat that emerges when “hoaxes and psychological operations” are globally propagated via memes).

\textsuperscript{179} E.g., Wu, supra note 166.

\textsuperscript{180} Cf. James Grimmelmann, The Platform Is the Message, 2 GEO. L. TECH. REV. 217 (2018) (analyzing the difficulties of platform content moderation in our algorithmic, demand-driven media ecosystem by exploring the persistence of the Tide Pod meme).
C. Copyright Claims for Memes\textsuperscript{181}

Though it has not been the norm, there have been some copyright claims made as to memes. Some have sued for copyright infringement, some have asked for credit, and some have licensed memes. This Section describes and contextualizes some of the more prominent claims.

1. Litigation\textsuperscript{182}

A mere handful of the countless number of creators of memes and their underlying images have asserted copyright claims against

\textsuperscript{181} Lawyer Dog, Know Your Meme, https://knowyourmeme.com/memes/lawyer-dog [https://perma.cc/B8XU-8WBS].

\textsuperscript{182} Evil Kermit, Know Your Meme, https://knowyourmeme.com/memes/evil-kermit [https://perma.cc/G7KQ-Y9VJ].
MEMES ON MEMES AND THE NEW CREATIVITY

meme copyists to control the spread of their memes. This low proportion indicates that most of the copying and creation happening with memes is currently happening outside of copyright’s sphere. The claims that are brought tend to be brought by a meme creator (or creator of a meme’s underlying image) against a commercial entity seeking to profit directly off the work, or against a copyist with a political or other message the creator deems to be undesirable. That said, as a final example in this Section shows, the threat of copyright infringement claims brought against everyday meme users who do not fit these paradigms lingers.

Some of the most successful, widely-copied memes have been the subject of copyright infringement lawsuits. These claims have not been brought one-by-one against each copyist but against a limited number of copyists, often for commercially using the meme. Take the Keyboard Cat and Nyan Cat memes. Keyboard Cat involves video footage of a cat dressed in human clothing and appearing to play a piano, a still of which is shown below. Nyan Cat, also shown below, is described as “an 8-bit animation depicting a cat with the body of a cherry Pop-Tart flying through outer space.” These memes’ creators sued Warner Bros. and 5th Cell Media for copyright and trademark infringement for using these characters in their Scribblenauts vide-


184 See infra notes 216–22 and accompanying text.


ogame, as also shown below.\textsuperscript{187} The lawsuit settled a few months later, with the meme creators receiving payment for the characters’ continued appearance in the videogame.\textsuperscript{188}

Keyboard Cat\textsuperscript{189} (left) and Nyan Cat\textsuperscript{190} (right)

Screenshot from Scribblenauts Videogame\textsuperscript{191}

Similarly, the owner of Grumpy Cat—a meme which was widely shared after the owner’s brother posted a photograph of a cat to

\begin{itemize}
  \item \textsuperscript{189} \textit{Keyboard Cat}, supra note 185.
  \item \textsuperscript{190} \textit{Nyan Cat}, supra note 186.
  \item \textsuperscript{191} This videogame screenshot is displayed in Keshishian, \textit{supra} note 187.
\end{itemize}
Reddit (shown below)\textsuperscript{192}—sued and won $710,000 for copyright infringement against the makers of Grumpy Cat Grumppuccino iced coffee drinks for exceeding the scope of a licensing agreement to use Grumpy Cat imagery.\textsuperscript{193}

![Grumpy Cat](image)

Grumpy Cat\textsuperscript{194} (left), and Grumpy Cat Grumppuccino Beverages\textsuperscript{195} (right)

In a similar scenario, the mother (and photographer) of Success Kid (shown below)\textsuperscript{196} sued the maker of a fireworks product called Back Off for copyright infringement after Back Off used her son’s image on the packaging (also shown below).\textsuperscript{197} According to the allegations, “Success Kid has generated substantial value, goodwill, and licensing revenue from authorized and age-appropriate commercial uses by companies who wish to associate Success Kid’s goodwill with their products and services, including Virgin Mobile, Radio Shack, Bell Canada, Marriott Hotels, Medicare, General Mills, and Coca

\begin{itemize}
  \item \textsuperscript{192} \textit{Grumpy Cat}, \textit{Know Your Meme}, https://knowyourmeme.com/memes/grumpy-cat [https://perma.cc/686U-UPT8].
  \item \textsuperscript{194} \textit{Grumpy Cat, supra} note 192.
  \item \textsuperscript{196} \textit{Success Kid / I Hate Sandcastles}, \textit{Know Your Meme}, https://knowyourmeme.com/memes/success-kid-i-hate-sandcastles [https://perma.cc/R6DS-F668].
\end{itemize}
Cola.” The mother’s lawyer noted further that “[w]e’re not questioning the right of Internet users to use this. This is more about a company making our client a de facto endorser of an age-inappropriate product.” The case subsequently settled.

Other creators of memes and their underlying images have pursued copyright infringement claims against those whose messages they find detestable. As one high-profile example, Matt Furie, the creator of the Pepe the Frog character (shown below), sued Alex Jones and Infowars for copyright infringement for making and selling Make America Great Again posters featuring Pepe the Frog (also shown below). This came in the wake of members of the alt-right movement and Donald Trump adopting and repeatedly meming Pepe the Frog. Furie opposed these messages using his character and in an attempt to disavow and stop these uses, he killed off the character by publishing a comic book featuring Pepe’s funeral. When Jones

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198 Complaint, supra note 197, at 1–2.
201 Success Kid / I Hate Sandcastles, supra note 196.
202 McCarthy, supra note 197.
205 Pepe the Frog, supra note 203 (tracing the alt-right evolution of the Pepe the Frog meme).
206 Id. (citing WORLD’S GREATEST CARTOONISTS (2017)).
began selling a campaign poster featuring Pepe, Furie sued Jones. Though Jones and Infowars asserted many defenses to the infringement claim, including Furie’s abandonment or implied license of his copyright in the character for letting nearly anyone and everyone else use it freely online, the district court held that Furie’s infringement claim withstood the defendants’ motion for summary judgment. A few months later, the parties settled the lawsuit, and Infowars agreed to turn over its profits from the poster and cease selling anything featuring Pepe the Frog.

Success Kid, discussed above, had a related experience in which Success Kid’s mother demanded that then-Congressman Steve King stop using the Success Kid meme (shown below using the meme for fundraising purposes), arguing copyright infringement. She stated that King—whom she thought displayed bigotry and whom she called “vile”—was antithetical to the Success Kid meme, which “is about

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209 Pepe the Frog, supra note 203.
positivity and celebrates achievement,” further arguing that “bigotry is just the antithesis of what we want to be the association with the meme.”

Copyright infringement claims over memes are rare and, as these examples show, have been brought mostly due to commercialization or undesirable messages. Yet the threat remains of broader assertions against run-of-the-mill meme users. Consider Getty Images, which demanded over $800 from a German technology blog for using a penguin photograph at the base of the successful Socially Awkward Penguin meme (shown below). After the claim received news coverage that was unfavorable to Getty, Getty Images defended its right to protect its copyright interests. The blog paid up, but even

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212 @LaneyMG, TWITTER (Jan. 27, 2020, 3:50 PM), https://twitter.com/laneymg/status/1221898247461056514 [https://perma.cc/BY62-2PPT]; Brennan, supra note 211.


214 Id.


though Getty Images asked that the settlement be kept confidential, the blog posted about the demand and how unreasonable it thought the terms were.\textsuperscript{219} The blog also created a new version of the penguin meme (shown below) that does not use the Getty Images penguin and encouraged others to use it to avoid a claim against them.\textsuperscript{220} \textit{Techdirt} referred to Getty Images’s behavior as “shaking down a blog” rather than protecting copyright.\textsuperscript{221} \textit{Techdirt}’s article elaborated:

No one is using this meme because of the photograph itself, and as can be seen by the alternative version, there’s nothing special about \textit{this} penguin that makes it especially necessary for this meme. It’s just a crazy meme that got popular on the internet, not because of Getty and not because of [the photographer].\textsuperscript{222}

![Socially Awkward Penguin Meme\textsuperscript{223} (left), and Blog’s Substitute Meme\textsuperscript{224} (right)](image)

spokesperson, who stated the company “believe[s] in protecting copyright and the livelihoods of photographers and other artists”).

\textsuperscript{219} \textit{ Getty Images Demands License Payment for Awkward Penguin!}, \url{GETDIGITAL.DE}, \url{https://www.getdigital.de/blog/getty-images-wants-license-fees-for-the-awkward-penguin-meme} [\url{https://perma.cc/FL5Q-EVUV}] (“[T]he Awkward Penguin is not just a random image we stole from Getty’s database, but one of the most well[-]known internet memes. Therefore the question arises why obviously no one in the whole internet knows that the image right of this penguin [is] property of a picture agency.”).

\textsuperscript{220} \textit{Id.}

\textsuperscript{221} Masnick, \textit{supra} note 217.

\textsuperscript{222} \textit{Id.}

\textsuperscript{223} \textit{Socially Awkward Penguin}, \textit{supra} note 216.

\textsuperscript{224} \textit{ Getty Images Demands License Payment for Awkward Penguin!}, \textit{supra} note 219.
2. **Credit**

Some meme creators choose to seek credit from copyists rather than pursue copyright infringement claims against them. The most notorious example of this involves the Instagram user FuckJerry, also known as Elliot Tebele, who has become infamous for his involvement in promoting the failed Fyre Festival. FuckJerry’s Instagram account mainly posted jokes and memes to its 14.3 million followers, but also made money from sponsored posts. Comedians and meme creators became upset upon realizing that the account would post their jokes and memes to advertise products without creator credit. Many of them asked for credit or, in the alternative, for deletion of the copied content. As shown in one example below, FuckJerry simply responded, “Shut up.”

After these requests went nowhere, a number of copied comedians and memists banded together to shame FuckJerry and cause the account to lose its lucrative followers. They initiated the hashtag #FuckFuckJerry.

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228 *Id.*

#fuckfuckjerry and asked the public to unfollow the account. After Comedy Central decided to pull its advertising from FuckJerry in response to this public response, Tebele apologized and promised to do better with regard to conferring credit when using others’ content.

Example of Request to FuckJerry for Credit

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232 #FuckFuckJerry, supra note 229.
3. Licensing\textsuperscript{233}

As the previous Sections on litigation and credit-seeking imply, there is also some licensing market for memes, even though most memes are copied and used entirely freely. Licensing tends to be by meme creators to established businesses, as Success Kid’s mother suggested.\textsuperscript{234} There is enough public expectation that memes will be licensed by businesses such that when T-Mobile aired an ad during the Super Bowl riffing on a viral meme (shown below), viewers were outraged by this copying, as shown in one example below, until the CEO tweeted that the meme was licensed.\textsuperscript{235}

\textsuperscript{233} I Am Once Again Asking for Your Financial Support, Know Your Meme, https://knowyourmeme.com/memes/i-am-once-again-asking-for-your-financial-support [https://perma.cc/9S73-S95S].

\textsuperscript{234} See supra text accompanying note 198.

Now that we have explored memes as a matter of definition, their contribution to society, and how their protection has been asserted within the existing copyright ecosystem, we turn to analyze how memes in fact upend copyright’s core assumptions.

237 Raj Mahal (@RajMahal06), Twitter (Feb. 3, 2019, 8:44 PM), https://twitter.com/ RajMahal06/status/1092237322974871554 [https://perma.cc/NZJ7-76UE].
Just as Ben Shapiro, the conservative political commentator, is asserted online to “destroy” every liberal concept and person he opposes, so too do memes threaten the core principles of copyright. As we explore below, memes pose a fundamental challenge to copyright law by violating copyright’s central tenets of creativity, commercialization, and distribution, which we explored in Part I. Whereas copyright law at its core views unauthorized copying as a threat to creativity, memes, a paradigm of contemporary creativity, owe their very existence to limitless, unauthorized, viral copying.


240 See supra Section II.B.
A. The Norms of Copying and Transformation\textsuperscript{241}

Whereas copyright law envisions an author who wants to fend off unauthorized copying,\textsuperscript{242} meme creators want just the opposite: They want their work to go viral, to be copied and remixed as much as possible.\textsuperscript{243} They want to lose control of their work.\textsuperscript{244}

\textsuperscript{241} Mr. Bean, \textsc{Know Your Meme}, https://knowyourmeme.com/memes/subcultures/mr-bean [https://perma.cc/PKB4-9NRR].

\textsuperscript{242} See supra Part I.

\textsuperscript{243} See supra Sections II.A–B.

\textsuperscript{244} But see infra notes 420–23 and accompanying text.
I. Copying

Memes turn a central pillar of copyright theory on its head. In previous work, we explored ways in which unauthorized copying can surprisingly stimulate the market for an underlying work rather than undercut it, thereby enriching the infringed-upon party. This phenomenon is surprising because it directly defies a fundamental premise of copyright law, that unauthorized copying harms the market for original works and must be prohibited in order to incentivize creation. Memes exemplify this phenomenon in which unauthorized copying helps rather than harms the original creator.

245 Success Kid / I Hate Sandcastles, supra note 196.
246 Adler, Fair Use, supra note 46 (exploring examples where unauthorized copying in art does not harm, and may even bring market benefits to, an original artist); Adler, Why Art Does Not Need Copyright, supra note 22, at 318–20 (exploring how unauthorized copying in art can bring economic benefits to original creators); see Adler & Fromer, supra note 47, at 1508–10 (providing an example of how copying might stimulate rather than undercut the market for the original work); Jeanne C. Fromer, Market Effects Bearing on Fair Use, 90 WASH. L. REV. 615, 616 (2015) (arguing for the assessment of market benefits as well as harms in fair use law); accord Kristelia García, Monetizing Infringement, 54 U.C. DAVIS L. REV. 265 (2020) (exploring how rightsholders can monetize being infringed upon).
247 See supra Sections I.A–C. But cf. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1206–08 (2021) (analyzing the effect of Google’s use on Oracle’s market by pointing not just to harms, but also to benefits).
In fact, memes depend for their very existence on unauthorized copying. Quite simply, a meme does not even come into being until it has been repeatedly copied.\footnote{See supra Section II.A.} Copyright law instructs us that unauthorized copying threatens to usurp the market for an original, but in memes, copying is what creates the value of the original in the first place.\footnote{Cf. infra Section V.C (discussing this phenomenon in the context of non-fungible tokens (NFTs)).} In this new environment, creators therefore create works with an eye to inviting copying rather than warding it off. Virality is the goal; the prospect of being copied is the incentive.\footnote{Pamela Vaughan, \textit{How to Make a Meme That Will Make People Cry (with Laughter)}, \textsc{Hubspot} (June 12, 2018), \url{https://blog.hubspot.com/blog/tabid/6307/bid/33363/memejacking-the-complete-guide-to-creating-memes-for-marketing.aspx} [https://perma.cc/ZS2T-4R2Q] (discussing the marketing technique of “memejacking” and how to optimize marketing memes for social sharing to enable as much copying as possible). See generally Adam Lonnberg, Pengcheng Xiao & Kathryn Wolfinger, \textit{The Growth, Spread, and Mutation of Internet Phenomena: A Study of Memes}, \textsc{Results Applied Mathematics}, May 2020 (analyzing different models for tracking and explaining meme virality, popularity, and behavior).} This is true not only of meme creators, but many creators in the digital environment, who understand that if images or clips of their works become memes, this will ultimately add value to the original work or to whatever else the creator may be marketing.\footnote{Connor O’Brien, \textit{Case Study: How Artists and Songs Go Viral}, \textsc{Edmprod} (Feb. 24, 2021), \url{https://www.edmprod.com/case-study-how-artists-and-songs-go-viral} [https://perma.cc/W4PN-TPWV]. Even creators who do not seek to be copied have benefited economically from being reproduced. Adler, \textit{Why Art Does Not Need Copyright}, supra note 22, at 314–20 (exploring examples of creators such as the Suicide Girls, an alt-porn collective, whose work gained in value after artist Richard Prince made unauthorized copies of it in his art series called “New Portraits”).} Nothing in copyright theory can describe this or even fathom it.

Consider Drake. His megahit music video for his song “Hotline Bling” (a still of which is pictured below) spawned endless memes,\footnote{We create one such “Hotline Bling” meme below in Section IV.A.} to the point where the proliferation of memes it inspired became a story in its own right. The “Hotline Bling” story was more than a social media phenomenon. Traditional media outlets like \textit{USA Today} and \textit{Time} wrote articles about the best “Hotline Bling” memes.\footnote{Eliza Berman, \textit{Drake’s ‘Hotline Bling’ Video Inspired Some Incredible Dancing Memes}, \textsc{Time} (Oct. 20, 2015), https://time.com/4079654/drake-hotline-bling-dancing-memes [https://perma.cc/9RGU-K6X9]; Maeve McDermott, \textit{The Best ‘Hotline Bling’ Drake Memes, from A to Z}, \textsc{USA Today} (Oct. 20, 2015), \url{https://www.usatoday.com/story/life/entertainthis/2015/10/20/best-hotline-bling-memes-drake/74267298} [https://perma.cc/XX67-DQL8].} The memes bled into real life: A football player for the Baltimore Ravens
copied Drake’s moves in his victory dance after kicking the winning field goal in a game; players on other teams have done the same.\textsuperscript{254}

What is extraordinary is that Drake, seeking a smash hit, designed the video to have exactly this result. As his partner and choreographer explained, “[A]ll those memes and [mashups], he knew that was going to happen!”\textsuperscript{256} Writing in the \textit{New York Times}, rock critic Jon Caramanica explained how the video was designed to be broken down into GIFs and screenshots to ensure it was copied and reused.\textsuperscript{257} He wrote, “[i]t’s less a video than an open source code that easily allows Drake’s image and gestures to be rewritten, drawn over, [and] repurposed.”\textsuperscript{258} The relatively empty backgrounds of the video function almost like a green screen built for remixes. And Drake’s slightly dorky dance moves were also “more or less blank.”\textsuperscript{259} Lacking

\begin{flushright}
Still from Drake’s “Hotline Bling” Video\textsuperscript{255}
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contemporary references and characterized by “small moves that [Drake] repeats,” the music video presented readymade GIFs of Drake for his copiers.260

2. **Transformation**261

Creators in meme culture not only hope that their works will be copied; they also hope their works will be altered and changed in unforeseen ways. Again, this creative goal violates basic assumptions that inform copyright law. Whereas copyright law pictures a creator who wishes to guard their work’s integrity262 and who will license derivative uses only if they meet the creator’s criteria, meme culture envisions a creator who wants to lose control of their work and to open it up to constant revisions, reuses, and misuses.263 In this way, we

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260 Id.


262 See supra Sections I.A–B; see also 17 U.S.C. § 106A(a) (granting “rights of . . . integrity” to authors of visual art).

might compare memes to certain instances of graffiti art: work that exists to be written over, transformed, and revised.\textsuperscript{264}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{ICANHASMONEY.jpg}
\caption{ICAN HAS MONEY}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{UCAN2.jpg}
\caption{U CAN 2}
\end{figure}

B. The Creation of Value for Underlying Works Through Copying\textsuperscript{265}

As just discussed, copying creates value for the underlying original work or expression rather than detracting from it. Sharing memes based on an underlying copyrighted image “helps ingratiate their brand into the culture to have their work copied all around the Internet.”\textsuperscript{266} RealityGif, a website that posts images from numerous reality television shows including The Real Housewives of Beverly Hills,\textsuperscript{267} has never received a request to take down content or pay for copyrighted material, suggesting the underlying content owners realize the promotional value that these meme spreaders generate for the material.\textsuperscript{268} In fact, one lawyer advises that if your image has been turned into a meme, the first thing to consider instead of suing is

\textsuperscript{264} See infra Section V.A.
\textsuperscript{265} Money Cat Template, \url{imgflip.com/memetemplate/131896771/Money-cat}, \url{https://perma.cc/KG6Q-HAF3}; see also CashCats, \url{Know Your Meme}, \url{https://knowyourmeme.com/memes/cashcats}, \url{https://perma.cc/8WKF-9GKL} (explaining the format of the “CashCats” type of meme).
\textsuperscript{266} Anna Rabe, Do Memes Violate Copyright Law?, \url{Law Tog}, \url{https://thelawtog.com/memes-violate-copyright-law} (citation omitted).
\textsuperscript{267} Id.; see also supra Section II.B (discussing memes, including one based on a scene from The Real Housewives of Beverly Hills).
\textsuperscript{268} Rabe, supra note 266 (commenting on how the decision not to send a takedown request and request for payment for the use of copyrighted materials suggests that the copyright owners benefit from the promotion).
“whether you might be able to turn the meme into a form of advertising for your own business.”269

C. Indirect Monetization of Works270

Copyright law is also built on the premise that providing creators with exclusive rights will encourage people to create expressive works from which they can directly profit.271 The meme economy subverts that assumption because most meme creators do not directly earn money by exercising copyright’s exclusive rights. Instead, they typically receive no monetary compensation for their creations or, if they do, they profit only indirectly off a meme’s success.

Most people who create and share memes do so not to earn money, but merely to engage with others on social media.272 The main reasons young people share memes is to make others laugh, to react to something in conversation, to communicate how they are feeling especially when they feel words will not do, and to convey code to somebody who will “get it.”273 As one journalist explains, “[m]ost users

269 Id.
271 See supra Section I.C.
273 Id.
likely don’t have big plans to copyright their tweets or TikToks for any reason, and many find a thrill in going viral.”

The many free meme generators online help these users craft and adapt memes to share, which they can easily do on a myriad of social media platforms. The prevalence of this sort of creativity thus challenges copyright’s core assumption that copyright law is necessary to incentivize the creation and distribution of expressive content.

A smaller but important group of meme creators and sharers profit from memes, but almost never directly. Even though they do not charge others for access to or use of their memes, creators can make significant money indirectly due to their success in creating and sharing memes. In particular, meme creators and sharers can attract loyal and significant numbers of followers based on their meme niche, be it about parents, cats, science, law, or politics. That in turn can generate profit opportunities for these meme creators and sharers. For example, in 2016, the FuckJerry Instagram account discussed earlier was on track to make $1.5–3 million based on sponsored posts they shared to their more than ten million followers by charging a fixed cost plus a cost per follower. These followers came for the freely shared memes and also viewed the sponsored content, allowing FuckJerry to profit indirectly. Similarly, well-known meme creators have been hired by established businesses, such as Gucci, to create memes to be copied and shared with the objective of capturing consumers.


275 See supra note 150 and accompanying text.

276 See, e.g., supra Section II.B (exploring the culture surrounding memes and situating memes within the market of attention rather than a monetary market); cf. Vaughan, supra note 250 (presenting a user guide for creating valuable memes, with objectives focused on traffic, visibility, and virality, rather than profiteering). But see supra Section II.C.1 (discussing a few meme lawsuits focusing on copier profit-extraction); supra Section II.C.3 (commenting on how some—albeit a very select few—memes are licensed by larger companies).

277 See, e.g., Jane, How to Make Money with Memes in 2021, This Mama Blogs (Aug. 16, 2021), https://thismamablogs.com/make-money-with-memes [https://perma.cc/CPV4-F7LA] (encouraging making memes that resonate with the maker’s audience by picking a niche such as parenting or cat ownership).

278 See supra Section II.C.2.


As previously discussed, a select few creators—such as the creators of the Success Kid and Grumpy Cat—monetize their memes through copyright licenses to traditional companies. Yet this rarified group operates in contrast to the rest of meme culture and against the practices of even the most successful meme creators and sharers. But even meme superstars who pursue lucrative licensing opportunities generate these opportunities principally by allowing their memes to be widely and freely shared, thereby defying the prototypical copyright story.

D. Line Between Commercial and Non-Commercial Activity

Following from the different ways that business happens in the meme economy is the observation that it is becoming harder to distinguish between commercial and non-commercial activity for the purpose of fair use analysis. As per the copyright statute, fair use turns how the meme remains a largely untapped resource to cannibalize within our attention economy.”); Jane, supra note 277.

281 See supra Section II.C.


283 The law also sometimes distinguishes between commercial and non-commercial activity with regard to infringement, but in limited ways. Specifically, with regard to copyright’s exclusive rights of public performance and public display, copyright law
in part on “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” Courts have struggled mightily with whether a defendant’s use is commercial. The Supreme Court has explained, “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” That so-called explanation has mystified courts and scholars, particularly because “profit from exploitation” seems inextricably tied to using copyrighted work without paying.

This already difficult-to-draw line between commercial and non-commercial use becomes even less precise in a meme economy in which successful creators and sharers tend to profit only indirectly, if at all, from their memes. It is very hard to determine, even notwithstanding the already-confusing copyright doctrine on commerciality, whether creators are engaging in commercial or non-commercial

exempts certain activities best described as nonprofit. See 17 U.S.C. § 110 (outlining permitted displays or performances, providing they are of a non-commercial nature). Moreover, the Audio Home Recording Act prohibits an infringement action “based on the noncommercial use by a consumer of [an audio recording] device or medium for making digital musical recordings or analog musical recordings.” Id. § 1008. This exception is fairly limited, as Congress chose not to include home computers as such devices. Id. § 1001(3) (specifying that a “digital audio recording device” means a device that is designed or marketed “for the primary purpose of” making an audio recording); Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072, 1078 (9th Cir. 1999) (finding that computers are not digital audio recording devices given the legislative history of the Audio Home Recording Act).


286 See e.g., Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1986) (rejecting the holding in Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), that any income-producing use presumptively falls outside of the fair use defense); Thomas M. Byron, Past Hits Remixed: Fair Use as Based on Misappropriation of Creative Value, 82 Miss. L.J. 525, 567–68 (2013) (discussing how the focus on commercial nature was once—but is no longer—“effectively dispositive” in the fair use inquiry); Igor Slabykh, Ambiguous Commercial Nature of Use in Fair Use Analysis, 46 AIPLA Q.J. 293, 317–19 (2018) (arguing that the “customary price” approach endorsed by Harper & Row is the most fair definition of commerciality). This unresolved tension may explain why courts tend to discount the importance of commerciality to fair use (though when courts conclude a defendant’s use is non-commercial, they are apt to find fair use). Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005, 156 U. PA. L. REV. 549, 600–03 (2008) (tracking the courts’ attention to the commerciality inquiry when ruling on fair use, and noting that while not consistent, the commerciality inquiry of Sony persists).
activity. This haziness might make fair use determinations in this context yet less predictable.

E. Breakdown of Idea-Expression Distinction

Memes break down copyright law’s assumptions further by laying bare the lack of distinction between idea and expression, that distinction being a central tenet of copyright law. Consider the Mocking SpongeBob meme shown above. Under traditional copyright analysis, the image itself (not to mention the text superimposed on it) is classic protectable expression. Yet meming an image can transform that expression into an idea. In the context of the Mocking SpongeBob meme, the image represents “a mocking tone towards an opinion or point of view.” The presence of that image now indicates that idea, either with or without accompanying text, perhaps even more than it conveys the image as expression. To the extent that this SpongeBob

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287 Compare Sony, 464 U.S. at 448–49 (ruling that “time-shifting [by recording broadcast television programs on a video cassette recorder] for private home use must be characterized as a noncommercial, nonprofit activity”), with Harper & Row, 471 U.S. at 562 (holding that a nonprofit news publication engages in commercial behavior in its news reporting); cf. Lantagne, supra note 107, at 416–17 (“[C]ommercial use on the internet—especially on social media—can be a complicated question.”).


290 See supra Section I.D.

291 “Why are there so many Spongebob memes?”, asks Time. Rachel E. Greenspan, Your Comprehensive Guide to the Best Spongebob Memes Across the Internet’s Sea, TIME (Sept. 19, 2019), https://time.com/5647509/best-spongebob-memes [https://perma.cc/PZ2P-7MV2]. In addition to SpongeBob’s evocation of nostalgia and ease of design, Matt Schimkowitz—a senior editor at the magazine—argues that emotions reign supreme:
image becomes synonymous with mockery, various people can use this same image to represent “mocking” tones in a multitude of situations. Therefore, the image is now sometimes expression, sometimes idea, or perhaps sometimes both simultaneously. This example reveals a characteristic of memes writ large: memes break down copyright’s idea-expression distinction, rendering it as nonsensical as SpongeBob himself sometimes can be.\(^{293}\)

![Meme diagram](image)

### F. Scale and Pace of Copying\(^{294}\)

The ability to launch and spread a meme virally on a mass level can happen in hours, as social media and other internet platforms are, as Limor Shifman puts it, “‘express paths’ for meme diffusion.”\(^{295}\) As discussed earlier, viral memes are not only copied, but they are also transformed.\(^{296}\) A Gen Z-er studying memes writes that viral memes

> “[T]he characters on SpongeBob . . . are incredibly direct in what emotion they’re trying to express,” with no real expressive subtlety. *Id.* SpongeBob is just his emotions, “which makes it much easier for people online to use them essentially as emojis and share them to express how they’re feeling about a particular subject.” *Id.* (quoting Matt Schimkowitz).

\(^{293}\) *Cf.* Lantagne, *supra* note 107, at 408 (“[M]emes are no longer pieces of creative expression so much as they are the basic building blocks of cultural communication.”).


\(^{295}\) *Shifman, supra* note 96, at 18.

\(^{296}\) See *supra* Sections III.A–B.
can have “thousands of variations and a huge online presence on social media. If [a] meme does happen to go viral, this means that it has diffused through society, or the Internet, and has been widely recreated. This meme will be visible everywhere, from Facebook to college professors’ lecture slides.”

They are copied and transformed at an exponential pace, something that is easy through social media’s facilitation of speedy cooption and virality, not like your grandfather’s copyright.

G. Staleness of Memes

What this scale and pace of copying also means is that innovation in the world of memes is proceeding at a supersonic pace. Copyright’s duration of an author’s lifetime plus seventy years seems like a misfit for memes that can hit it big and go stale all in the matter of weeks. Many memes decay with a quick half-life—on the order of

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301 In their work regarding the fashion industry, Kal Raustiala and Chris Sprigman note the quickened pace of copying—often seasonal—which leads to the fast obsolescence of a trend followed by innovation to replace each dying trend. Kal Raustiala & Christopher Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design, 92 VA. L. REV. 1687, 1689–92 (2006). By comparison, the scale and pace of copying and transformation of memes make the fashion industry look sluggish.
days and weeks—leading new memes to rise up and take their place.\footnote{See Eileen Brown, \textit{The Maths Behind the Memes: Why We Share on Social Media}, ZD\textsc{net} (July 25, 2017), https://www.zdnet.com/article/the-maths-behind-the-memes-why-we-share-on-social-media [https://perma.cc/7K6Q-2TRR] (studying mathematically the brief popularity-window of memes); Lonnberg, Xiao & Wolfinger, \textit{supra} note 250 (modeling how memes “are spread rapidly by internet users, often for a relatively short period of time").}

\section*{H. Selective Enforcement\footnote{Pepe the Frog, \textit{supra} note 203.\footnote{See \textit{supra} Section I.F.\footnote{As explained by the organization itself, “Creative Commons is a nonprofit organization that helps overcome legal obstacles to the sharing of knowledge and creativity to address the world’s pressing challenges.” \textit{What We Do}, \textsc{Creative Commons}, https://creativecommons.org/about [https://perma.cc/RDS4-5WBY].}}} \label{Selective Enforcement}

Another way in which memes upend copyright’s assumptions is with regard to selectivity of enforcement. Recall that copyright law permits owners to choose whether to license their exclusive rights and to whom.\footnote{See \textit{supra} Section I.F.} By default, then, very few people or entities are likely to have express license to any of the copyright rights. The major exceptions are for open-source software, a work licensed by Creative Commons,\footnote{As explained by the organization itself, “Creative Commons is a nonprofit organization that helps overcome legal obstacles to the sharing of knowledge and creativity to address the world’s pressing challenges.” \textit{What We Do}, \textsc{Creative Commons}, https://creativecommons.org/about [https://perma.cc/RDS4-5WBY].} or a work with a shrinkwrap license. With such a mass license, the use of these works is restricted only by the use terms of
the license, rather than the user’s identity. What unifies these exceptions is that they are offered on a take-it-or-leave-it basis uniformly to everyone.\footnote{306}{For an exploration of these types of licenses side by side, see Jeanne C. Fromer \\ & Christopher Jon Spigman, Copyright Law: Cases and Materials v.3.0, at 654–65 (2021).}

Meme licensing differs from these scenarios in terms of the selectivity of enforcement. Writ large, copying and transforming memes is tolerated and typically encouraged,\footnote{307}{See supra Sections III.A–B.} an opposite scenario from copyright’s assumed default.\footnote{308}{See supra Section I.F.} Yet at the same time, some meme creators employ almost surgical exclusion to prevent a handful of people or groups whose messages they do not like from using their memes. Recall Pepe the Frog’s creator deploying copyright to stop Alex Jones, and Success Kid’s mother doing the same to stop Steve King.\footnote{309}{See supra Section II.C.} In these situations, only very few have no permission to use the copyright-protected work because of their views or message while all others can use, copy, and transform the same meme freely, making this different both from copyright’s assumed default and take-it-or-leave-it licenses.

I. The Centrality of the Meme, Not the Author\footnote{310}{Bye Felicia, Know Your Meme, https://knowyourmeme.com/memes/bye-felicia [https://perma.cc/PTY8-T3JG].}

Another way in which memes undermine copyright’s core tenets is that they decentralize the author\footnote{311}{See supra Section I.G.} and instead center the meme itself. Compare this situation with more traditional works like songs, books, paintings, or movies. While not everyone can identify the singer who recorded Hotline Bling, the author who wrote The Catcher in the Rye, the painter who created Starry Night, and the director, writer, and actors of Nomadland, many can and will associate such
works importantly with their respective authors. People understand these works as shaped by the authors’ particular circumstances and viewpoints.\textsuperscript{312} Such author-centricity is even characteristic of many works made for hire, such as software.

Many people are involved in a meme’s creation and spread: Someone creates an underlying image used to make a meme, someone turns it into a meme, and then others copy and transform that meme. Indeed, copyright law might label many of these actors as authors.\textsuperscript{313} But despite the possibility of legal authorship recognition, even the most well-known memes, like Distracted Boyfriend,\textsuperscript{314} are identifiable not by any of these creators but rather as known as the meme and its variations. This is true even when one can trace a meme’s spread to particular individuals and identify the author of the underlying image, as the \textit{Know Your Meme} reference site sometimes does. Moreover, authorship lacks centrality even though the multiple layers of contributions offer potential opportunities for individual identification.\textsuperscript{315} Memes are dissociated from their creators; authors rarely—if ever—receive personal recognition. As literary scholar Marta Figlerowicz explains:

\begin{quote}
[A]ny image or quip that becomes an internet meme begins as some particular user’s act of self-expression. But if it is successful it evolves into a piece of cultural syntax, cycling through many people’s perspectives and becoming divorced from its original context. Soon that original context—or any other single iteration of the meme—matters little to its current or its fullest meaning. At its most interesting, a meme is a cloud of variants and reuses, coming alive in each reenactment but meaningful only when one thinks of the abstraction at its center.\textsuperscript{316}
\end{quote}

\textsuperscript{312} Cf. Mala Chatterjee, Understanding Intellectual Property: Expression, Function, and Individuation 4–5 (Aug. 2, 2021) (unpublished manuscript) (on file with the \textit{New York University Law Review}) (making the case that works protected by copyright law are individuated by author, making authorship central to these works).

\textsuperscript{313} See supra Section I.G.

\textsuperscript{314} See \textit{Distracted Boyfriend}, supra note 299.

\textsuperscript{315} In this way, authorship is more profuse and arguably egalitarian than it once was. Everyone is now an author, yet authorship matters less. Cf. Chatterjee, supra note 312 (positing that authorship of artistic works is central to copyright law as artistic works are distinguished by the identity of their authors).

\textsuperscript{316} Marta Figlerowicz, \textit{It Me: The Trouble with Memes}, \textit{Yale Rev.} (May 19, 2021), https://yalereview.org/article/it-me [https://perma.cc/FK7F-4AV2]; accord Donovan, supra note 118 (“Importantly, as memes are shared they shed the context of their creation, along with their authorship. Unmoored from the trappings of an author’s reputation or intention, they become the collective property of the culture. As such, memes take on a life of their own.”).
This aspect of memes is true to Richard Dawkins’s original conception in *The Selfish Gene*. Just as Dawkins theorized that living creatures exist to transmit and propagate their genes, one might say that authors exist to create, transmit, and copy memes. That is not necessarily to strip the agency from the humans involved in the creation and spread of memes, but to recognize that memes stand and thrive apart from their human creators and that these creators are less identifiable than copyright law imagines authors would be.

The traditional copyright view is that the work is entirely indebted to its author. The author is the “mastermind,” as the Supreme Court said long ago, without whom the work would not exist. Indeed, the moral rights interpretation of copyright—in Europe and also enshrined in American copyright law in the Visual Artists Rights Act—pictures the author’s relationship to the work as even deeper. The work of art is pictured metaphorically as the artist’s child. As the Second Circuit explained, the parent/author

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317 See supra notes 95–97 and accompanying text.
318 Cf. Figlerowicz, supra note 316 (“[B]oth genetic tendencies and cultural trends gain their fullest expression on the level of large populations rather than individuals. And so any particular self serves merely as a temporary means by which a gene, or a meme, perfects itself and prolongs its survival.”).
320 In this regard, Kale Salad, an Instagram meme account, is an anomaly in seeking to track down the origin of particular memes and credit the original meme creator. See Shelby Black, *Meet Kale Salad, the Meme Account Giving Creative Ownership Back to the Internet*, PAPER (Feb. 7, 2017), https://www.papermag.com/meet-kale-salad-the-meme-account-giving-creative-ownership-back-to-the-2245569929.html [https://perma.cc/QP9V-E9PS]. Even so, crediting the original meme creator fails to recognize the multiple people who played an essential role in creating and contributing to a meme’s meaning and existence.
321 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (stating that authorship “involves originating, making, producing, as the inventive or master mind, the thing which is to be protected” (internal marks omitted)); see also Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 2000) (expanding on the “mastermind” approach in works involving joint authorship).
“injects his spirit into the work.”324 And the work must be preserved exactly as the author intended it to be.325

But in memes, as in so many creative works in digital culture, if the creative work is the artist’s child, then we see what happens when the child grows up and leaves home.326 Now the work takes on a life of its own; it becomes promiscuous, changing, and mutating, being reworked by other authors and other memes it meets up with in the digital landscape. Instead of being preserved just as the author/parent envisioned, the work mutates, travels, and ultimately becomes parent in its own right, giving birth to an endless array of works that use the first work as a template for further creativity.

This view of the meme as a child who has grown up and left home bears some relationship to the biological origins of the term “meme,” in which the gene, like the work, retains agency. Indeed, there is debate in memetics scholarship about how to conceive of human agency in relation to memes: Does the meme, like a gene, control the people who reproduce and disseminate it, or do human agents exert power over the meme?327 Whatever the answer, we can see that we are a far cry away from the copyright’s vision of the author: the all-powerful mastermind or parent, who controls the obedient work.

What memes contribute and how they depart from copyright law reflects an ongoing progression of creativity in contemporary culture. At the beginning of the twenty-first century, technologists touted Web 2.0 with its emphasis on user-generated content,328 while legal scholars worried that cheap-to-create, often amateur, content—frequently posted on YouTube—was a poor fit for copyright law.329 Now that the

324 Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).
325 E.g., Roberta Rosenthal Kwall, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul, 81 NOTRE DAME L. REV. 1945, 1972 (2006) (“[T]he right of integrity guarantees that the author’s work truly represents her creative personality and is free of distortions that misrepresent her creative expression.”); John Henry Merryman, The Refrigerator of Bernard Buffet, 27 HASTINGS L.J. 1023, 1041 (1976) (explaining that viewers maintain an interest in “seeing, or preserving the opportunity to see, [a] work as the artist intended it, undistorted and ‘unimproved’ by the unilateral actions of others”).
326 See Adler, Against Moral Rights, supra note 323, at 269.
327 Shifman, supra note 96, at 12 (“[A] . . . fundamental controversy in memetics . . . relates to the issue of human agency in the process of meme diffusion.”).
internet has advanced many versions to integrate—among other things—smartphone-generated content and social-media interconnectivity, creativity has morphed as well to fit our dramatically changed technological landscape. Many of the characteristics of memes we have explored so far build on the creativity features of Web 2.0, yet technological changes allow them to progress well beyond them. Whereas with earlier online creativity, people copied pre-existing commercial works and posted them on a platform like YouTube for others to see, memes instead reflect a participatory creative culture, in which people iterate on each other’s creative works, continuously transforming them again and again into new versions. Scholars from over a decade ago who analyzed Web 2.0 explored how user-generated content, drawn from pre-existing works, would often cause no harm to the market for the underlying works. But even more than causing no harm, the copying involved in memes actually creates value for underlying works. Whereas the amateur creativity of Web 2.0 was principally attributable to each creator, meme creativity has decentered the author and often rendered attribution unlikely, if not impossible. Moreover, the scale of copying in memes proceeds at a pace unknown even in Web 2.0. In short, contemporary creativity has shifted dramatically in the decade since legal scholars first considered the effects of digital technology on cultural production. This shift defies many more of the fundamental expectations on which copyright law and theory are based.

In all the ways explored in this Part—with regard to creativity, commercialization, and distribution of works—memes break down many core assumptions of copyright law. Given this disconnect between copyright law and meme culture, we now turn to how copyright law should think about memes.

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331 See supra Section II.B.3.
332 See supra Section III.B.
333 See supra Section III.I.
334 See supra Section III.F.
IV
HOW SHOULD COPYRIGHT LAW THINK ABOUT MEMES?335

As we have shown, memes upend many of copyright law’s central assumptions. Yet memes are creative works that fall within the scope of copyright law, as original works of authorship fixed in a tangible medium of expression.336 Creators deemed to be authors pursuant to copyright law can assert their exclusive rights to prevent others from copying and transforming their works.337 As such—and as particularly exemplified by the Socially Awkward Penguin scenario detailed previously—we think that applying copyright law as is to memes is dangerous if one wants to preserve meme culture.338 Because copyright law currently covers memes, it enables the assertion of infringement claims in ways that can destroy meme culture precisely because of the multiple mismatches just explored. We think that these mismatches ought to be taken into account in determining whether and how to apply existing copyright law to memes, how to modify the applicable

336 See supra note 6 and accompanying text.
337 See supra Part I.
338 See supra Part II.
legal regime, or—ultimately—whether any governing legal regime is ever appropriate.

A. Keep Copyright Law Away from Memes?  

Over its centuries, copyright law has seen many new media forms and technologies of distribution develop, including photography, motion pictures, television, VCRs, search engines, and social media. In turn, Congress and courts have contended with whether and how to apply existing copyright rules to these new forms. Many of these new forms are swept into copyright law, sometimes evaluated under pre-existing rules and other times under modified rules.


At the same time, some expressively creative works—long-standing forms as well as newer phenomena—sit outside of copyright law. They do so for one of two reasons: Either these works are excluded from protection by copyright’s rules or are protectable but generally not challenged by the relevant creative community. Yet creativity flourishes in both contexts, yielding a rich set of expressive works without reliance on copyright protection.\(^\text{341}\) Studied categories of works excluded from copyright protection where creativity prospers include stand-up comedy,\(^\text{342}\) cuisine and recipes,\(^\text{343}\) and magic.\(^\text{344}\) In general, works in these categories often fail copyright’s requirements of originality, fixation in a tangible medium of expression, or not being a method.\(^\text{345}\)

Creativity also prospers without reliance on copyright law in some spaces in which it is likely available, such as tattoos\(^\text{346}\) and makeup designs for clowns.\(^\text{347}\) Such contexts in which copyright is available but not asserted tend to be characterized by communal norms against invoking copyright law. Instead creators rely on alternative norms to register or enforce “claims” of ownership.\(^\text{348}\) Consider tattoos: As Aaron Perzanowski explains, even though copyright law can be invoked to enforce rights in tattoo designs, the tattoo community instead relies upon its own norms—sometimes for copying, sometimes against—out of a shared “disdain for authority and a history of harsh legal regulation that renders them generally hostile to the legal system,” as well as a “sensitiv[ity] to consumer expectations.”\(^\text{349}\)

Rights enforcement in meme culture currently is closer to that of tattoos than stand-up comedy or movies. That is, copyright law is generally available to protect memes but copyright claims are infrequently brought against meme copyists, transformers, and

\(^{341}\) See supra text accompanying note 21.

\(^{342}\) Oliar & Sprigman, supra note 21.

\(^{343}\) Buccafusco, supra note 21; Fauchart & von Hippel, supra note 21.

\(^{344}\) Loshin, supra note 21.

\(^{345}\) See 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”); id. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any . . . method of operation . . . , regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). With respect to magic in particular, the creative act of “live performance” cannot be copyrighted. Loshin, supra note 21, at 131.

\(^{346}\) Aaron Perzanowski, Tattoos & IP Norms, 98 MINN. L. REV. 511, 513 (2013).


\(^{348}\) See, e.g., Perzanowski, supra note 346, at 513; Fagundes & Perzanowski, supra note 347, at 1318.

\(^{349}\) Perzanowski, supra note 346, at 515.
As long as this norm continues to hold, meme culture and the creativity flourishing within it can carry on mostly unimpeded. Yet norms that tend to tolerate copying and favor nonenforcement of copyright are not always stable. Sometimes norm-shifting occurs in response to a legal change. For example, although fashion designs were long understood to be uncopyrightable or minimally copyrightable due to their functional aspects, the Supreme Court in 2017 established a more protective framework for copyrightability of fashion designs. Although it is still an open question whether copyright claims regarding fashion designs will significantly increase, the Supreme Court’s decision disrupted an equilibrium in the fashion industry regarding copyright enforcement.

Norm shifts (and changes in copyright enforcement practices) can affect the type of works that are created in the first place. Consider the practice of sampling in hip hop. In decades past, the two most common types of sampling were use of a single song segment—whether or not repeatedly or recognizably—and a combination of many song segments or elements. This latter type of “mash up” sampling, exemplified by the Beastie Boys’ widely-praised album *Paul’s Boutique*, has mostly been abandoned in favor of the former.

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350 See *supra* Section II.C.
351 *E.g.*, Raustiala & Sprigman, *supra* note 301, at 1689.
352 Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017) (holding that “a feature incorporated into the design of a useful article” may be copyrightable if it “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work . . . if it were imagined separately from the useful article into which it is incorporated”). See generally Barton Beebe, *Star Athletica and the Problem of Panaestheticism*, 9 UC IRVINE L. REV. 275 (2019); Christopher Buccafusco & Jeanne C. Fromer, *Fashion’s Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51 (2017); Christopher Buccafusco & Jeanne C. Fromer, *Essay, Forgetting Functionality*, 166 U. PA. L. REV. ONLINE 119 (2017); Mark P. McKenna, *Essay, Knowing Separability When We See It*, 166 U. PA. L. REV. ONLINE 127 (2017); Rebecca Tushnet, *Shoveling a Path After Star Athletica*, 66 UCLA L. REV. 1216 (2019).
type because of a few copyright rulings against samplers.\footnote{The most notable such ruling is Bridgeport Music, Inc. \textit{v.} Dimension Films, 410 F.3d 792 (6th Cir. 2005), which held that there is no \textit{de minimis} exception to infringement liability for copying sound recordings.} As \textit{Rolling Stone} put it, the Beastie Boys’ album “sampled everyone from the Ramones to Mountain to the Funky 4+1 and stitched together song fragments in a way rarely seen before or since.”\footnote{\textit{Rolling Stone}, \textit{supra} note 355.} Even though copyright law was even murkier at the time about the need to license their samples, the band had licensed the 105 songs sampled on the album for $250,000.\footnote{Casey C. Sullivan, \textit{How Litigation Changed Hip Hop Sampling}, \textit{GREEDY ASSOCIATES} (July 28, 2015), https://blogs.findlaw.com/greedy_associates/2015/07/how-litigation-changed-hip-hop-sampling.html [https://perma.cc/5USB-BNVV].} After the adverse copyright rulings, sampling licenses became costlier and were understood to be necessary (at least as a practical matter for risk-averse record companies); it is estimated that these licenses today would cost $20 million, a prohibitively expensive price.\footnote{Id.} In this way, copyright law changed hip hop music, moving it away from songs comprising interwoven mash-ups to those with a single or limited number of samples, a more affordable practice.\footnote{Cf. Lloyd, \textit{supra} note 354, at 154 (observing that, due to the imprecise statutory guidance concerning music sampling, “the act of clearing a sample can be a convoluted and expensive process for an artist”); Sullivan, \textit{supra} note 358 (concluding that sample-heavy music has become more difficult and expensive).}

Some have argued this result is good, as those who are sampled get paid,\footnote{E.g., Terry Hart, \textit{License to Remix}, 23 \textit{GEO. MASON L. REV.} 837 (2016).} while some have argued the opposite in that it has stifled valuable creativity.\footnote{E.g., Lloyd, \textit{supra} note 354, at 170 (arguing that increased litigation involving unauthorized sampling will deter artists from crafting certain creative works).} But nevertheless, these rulings have undeniably changed the landscape of hip hop music.

In short, when copyright claims might plausibly be brought, non-enforcement norms are unstable and can shift in response to even a single legal ruling, leading to changes in the works created. If a culture is worth preserving, as meme culture might be, leaving copyright law to lurk in the background as a potential disruptor leaves the possibility of significant alterations or curtailments of this culture. Depending on one’s take on meme culture, perhaps this is a good thing or perhaps this is a bad thing, but either way it should be contended with.

If one wants to preserve meme culture in the current copyright regime, one is left with an unstable situation given the inconsistencies between meme culture and copyright law’s premises. The most significant barrier against norm destruction via copyright assertions could be
collective shaming upon those who opt to bring legal claims, as occurred in the Socially Awkward Penguin meme dispute described above.\textsuperscript{363} Such shaming can help keep the copyright nonenforcement norm relatively intact.\textsuperscript{364} Even so, one must accept the deep instability given the many disconnects between copyright law and meme culture. As such, promotion of robust affirmative norms or changes to copyright law may be preferable to better harmonize the two spaces—issues to which we now turn.

![Image of Bill meme]

**B. An Attribution Regime?**\textsuperscript{365}

Attribution for meme creation, transformation, and distribution is one possible norm that meme culture might take on as an alternative (or supplement) to copyright protection, though it is likely unworkable. Indeed, as discussed above, attribution has already reared its head in meme culture.\textsuperscript{366} Credit for creative work is generally something creators consider desirable both for expressive and

\textsuperscript{363} See supra Section II.C.1.

\textsuperscript{364} We explore the power of shaming in the opposite direction—to enforce intellectual property rights—in Adler & Fromer, supra note 47, at 1459.

\textsuperscript{365} Be Like Bill, KNOW YOUR MEME, https://knowyourmeme.com/memes/be-like-bill [https://perma.cc/AX82-9PFX].

\textsuperscript{366} See supra Section II.C.2.
pecuniary reasons.\textsuperscript{367} It can bolster a creator’s reputation, thereby both generating a visible link between creators and their works and providing more professional opportunities for these creators.\textsuperscript{368} As analyzed above, memes can lead to financial opportunities for their creators,\textsuperscript{369} and for that to happen, memes must be personally attributable in one way or another. The attention-getting campaign against Instagram user FuckJerry for meme attribution,\textsuperscript{370} the Kale Salad Instagram account that traces memes to their creators and provides credit,\textsuperscript{371} and the \textit{Know Your Meme} reference site’s encyclopedic tracking of memes all point to some hunger to credit memes to a creator.

Attribution is less in tension with meme culture than copyright law in general is,\textsuperscript{372} but it still has some disconnects and impracticities. In particular, the fast pace of copying and spread of memes\textsuperscript{373} might make it hard to attribute memes correctly to their creators. There is so much creation, copying, and transformation constantly occurring in meme culture—a culture in which the author is decentered—\textsuperscript{374}—that it is hard, and maybe impossible, to know how many and which creators to whom to attribute a meme. The cumbersome nature of comprehensive attribution has been noted before with regard to more traditional expressive works,\textsuperscript{375} but the extent of this concern is exponentially increased with memes because of the scale and pace of development and creative input. Put another way, the collective nature of authorship with regard to memes makes an attribution regime seem like a folly.

\textsuperscript{368} Id.
\textsuperscript{369} See supra Section III.C.
\textsuperscript{370} See supra Section II.C.2.
\textsuperscript{371} See supra note 320.
\textsuperscript{372} Cf. Rebecca Tushnet, \textit{Payment in Credit: Copyright Law and Subcultural Creativity}, 70 \textit{Law \& Contemp. Prosbs.} 135, 137 (2007) (“[M]oral claims to attribution are widely recognized in fandom, and attribution rights are far less disruptive to ordinary interpretive practices than other kinds of moral rights.” (emphasis omitted)).
\textsuperscript{373} See supra Section III.F.
\textsuperscript{374} See supra Section III.I.
Consider the Texts from Hillary meme that was popular in 2012, in which a photograph of then-Secretary of State Hillary Clinton in an airplane wearing sunglasses texting on her phone was juxtaposed with another photograph of someone to hypothesize a text conversation between them. An example of the meme is shown above. Diane Walker, upset that her photograph of Clinton was being used in the meme, asked the initial meme creators to credit her for the photograph on their website, which they did. Yet even conventional media sources reporting on attribution and other rights in the photograph and meme lamented the difficulties in a broader photograph-based meme attribution regime. *Time* noted, “we always aim to credit photographers, promote their work and link back to the original source, but today there are no clear rules to follow. (Case in point: we don’t know where all the photos from *Texts from Hillary*, used in this

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377 Id.

As this example shows, as attractive as attribution might be as an alternative regime to copyright law, it might prove too cumbersome and staid a mismatch for meme culture. The attribution to a single author, the photographer of the underlying image, fails to capture the complexity of authorship in the realm of memes, where a work only becomes a meme if someone takes the original image and turns it into a meme and others then copy and transform it.

C. A Shortened Duration?380

Another possibility to better align copyright law with meme culture is to create meme-specific copyright rules. One of the most obvious changes would be to copyright duration, which is now typically the author’s lifetime plus seventy years.381 As discussed previously, some judges and scholars have decried what they see as the excessively long duration of copyright for traditional works in opposition to copyright’s aims.382 Yet given the extraordinarily fast pace by

381 See supra Part I.
382 See supra Section I.E.
which memes become stale—on an order of days, weeks, or months\textsuperscript{383}—this critique applies with even greater force to memes. If there is little to no exploitable value to a meme after this short duration, it makes no sense to keep copyright’s exclusive rights in effect and prohibit uses of the meme. Therefore, it could be advisable to curtail copyright duration to a maximum of a few months for memes, as a utilitarian theory of copyright aims to key duration to the commercially viable period of a work.\textsuperscript{384} This change would correspond better with what copyright aims to achieve: striking a balance between providing incentives to creators to make valuable material in the first instance and allowing society to access and use these materials.\textsuperscript{385} Once the incentive to creators becomes near valueless because a work is no longer economically exploitable, it makes little sense to deny society access and use of creators’ works. Moreover, by shortening copyright duration, the mismatch between copyright and meme culture is minimized to a more manageable time period.\textsuperscript{386} Of course, this assumes that copyright law’s exclusive rights create pecuniary value during a meme’s productive period, an assumption we think does not generally hold, as discussed above.\textsuperscript{387}

\textsuperscript{383} See supra Sections III.F–G.

\textsuperscript{384} See supra notes 73–76 and accompanying text. We do not necessarily think this reasoning applies with the same force to the image underlying a meme and would not propose curtailed duration for it.

\textsuperscript{385} See supra Part I.

\textsuperscript{386} However, shortening the copyright duration flies in the face of current treaty obligations, which require a minimal duration much longer than that suggested here. See Berne Convention for the Protection of Literary and Artistic Works art. 7(1), July 14, 1967, 828 U.N.T.S. 221.

\textsuperscript{387} See supra Sections III.B–C. The limited opportunities for monetization would suggest that copyright law should not operate during a meme’s productive period either, a possibility we explore above in Section III.A.
D. A Narrowed Copyright Scope?\textsuperscript{388}

For similar reasons, it might also make sense to construe copyright scope more narrowly for memes than for other works. Scope can be narrowed in several ways that put copyright law in better correspondence with meme culture, thereby allowing more copying, transformation, and distribution of memes to continue unthreatened by a mismatched copyright law. We raise three of the most salient ways to narrow scope below.

First, as discussed above, the underlying images used in memes—which would ordinarily be protectable expression—tend to become unprotectable ideas when used in memes.\textsuperscript{389} Copyright law ought to take cognizance of this porous boundary between expression and idea in the context of memes rather than reflexively protecting images used in memes against meme creators, copyists, and transformers. Once expression morphs into idea, protecting it can threaten others’ free expression and creativity. One way to narrow copyright’s scope, then, is to disallow protection for images that are used in memes, at least whenever they are used in memes.

Another way in which copyright law might take cognizance of the characteristics of meme culture is by recognizing that some memes might lack authorship due to the author’s decentralization.\textsuperscript{390} When that is the case, memes should be denied protection as they are not the requisite “works of authorship.”\textsuperscript{391} While a meme might represent “original intellectual conceptions” of its creator as doctrinally

\textsuperscript{388} Community, Know Your Meme, https://knowyourmeme.com/memes/subcultures/community [https://perma.cc/7MUK-EJH7].

\textsuperscript{389} See supra Section III.E.

\textsuperscript{390} See supra Section III.I.

\textsuperscript{391} 17 U.S.C. § 102(a).
required for authorship, as a meme spreads, the creator’s conceptions can frequently dissipate into nothingness as a meme is absorbed into culture. Copyright law might therefore understand authorship in the context of memes not as something static that is either present or absent, but as something that can be lost as a meme spreads through society, thereby disqualifying copyright protection.

Copyright scope may also be narrowed by expanding the fair use doctrine. This could be achieved by discounting commercial use as a rebuttal to fair use for memes, given the fuzzy line between commerciality and noncommerciality in meme culture. Additionally, as Stacey Lantagne, David Tan, Angus Wilson, and others observe, memes are transformative in their capacity to change the meaning of or comment on their underlying images and preceding memes. And a work that is found to be transformative is frequently found to be a fair use of a copyrighted work.

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393 See supra Section III.I. Stacey Lantagne makes a related argument, that memes can lack the authorship copyright law requires because “a mutating meme scatters authorship so widely that the resulting creative output is so effectively crowd-sourced as to be a de facto common good outside of copyright protection.” Stacey M. Lantagne, Mutating Internet Memes and the Amplification of Copyright’s Authorship Challenges, 17 Va. Sports & Ent. L.J. 221, 222 (2018). She argues this is consistent with courts’ attempts to avoid outcomes with too many copyright authors. Id. at 229–33 (discussing, for example, Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (en banc), in which the court held that an actor held no copyright in her short scene in a movie).
395 See supra Section III.D.
E. Addressing Selective Enforcement

Whether or not copyright law is curtailed for memes, it is critical to address the issue of selective enforcement, as well as the related concern of whether a copyright owner implicitly licenses or abandons copyright in a work to be memed. As discussed above, memes are distinctive in that the underlying image creator as well as subsequent meme creators generally do not assert copyright claims against almost anyone, though they occasionally seek to stop a selective few from using their work for certain purposes, principally those that are commercial or those they find politically unpalatable. On the one hand, this outcome seems to be nothing more than an extension of copyright’s grant of control to authors to decide who can and cannot use their works. On the other hand, when almost everyone except a very small select few cannot use a work, there are serious concerns for free speech values.

Before turning to the significant attractions to and worries from allowing such surgically selective enforcement, we first discuss whether any plausible copyright owner in the meme chain might be able to pursue a claim against a subsequent meme creator, distributor, or transformer. That is, by acquiescing to the memeification of their image, does a copyright owner implicitly license their work to anyone, or abandon copyright in the work? Is it reasonable for anyone and everyone to think they are free to use a meme without copyright repercussion? If so, selective enforcement is a nonissue because copyright cannot be enforced in the first place.

As to implied copyright licenses, courts sometimes infer them “when the circumstances . . . demonstrate that the parties intended

\[^{398}\text{Mean Girls} \text{ Victimized, } \text{imgflip.com/meme/25246414/mean-girls-victimized}[\text{https://perma.cc/VCN6-RGZA}]; \text{see also Mean Girls, } \text{KNOW YOUR MEME, } \text{https://knowyourmeme.com/memes/subcultures/mean-girls}[\text{https://perma.cc/86XE-VUHU}].\]

\[^{399}\text{See supra Section III.H.}\]
that the work would be used for a specific purpose.”\footnote{WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:131 (2021).} While some circuits have set out (somewhat circumscribed) multifactor tests to assess the existence of a nonexclusive implied license, others have looked to the totality of circumstances.\footnote{See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03[a][7] (2021); PATRY, supra note 400, § 5:131.} Either way, whether an implied license exists is expectedly murky.

Abandonment is not much clearer. Unsurprisingly, because copyright protects a work of authorship—an abstraction rather than an actual physical object—copyright abandonment is not a straightforward inquiry as compared to, say, a couch left on the sidewalk with a sign indicating it is free to take.\footnote{See Dave Fagundes & Aaron Perzanowski, Abandoning Copyright, 62 WM. & MARY L. REV. 487, 492–94 (2020) (attempting to make sense of abandonment doctrine in copyright law).} Even so, the legal test for copyright abandonment is the same as for chattel: intent to abandon and an overt act demonstrating that intent.\footnote{See id. at 493.} An abandoned copyright cannot be owned by someone new; instead, works once protected by that copyright immediately and irrevocably fall into the public domain.\footnote{Cf. Nat’l Comics Publ’ns, Inc. v. Fawcett Publ’ns, Inc., 191 F.2d 594, 599 (2d Cir. 1951) (recognizing that the lack of copyright notice affixation to a published work could thrust that work into the public domain).} The difficulty with abandonment, as Dave Fagundes and Aaron Perzanowski explore, is that the doctrine is hazy, making it hard to know precisely what constitutes abandonment.\footnote{Fagundes & Perzanowski, supra note 402, at 540–52.} Courts are also unclear whether a copyright can be partially abandoned: For example, can a copyright owner allow free distribution of derivative works while nevertheless retaining exclusive rights in the realm of commercial distribution?\footnote{See id. at 549–52 (citing Micro Star v. FormGen, Inc., 154 F.3d 1107, 1114 (9th Cir. 1998)).}

As a general matter in copyright law, these doctrines are imprecise; with respect to memes, these doctrines are completely unsettled. To get a sense of how creators might implicitly license their works or abandon their copyright, consider again the infringement lawsuit brought by Matt Furie, Pepe the Frog’s creator, against Infowars.\footnote{See supra Section II.C.1.} In that case, the defendants claimed that Furie had abandoned his copyright based on public statements they characterized as indicating Furie’s joy “about Pepe the Frog becoming a meme,” his inspiration “by rampant unauthorized use of the character,” his lack of action notwithstanding his awareness of third-party profiting, and his
unbothered acknowledgement that “he had lost control over the character.”\textsuperscript{408} For instance, Furie told \textit{New York} that he “realized that Pepe is beyond my control . . . He’s like a kid, he grew up and now I have to set him free to live his life.”\textsuperscript{409} And when asked in an \textit{Atlantic} interview about how he felt about the alt-right adopting Pepe, Furie responded:

\begin{quote}
My feelings are pretty neutral, this isn’t the first time that Pepe has been used in a negative, weird context . . . The internet is basically encompassing some kind of mass consciousness, and . . . I just think that people reinvent [Pepe] in all these different ways, it’s kind of a blank slate. It’s just out of my control, what people are doing with it, and my thoughts on it, are more of amusement.\textsuperscript{410}
\end{quote}

But in response to the defendant’s rebuttal that such statements amounted to the requisite intent and overt act to abandon any copyright interest in Pepe the Frog, Furie pointed to an interview in \textit{Esquire} in which he asserted that “Pepe the Frog is copyrighted by me” and made other statements indicating a desire to enforce his copyright.\textsuperscript{411} Based on the statements, the district court ruled that there was a dispute of material facts and denied summary judgment on abandonment,\textsuperscript{412} after which the case settled.\textsuperscript{413} On the implied-license defense, the court granted summary judgment to Furie, reasoning that Furie’s statements did not constitute an offer to contract and there was no consideration.\textsuperscript{414}

The court’s reasoning indicates that it will be difficult, though sometimes possible, to prove abandonment or implied license. It is also more likely that copyright will be found to have been abandoned or an implied license created with regard to memes rather than the underlying images contained in memes. The circumstances of meme culture lend themselves better to a conclusion that the creator wanted their work to be copied, transformed, and distributed freely, whereas no such understanding might sit in the background for creators of the underlying images used in memes. But with abandonment and implied license murkily available on the right set of facts, we now consider how to analyze situations where copyright remains intact and the owner is engaging in surgical selective enforcement.

\textsuperscript{408} Furie v. Infowars, LLC, 401 F. Supp. 3d 952, 965 (C.D. Cal. 2019).
\textsuperscript{409} Id. (alteration in original).
\textsuperscript{410} Id.
\textsuperscript{411} Id. at 966.
\textsuperscript{412} Id.
\textsuperscript{413} See supra Section II.C.1.
\textsuperscript{414} Furie, 401 F. Supp. 3d at 968–69.
1. The Worry of Forcing Creators to Allow Universal Use

One can see the motivation behind granting copyright owners control to decide who should be allowed to use their work. Just as parents want to ensure their children are left in good hands with a caregiver, authors are frequently protective of their works. Economically, authors want to control who exercises copyright rights to make sure that third parties will not undercut the market for the author’s works. Moreover, as a matter of moral rights, authors often want to make sure that third parties are not using their works in ways that run contrary to an author’s vision or brand. To the extent that creation is actually spurred through copyright law’s incentives, authors might be reluctant to create were they to lose control over who can and cannot license their works. Telling an author that they must allow anyone, including an organization they consider to be a hate or extremist group, to use their work might feel akin to handing over one’s baby so they can be indoctrinated and turned evil.

Indeed, recent incidents confirm that creators can feel this way. For example, Matt Furie, in addition to asserting his creative ownership of Pepe, expressed his dismay at the alt-right having adopted Pepe as a symbol in their memes. That Pepe—a “peaceful frog-dude”—has been labeled a hate symbol and shared among racists and

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416 See supra Section I.F.
417 Cf. Fromer & Lemley, *supra* note 83 (arguing that copyright law is centrally about protecting creators from market substitutions).
420 See supra notes 407–14 and accompanying text.
anti-Semites was, to Furie, “completely insane” and “a nightmare.”\textsuperscript{421} He continued: “[T]he only thing I can do is see this as an opportunity to speak out against hate. . . . I understand that it’s out of my control, but in the end, Pepe is whatever you say he is, and I, the creator, say that Pepe is love.”\textsuperscript{422} Even further, Furie forewent economic opportunities by ceasing to sell Pepe merchandise to avoid it being worn by groups he found hateful.\textsuperscript{423}

The copyright owner’s interest in controlling who can use their work, however, is not the full story. There are weighty interests on the other side, especially when a copyright owner is engaged in surgical selective enforcement, to which we now turn.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{content/image.png}
\caption{Image description.} \label{fig:image}
\end{figure}

\section{The Worry of Selective Silencing\textsuperscript{424}}

When everyone but a handful of people or groups is permitted to use an image in a meme or copy and transform a meme—something that seems to be an extension of copyright’s allowance of selectivity—

\begin{flushright}
\textsuperscript{422} \textit{Id.} Not dissimilar is the pain actress Cindy Lee Garcia felt after her lines spoken in a film—\textit{Innocence of Muslims}—were redubbed to have her ask, “Is your Mohammed a child molester?” Unbeknownst to Garcia, this film had an anti-Islam agenda and was not the adventure story that was initially advertised to her. Garcia sued but lost her claim for copyright infringement. Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (en banc).
\end{flushright}
this creates a situation typically unseen in copyright law: Only a select few are silenced from using a copyrighted work, rather than the historically typical situation in which only a select few are allowed to use a copyrighted work.\textsuperscript{425} This circumstance creates worries heretofore generally unseen in copyright law, principally to free speech values.

\begin{figure}[h]
  \centering
  \includegraphics[width=\textwidth]{thanks_for_coming_to_my_ted_talk.png}
  \caption{Thanks for Coming to My TED Talk}
  \end{figure}

\begin{itemize}
  \item a. Nearly Everyone Gets to Use a Meme\textsuperscript{426}

    Once a meme is created and begins to spread virally, many people partaking in meme culture will copy, transform, or distribute the meme. They will use it to participate in digital culture, communicate their take on the meme, seek to fit in with various communities, and try to get attention.\textsuperscript{427} There might in fact be no better way to accomplish these communicative and other goals online than through using the meme. Social media platforms, and online culture more broadly, give individuals a megaphone to accomplish their goals, wherein each meme is akin to a personal mini-TED talk.
\end{itemize}

\begin{flushright}
\textsuperscript{425} See supra Sections I.F, III.H.
\textsuperscript{427} See supra Part II.
\end{flushright}
b. Except a Select Few\textsuperscript{428}

Yet at the same time, a very select few might be singled out and challenged under copyright law not to be able to use a meme. Pepe the Frog is perhaps the most prominent example, but there have been other copyright claims brought against figures that are politically unpopular with certain copyright holders, such as Steve King,\textsuperscript{429} Donald Trump, various pro-Trump memists, and alt-right figures.\textsuperscript{430} In addition, as discussed above, copyright holders in memes and images used in memes have brought suit against a small number of commercial uses of their works.\textsuperscript{431}

We think that such surgical selective enforcement raises free speech concerns not usually present in copyright law. By invoking copyright to silence only the very few found to be politically (or otherwise) unpalatable from using a meme, copyright law can fall on the wrong side of the balance between free speech and exclusive rights preventing another from speaking.

In the past, the Supreme Court has rejected First Amendment challenges to copyright law’s restriction of speech, holding that copyright law already “incorporates its own speech-protective purposes

\textsuperscript{428} Shut the Fuck Up, Liberal, \textsc{Know Your Meme}, https://knowyourmeme.com/memes/shut-the-fuck-up-liberal [https://perma.cc/TDC3-WKLH].

\textsuperscript{429} See supra Section II.C.1 (discussing the Success Kid image creator going after Steve King).

\textsuperscript{430} \textsc{E.g., Lawsuit Against Carpe Donktum over Pro-Trump Meme Dismissed}, \textsc{Post Millennial} (July 9, 2021), https://thepostmillennial.com/lawsuit-against-carpe-donktum-over-pro-trump-meme-dismissed [https://perma.cc/S3CM-74LX].

\textsuperscript{431} See supra Section II.C.1.
and safeguards.”

Copyright not only plays a role in “spurring the creation and publication of new expression,” but as the Court has explained, there are also “First Amendment protections already embodied” in copyright law. In particular, the Court has identified two built-in features of copyright law that act as First Amendment checks: the idea-expression distinction and the fair use defense. As the Court has explained, “copyright’s idea-expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’” Furthermore, the fair use defense “allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.”

Scholars have reasonably questioned the Court’s decision to immunize copyright law from First Amendment scrutiny and instead rely exclusively upon copyright’s internal safeguards, an approach not taken with regard to other laws. Either way, if courts deem memes or their underlying images to be protected expression, and find copying is not excusable as fair use or otherwise, this will allow copyright owners to engage in surgically selective enforcement in ways that silence only a few. If memes are the communicative currency—and indeed, for many, they currently are—hyper-targeted enforcement against a select few is problematic to free speech values. Of course, the forbidden few can use other images or memes—assuming those are not held off limits to them too—but that is beside the point when specific memes are the cultural

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433 Id.
435 Id. at 556 (alteration in original) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1983)).
437 E.g., Joseph P. Liu, Copyright and Breathing Space, 30 COLUM. J.L. & ARTS 429 (2007); Netanel, supra note 175 (arguing that while the courts have treated copyright law anomalously, this stance is wrong and should be subject to First Amendment doctrine); Alfred C. Yen, A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s “Total Concept and Feel,” 38 E MORY L.J. 393 (1989). But see Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180 (1970) (presaging the Supreme Court’s approach).
438 See supra Section IV.D.
439 See supra Sections II.A–B.
440 See supra Section III.E.
Indeed, in the traditional First Amendment context of government censorship, the Supreme Court explicitly noted that a particular mode of expression might sometimes be necessary to express an idea. As the Court explained in *Cohen v. California*: “[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”

All in all, given that copyright law’s fundamental assumptions are so mismatched with meme culture, if we assume meme culture is worth preserving, it could prove dangerous to rest on the current norm of copyright nonenforcement. Instead, it would be worth rejigging copyright law to put it in better accordance with meme culture and free speech values.

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441 *Cf. Fromer, Information Theory, supra* note 63, at 92–96 (explaining how some expression needs to be reused by others to extract the value copyright law is designed to provide). Given that nearly everyone is permitted to use creative works in making and sharing memes, the individuals later asked to desist might have reasonably relied on these works being available to them, providing another reason to worry about surgically selective enforcement.

442 403 U.S. 15, 26 (1971); *accord* FCC v. Pacifica Found., 438 U.S. 726, 773 (1978) (Brennan, J., dissenting) (“The idea that the content of a message and its potential impact . . . can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image.”).
V
BEYOND MEMES

As we have shown, memes depart from several of the most basic pillars of copyright theory. But how significant an issue is this departure? If memes are sui generis, a one-off exception to the premises of copyright law, then the problem is relatively contained. But we think this is far from the case. Instead, the concern with memes signals a much broader problem in copyright law and theory.

In our view, memes expose two profound problems in copyright law and theory. First, before the advent of meme culture, scholars and courts had already questioned several basic concepts in copyright law, some of which are the very ones that memes have now pushed to their limits. In Part III, we argued that memes render nonsensical certain pillars of copyright law, such as the idea-expression distinction, the distinction between commercial and noncommercial uses in fair use, and even the conventional notion of the author. Meme culture has now pushed these already problematic copyright principles to a breaking point. Second, rather than a one-off exception to the premises of copyright law, memes are instead a prototype of a new mode of creativity that is emerging in our contemporary digital era. Thus, the

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443 Disaster Girl, Know Your Meme, https://knowyourmeme.com/memes/disaster-girl [https://perma.cc/RPQ7-XQZ5].
444 See supra Part III.
445 See, e.g., Netanel, supra note 64 (challenging the idea-expression distinction); notes 74–76 and accompanying text (questioning copyright’s duration); notes 89–90 and accompanying text (attacking the author’s centrality within copyright).
446 See supra Sections III.D–E, III.I.
problems we have explored with memes go to the core of copyright’s role in advancing creativity.

We begin by exploring ways in which traditional works already share certain aspects of meme culture. We then show how memes are part of a broader shift in creativity in digital culture. Finally, we analyze the recent craze for non-fungible tokens (NFTs) as a reaction to memes and to the post-rarity culture that they emblematize.

A. Traditional Works Can Be Like Memes

Traditional works fit copyright’s foundational assumptions much better than memes do. Nonetheless, certain aspects of memes that we highlight in this Article were already present—to varying degrees—in some creative works that preceded memes. Here we point out a few ways in which traditional works could be reconsidered through the lens of memes.

Most prominently, copying and repetition, so essential to memes, have always been a part of creativity as evidenced by repeated motifs,

448 See supra Part I.
themes, and allusions that characterize the literary tradition, the history of art, music, and many other creative practices. For example, we could reimagine the trope of the reclining Venus in art history as a kind of proto-meme: an image on which artists rely because it is immediately recognizable as part of a tradition of previous works, and yet one that artists transform with each individual repetition. Consider the reclining Venus images below, from contemporary to Renaissance: Mickalene Thomas’s A Little Taste Outside of Love, which reimagined through the lens of race Manet’s Olympia, whose meaning in turn depended on its reference to Titian’s Venus of Urbino, which in turn had drawn on Giorgione’s Sleeping Venus. Whereas the Renaissance works depicted an idealized erotic goddess, Manet’s pictured a prostitute as Venus, prompting the novelist Emile Zola to write, “When our artists give us Venuses, they correct nature, they lie. Edouard Manet asked himself why lie, why not tell the truth; he introduced us to Olympia, this fille of our time, whom you meet on the sidewalks.” Mickalene Thomas’s contemporary work repeats the trope while changing it again. As the Brooklyn Museum describes the work, Thomas “turns the historic nude on its head and ousts the white European woman from the bed where she often lounges, attended by a black maidservant, in Western art.”

449 As the literary critic Northrop Frye wrote in the mid-twentieth century, “Poetry can only be made out of other poems; novels out of other novels.” Northrop Frye, Ethical Criticism: Theory of Symbols, in Anatomy of Criticism: Four Essays 71, 97 (1957).

450 See Adler, Fair Use, supra note 46, at 568–69 (arguing that the history of art depends on the longstanding tradition of borrowing from others’ works).

451 See Olufunmilayo B. Arewa, From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context, 84 N.C. L. Rev. 547 (2006) (arguing that the history of music shows the continuity and importance of musical borrowing).

452 See Adler & Fromer, supra note 47, at 1529 (citing arguments that the history of art, music, literature, and fashion depend on copying, emulating, alluding to, reworking, or changing pre-existing works to create new ones).


457 Frits Andersen, Corpus Delicti: Zola’s Nana, Breton’s Nadja—Siamese Twins in the Body of the Novel, in Reinventions of the Novel: Histories and Aesthetics of a Protean Genre 79 (Karen-Margrethe Simonsen, Marianne Ping Huang & Mads Rosendahl Thomsen, eds., 2004).

458 Thomas, supra note 453.
Similarly, in music, certain phrases of expression that have been repeatedly alluded to and transformed can be thought of as meme-like. We could characterize snippets of songs in hip hop as analogous to memes—copies that conjure up a tradition of previous works while at the same time altering and advancing that tradition. For example, record producer and acclaimed DJ Mark Ronson has explored the extraordinary persistence of one of the most sampled songs of all time, “La Di Da Di” by Slick Rick & Doug E. Fresh. Ronson shows how it gave birth to a lineage of songs, including music by Snoop Dogg, the Notorious B.I.G., and Miley Cyrus.

Some traditional works outside of meme culture also depart from other copyright assumptions in ways that parallel the problems we have explored with memes. For example, musicians have sometimes engaged in surgically selective enforcement of copyright, objecting to

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459 Id.
460 Manet, supra note 454.
461 Titian, supra note 455.
462 Giorgione, supra note 456.
464 Id. at 08:45–12:55.
a song’s use by particular politicians while otherwise permitting broad licensing.465 These disputes, several of which arose for songs that Donald Trump used at political rallies,466 tended to focus on whether the use of the musical works occurred pursuant to a blanket license agreement.467 Some musicians have sued directly for copyright infringement in cases that ultimately turned on fair use.468 For example, Don Henley sued politician Charles DeVore, a Republican candidate for the U.S. Senate in California, for using Henley’s songs “The Boys of Summer” and “All She Wants to Do Is Dance” in two political advertisements.469

Another example of a longstanding art form outside of meme culture that bears some striking similarities to memes is graffiti.470 Like memes, street art as a genre is ephemeral, fast-moving, and often collaborative; artists frequently expect others to write over their works, rather than to preserve them exactly as is in perpetuity.471 For example, in a recent case involving 5Pointz, the celebrated New York City graffiti site, the Second Circuit described the ethos of “creative destruction” that characterizes graffiti.472 As the court explained, while some art at 5Pointz “achieved permanence,” most of it “had a short lifespan and was repeatedly painted over.”473 Indeed, street art works sometimes result from frequent modifications (invited or not) among artists who repeatedly alter and overpaint each other’s

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465 See supra Sections III.H, IV.E. For one account of these disputes, see Danwill D. Schwender, The Copyright Conflict Between Musicians and Political Campaigns Spins Around Again, 35 AM. MUSIC 490, 492 (Winter 2017) (discussing Mike Huckabee’s use of Eye of the Tiger song by Survivor without a license at a rally as well as Donald Trump’s licensed but unwelcome use of Neil Young’s song Rockin’ in the Free World).


469 Henley, 733 F. Supp. 2d at 1147–48 (finding the politician Charles DeVore’s use in political advertisements of two copyrighted Don Henley songs, “The Boys of Summer” and “All She Wants to Do Is Dance,” was not fair use).

470 See Russell, supra note 263 (arguing that street art is a metaphor for art in digital culture).


472 Castillo v. G&M Realty LP, 950 F.3d 155, 162 (2d Cir. 2020).

473 Id.
work. In its analysis, the 5Pointz court described another street art site that resulted from a “creative feud between Banksy and rival artist King Robbo, which involved repeated modification and overpainting of each other’s work.”

B. Memes as a Paradigm of a New Model of Creativity

Despite the shared ways memes and traditional works push against basic copyright law concepts, we also think that memes herald a larger shift that is underway in contemporary creativity. As such, the problems that memes present are of increasing and widespread significance to contemporary creators. New forms of creativity are emerging that share most of the characteristics of memes that we established above as having upended copyright’s assumptions—particularly the norms favoring copying and transformation of works, creation of value for underlying works through copying, indirect monetization of works, breakdown of distinction between idea and expression, widespread and accelerated pace of copying, and decentralization of the author. Here we highlight three particularly salient qualities that these new forms of creativity share with memes: visuality, copying technology, and participatory authorship. We then

474 See Adler, Against Moral Rights, supra note 323, at 287 (describing street art as a dialogue of authorship among different authors in which “destruction and creation merge”).
475 Castillo, 950 F.3d at 168 n.5. The court held that temporary artwork that is overpainted may nonetheless achieve recognized stature for purposes of moral rights protections.
477 See supra Part III.
478 See supra Part III.
use these characteristics to sketch the contours of a major and emerging shift in contemporary creativity.

First, memes exemplify a broader cultural shift in which images have surpassed words as the primary mode of communication. This shift toward the visual, fueled by the pervasive use of smartphone cameras, is evident in the online dominance of primarily visual social media platforms, such as Instagram, Pinterest, Snapchat, TikTok, and YouTube. Even social media platforms like Twitter and Facebook, which did not begin as chiefly visual, have evolved to give greater prominence to visual content. Digital marketers, well aware of this shift, emphasize visual content to exploit the power and speed of visual images. While legal scholars track the explosion of content in the attention economy and the emergence of “cheap speech,” they have not considered the qualitative shift toward images and away from words as the primary mode of communication and creativity in our culture, or the implications for First Amendment law of reframing “speech” as increasingly image-based rather than text-based.

Second, consider that copying, the foundation of meme culture, has come to play a new and increasingly central role in contemporary creativity across the board. Of course, as we have previously argued, copying has always been a significant building block of creativity. But now in digital culture, the role of copying in

479 See supra Sections II.A–B.
482 See generally Eugene Volokh, Cheap Speech and What It Will Do, 104 Yale L.J. 1805, 1807 (1995). For a few examples of the burgeoning literature around the topic of cheap speech, see, for example, Alan K. Chen, Cheap Speech Creation, 54 U.C. Davis L. Rev. 2405, 2454 (2021); Richard L. Hasen, Cheap Speech and What It Has Done (to American Democracy), 16 First Amendment L. Rev. 200 (2018); Toni M. Massaro & Helen Norton, Free Speech and Democracy: A Primer for Twenty-First Century Reformers, 54 U.C. Davis L. Rev. 1631 (2021). See also supra Section II.B.4 (discussing attention scarcity and cheap speech).
483 See Adler, First Amendment, supra note 121, at 42 (arguing that the First Amendment assumes an implicit hierarchy favoring text over image).
484 See supra Sections II.A, III.A.
485 See Adler & Fromer, supra note 47, at 1529; see also supra Section V.A and sources cited therein.
creativity has taken on a new urgency. As one of us has previously explored, this newfound centrality of copying stems from two interlocking reasons: In a culture of endless repetition, copying has now become the subject of work as well as a basic tool of how people create. As such, it is not just in memes, but throughout digital culture, that we see authors choosing to create by rummaging through the shards of existing works rather than beginning with a blank slate. Memes in this sense are just the tip of the iceberg.

We are now overwhelmed by images and information. In that regard, it is no wonder that many creative endeavors now rely on existing work as a pool for creativity. This development is abundantly clear in visual art. As one of us has previously argued:

Technology has unleashed both a torrent of images and the capacity to copy them with a click . . . . We used to think of an artist as someone who sat in nature or in his garret, working alone to create something new from whole cloth. . . . [Yet in] a world with a surfeit of images, perhaps the greatest artist is not the one who makes an image but the one who knows which image to take: to sort through the endless sea of images in which we are now drowning and choose the one that will float.

In his 2013 book After Art, critic David Joselit explains that “contemporary art marginalizes the production of content in favor of producing new formats for existing images.” Moreover, artists have always tried to depict our world, and our world now looks like Google Images. The digital screen and its endless play of disconnected images is our new daily landscape, as Giverny once was for Monet.

Furthermore, in the digital era, copying has become a fundamental tool of how people create. Let’s return to hip hop. Mark Ronson, who explores the history of sampling, describes the pivotal role copying technology played in the birth of this art form, explaining

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486 See Adler, Fair Use, supra note 46, at 568.
487 See id.
488 See id. at 572.
489 See id.
490 Adler, Fair Use, supra note 46, at 571–72.
491 David Joselit, After Art 58 (2013); see also Adler, Fair Use, supra note 46, at 571.
492 See Laura Hoptman, The Forever Now: Contemporary Painting in an Atemporal World 14 (2014) (“Artists have always looked to art history for inspiration, but the immediate and hugely expanded catalogue of visual information offered by the Internet has radically altered visual artists’ relationship to the history of art.”); cf. Joselit, supra note 491, at 58 (drawing parallels between the historic role of art and architecture and the current role of Google’s algorithm in “reformat[ting] existing streams of images and information”).
493 See Adler, Fair Use, supra note 46, at 568.
494 See supra Part IV.A.
that “all of a sudden [artists] found themselves in possession of the technology” to create music from past recordings. Ronson expounds on this, saying:

[T]hat’s what the past 30 years of music has been. That’s the major thread. See, 30 years ago, you had the first digital samplers, and they changed everything overnight. All of a sudden, artists could sample from anything and everything that came before them, from a snare drum from the Funky Meters, to a Ron Carter bassline, the theme to “The Price Is Right.”

In short, technology unleashed a new means for creativity. It is now a basic tool, as musical instruments are to music or as paintbrushes are to art. And it has leveled the playing field for creativity. Meme culture is a prime example of a genre in which technology makes it so easy to create. If you don’t believe us, go to an online meme generator like imgflip and try making your own.

A third hallmark of contemporary creativity is its reliance on diffuse, participatory authorship. In an older model of creativity, we pictured an identifiable author who unleashed a discrete and final work. But in the new meme-like participatory model of creativity, existing works are always in flux, subject to reuse and transformation by others. Rather than a finished product, the work is now a template that multiple authors use, copy, and transform in an ongoing conversation that produces new and collective works in dialogue with one another.

With these insights on visuality, copying technology, the participatory creativity of works, and the additional characteristics possessed by memes that upend copyright’s assumptions, we now turn to a range of examples of this new model of meme-like creativity.

One category of creative works that shares several meme attributes is dance as created, copied, and shared on the TikTok platform. Examples range from the fast-paced Renegade dance (created by an Atlanta teenager, set to K Camp’s song “Lottery” and copied and transformed over 29.7 million times) to the Number One Baby dance

\footnote{Ronson, supra note 463, at 06:00.}

\footnote{Id. at 05:15.}

\footnote{Cf. Arthur Danto, The Artworld, 61 J. Phil. 571, 581 (1964) (calling the readymade “a contribution to artists’ materials, as oil paint was”).}


\footnote{Meme Generator, IMGFLIP, https://imgflip.com/memegenerator [https://perma.cc/JK53-ACES]; see also Nield, supra note 150 (discussing various platforms used to create memes).}
(set to a hip hop song by Young Thug and Future and copied over 27 million times) to the Cannibal dance (set to a ten-year old pop song by Kesha and copied over 9 million times).\textsuperscript{500} Some popular dances (often called “dance challenges,”\textsuperscript{501} a term that itself provokes memetic spreading on TikTok) are based on children’s songs, K-pop, and even Vietnamese music about the countryside.\textsuperscript{502} Choreographers analyze how TikTok has created a new dance genre because the moves—given the video frame—tend to focus on the body above the legs (often featuring finger guns, hip wiggles, chest bangs, and dice rolls), are fairly energetic, and must be easy to learn if they want a chance at viral success.\textsuperscript{503} As one dancer explains, despite sometimes appearing like a homogeneous style, these dances in fact “have roots in hip-hop but also pull from so many other styles like belly dancing, dancehall dance moves, [and] jazz funk.”\textsuperscript{504} That is, these dance videos are frequently in dialogue with one another. Moreover, as one analyst explains, “TikTok dances are often recorded by creators alone, with the only social aspect being the imagin[ed] connection between the dancer and their future phone-scrolling viewers.”\textsuperscript{505} As these dance videos are copied and transformed, often at a brisk pace, they also frequently are stripped of their context and creator, making attri-

\textsuperscript{500} See Andria Moore & Palmer Haasch, 20 of the Most Viral Dances on TikTok, from ‘Corvette Corvette’ to the ‘Renegade,’ INSIDER (Feb. 5, 2021), https://www.insider.com/tiktok-dances-renegade-say-so-and-more-19-top-2020-3 [https://perma.cc/LFY4CVUS]. These numbers can spill over into the real world, increasing rates of song streaming and downloads, see infra notes 552–57 and accompanying text, to the extent that some artists and record companies pay popular TikTok personalities to dance to their music. See Amelia Tait, Meet the Choreographers Behind Some of TikTok’s Most Viral Dances, WIRED UK (Aug. 18, 2020), https://www.wired.co.uk/article/tik-tok-dances [https://perma.cc/BKJ5-9RY6]; accord Christopher Buccafusco & Kristelia García, Pay-to-Playlist: The Commerce of Music Streaming, 12 U.C. IRL. REV. (forthcoming 2022).

\textsuperscript{501} Moore & Haasch, supra note 500.


\textsuperscript{504} Ewe, supra note 503 (quoting dancer Rhiam Bichri).

\textsuperscript{505} Id. (quoting dance instructor Nika Kermani).
bution harder than in traditional spaces.\footnote{506}{See Tait, supra note 500 (noting that the format of TikTok makes it often hard to trace the original creator of a viral dance). This has led to controversy, as dances of Black creators are often copied and popularized by white TikTok figures and credit is lost along the way. See J. Clara Chan, Black TikTok Creators Grapple with How Far to Take Strike: “Why Should We Have to Leave?,” \textsc{Hollywood Rep.} (July 28, 2021), https://www.hollywoodreporter.com/business/digital/tiktok-strike-1234988427 [https://perma.cc/HDT3-5NQJ]; Tait, supra note 500; Hannah Yasharoff, \textit{Jimmy Fallon Addresses His TikTok Dance Segment with Addison Rae. Here’s Why It Sparked Backlash}, \textsc{USA Today} (Mar. 30, 2021), https://www.usatoday.com/story/entertainment/tv/2021/03/30/tiktok-dances-why-addison-rae-jimmy-fallon-clip-sparked-backlash/7058920002 [https://perma.cc/PK8D-CUUA]. In response, a movement to register copyright in the choreography is underway. Paige Skinner, \textit{The TikToker Who Created the Viral “Savage” Dance Is Copyrighting the Moves}, \textsc{BuzzFeed News} (Aug. 2, 2021), https://www.buzzfeednews.com/article/paigeskinner/savage-dance-copyrighted [https://perma.cc/BL7T-578Y]. Whether these actions are merely a way to claim official credit or a desire to formally enforce exclusive rights is unclear.}

As another illustration of the range of meme-like creativity currently flourishing, consider the Broadway-like musicals being created online in a fashion that is collaborative, iterative, and viral.\footnote{507}{Tait, supra note 500. One difference between memes, which proliferate without underlying payment to or permission from their creators, and TikTok content is that TikTok pays licensing fees for the songs underlying users’ dance videos. Amy Johnson, \textit{TikTok Music & Royalties: How Does It Work?}, \textsc{Audiosocket}, https://www.audiosocket.com/social-media-guides/tiktok-music-royalties-how-does-it-work [https://perma.cc/SX9U-P3MF]. Not all social media platforms pay for licenses. That TikTok finds it worthwhile to do so provides another model of how meme culture could work. This model also suggests the need for further analysis, especially because TikTok might be paying for licenses to avoid copyright claims—even ones that should fail—to keep the platform successful. It is possible that the new creativity could be inhibited were TikTok to stop its licensing practice.}

Perhaps the most successful has been \textit{Ratatouille the Musical}, based on the 2007 Disney-Pixar animated film \textit{Ratatouille} about Remy, a Parisian rat who dreams of becoming a chef. The crowdsourced musical version began on TikTok with \textit{Le Festin}, a song from the \textit{Ratatouille} movie soundtrack, frequently used as background in users’ cooking videos.\footnote{508}{See Laura Wheatman Hill, \textit{What’s The Deal With All These TikTok Musicals?}, \textsc{Betches} (Feb. 1, 2021), https://betches.com/whats-the-deal-with-all-these-tiktok-musicals [https://perma.cc/S4A6-T3B6] (identifying TikTok musicals, such as \textit{Grocery Store: The Musical} and \textit{Ratatouille the TikTok musical}, and asking whether this phenomenon is “the future of content creation”); see, e.g., Jeff Lunden, \textit{Now Playing on TikTok: ‘Bridgerton’ The Musical, All Things Considered} (Feb. 13, 2021, 5:08 PM), https://www.npr.org/2021/02/13/967175912/now-playing-on-tiktok-bridgerton-the-musical [https://perma.cc/GPG9-ZW2A] (explaining how two singer-songwriters wrote and posted songs about the Netflix show \textit{Bridgerton} that went viral on TikTok).}

A parody version of the song—featuring nonsensical

\footnote{509}{Rebecca Alter, \textit{Broadway Is Closed, but Ratatouille the Musical Is Cooking on TikTok}, \textsc{Vulture} (Nov. 19, 2020), https://www.vulture.com/2020/11/ratatouille-musical-tiktok.html [https://perma.cc/EMCS-7GXZ].}
French-sounding lyrics set to *Le Festin*’s tune—followed and was debuted as background music to a TikTok video that depicted what one news story described as “self-consciously gross or bad cooking, or really any sort of weird lifestyle-hack fails.” Subsequently (and following up on her homages to other cartoon characters, including Jar Jar Binks and Winnie the Pooh), TikTok user Em Jaccs shared an ode to Remy that she had written and performed, in which she had modified her voice to sound like a mouse. TikTok user Daniel Mertzlufft then adapted the song into an all-out Broadway number with arrangement and orchestration. This song was viewed over one million times and used in thousands of others’ TikTok videos, including videos that made a set design for this “musical,” created choreography, made a musical playbill, designed makeup for the characters, and performed a cast party. Others built further on the song, some using TikTok’s duet feature to voice lyrics they wrote for other characters in the movie to sing along with Remy. TikTok users then added new songs corresponding to scenes throughout the movie, often with numerous songs per scene, in many styles including a Lin-Manuel Miranda parody song. Other TikTok users created songs that went beyond Id.; see, e.g., JoKo entertainment, CEO of Speaking French (*Ratatouille*) TikTok TREND COMPILATION — FAILS, YOUTUBE (May 17, 2020), https://www.youtube.com/watch?v=3WlC2ybFjKY [https://perma.cc/V32S-KARE] (YouTube compilation of these TikTok videos).


the film, such as a song adopting the view of Remy’s mother, a character that does not appear in the movie.\textsuperscript{516} Then Broadway actors began performing these songs online.\textsuperscript{517} Eventually, this led to a virtual performance of a musical culled from the TikTok songs and other videos by Broadway performers such as Tituss Burgess, Wayne Brady, and Adam Lambert, which raised over $2 million for charity\textsuperscript{518} and was reviewed in traditional media outlets like the Chicago Tribune.\textsuperscript{519} Not only did Disney not use copyright to challenge these works, but it supported the charity performance.\textsuperscript{520}

In these new forms of online creativity, users also have revived and transformed centuries-old forms of work. At the end of 2020, Scottish postman Nathan Evans posted on TikTok his rendition of Wellerman, a nineteenth-century sea shanty sung by merchant seamen as they worked to distract themselves from labor.\textsuperscript{521} Sea shanties are folk songs that typically have lyrics about whaling, winds, and harpoons.\textsuperscript{522} In a few weeks, Evans’s video was viewed over nine million times and provoked an outpouring of creativity: TikTok duets using his and others’ performances of sea shanties, remixes of these sea shanties, newly composed sea shanties, reactions to the revival of such an old form of music, memes about sea shanties, Kermit the Frog

\begin{footnotesize}
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\item 516 See Maskell, supra note 515.
\item 517 See Alter, supra note 509 (noting a TikTok performance by Andrew Barth Feldman, who performed a personalized song made by TikTok user Nathan Fosbinder); Nathan Fosbinder (@fozzyforman108), TikTok (Nov. 10, 2020), https://www.tiktok.com/@fozzyforman108/video/6893577050712476934?refer=embed [https://perma.cc/R28D-ARXP] (TikTok video of Feldman performing the song).
\item 522 See Kathryn VanArendonk, Um, It Makes Total Sense We’re All into Sea Shanties Now, VULTURE (Jan. 12, 2021), https://www.vulture.com/2021/01/tiktok-sea-shanties-explained.html [https://perma.cc/UY2N-WB7H].
\end{itemize}
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performing a sea shanty, and even an electronic dance music version of this new shanty genre. Famous musicians got involved, with Sir Andrew Lloyd Webber layering his piano playing atop, and boy bands harmonizing with, Evans’s performance.

Like TikTok dances, these songs are suited to the platform. As one news report explains, “[t]hey’re songs with simple, blunt rhythms, meant to be easy to learn and easy to sing along with. . . . [T]he engine of the song is in the repeating chorus that everyone sings together. . . . They are unifying, survivalist songs, designed to transform a huge group of people into one collective body.” Another analysis elaborated, “[o]n a technical level, shanties seem perfectly primed for TikTok. They’re a call-and-response genre on a call-and-response app. . . . And, like memes, the shanty is an art form that seemingly belongs to no one, comes from nowhere, exists to be replicated.” TikTok participants commented how much they felt it brought them together during a pandemic and gave a sense of adventure, as if they were on a collective seafaring voyage rather than stuck at home alone. Evans, himself, got so much positive attention from launching this trend that he was signed to the Polydor record label and quit his job as a postman.


While much of this creativity is taking place on TikTok—a current dominant social media platform—it is all over just about every form of social media. On Instagram, users participate in challenges in which, according to one guide explanation, “someone on Instagram sets a theme and asks people to share photos [or videos] on that theme using a particular hashtag.”

Examples include #floralfriday competition (a weekly challenge to share photos of flowers or gardens), #INKtober (a challenge to draw and post an ink drawing each of the thirty-one days of October), and #pillowchallenge (a challenge where, as explained by one news article, “participants fashion dresses out of their bedding by belting a pillow at the waist”).

Pinterest has users curating and sharing theme boards of everything from their favorite pink dresses to interior design to architecture details and wedding photos. Tumblr and Medium provide ways for users to create blogs or stories filled with text, audio, photos, videos, and more and for others to follow, copy, and engage with those who share their interests. Twitch has users streaming aspects of their lives, including video game play, to others watching and interacting in real time. DeviantArt is a social network set up to share user artwork. Wattpad is a platform where users can publish their writing to be read by its ninety million readers and can create social communities around stories; it also provides a spot for fan fiction and is a launchpad for


Amanda Fortini, How Pinterest Became a Booming Factory for Creativity, Wired (July 22, 2014), https://www.wired.com/2014/07/pinterest-creativity (describing Pinterest, which allows users to curate their user experience to support their creative hobbies).

See Medium, https://medium.com [“Medium is a place to write, read, and connect.”]; Tumblr, https://www.tumblr.com [“Make stuff, look at stuff, talk about stuff, find your people.”].
publication or movie adaptation. Each of these social media platforms has built-in mechanisms to copy and share others’ work and to engage with it, underscoring the recognized value of copying and dialogue among works.

These examples demonstrate the pervasiveness of the new mode of creativity—much as with memes—particularly among visual works, which have become a dominant form of expression. Copying and transformation of works is no longer condemned but celebrated. Copying happens easily with a click of a button or two. And it creates value for the underlying works being copied. The subsequent creators can profit, but usually only do so by indirect monetization. Reuse of expression can turn what was once only expression into idea. Copying proceeds at a frenetic scale and pace and can lead works to become stale at previously unforeseen rates. These works, as they are passed around, become decentered from their authors. And the works—by building on, communicating with, and drawing from one another—are interwoven into a grand conversation and communal cultural experience. As with memes, copyright law is a misfit for this new creativity.


See supra Part III.
C. Trying to Make Memes More Like Traditional Works

The extraordinary spread of meme-like creativity helps shed light on another emerging cultural phenomenon. Consider the recent market craze for NFTs that has captured public attention due to the astonishingly high prices NFTs command. As a New York magazine article exploring the NFT hype defined it, an NFT is “a digital asset whose uniqueness, and therefore its value, is stored cryptographically on the digital ledger known as the blockchain.” Though NFTs, as unique digital identifiers, can be used to sell anything, they are commonly used to sell tokens for digital images or clips, even though these images or clips are themselves freely available and copyable. Here we offer a novel interpretation: We see the craze for NFTs as a direct reaction to meme culture and what it represents.

As we have argued, memes encapsulate a distinctly modern condition of creativity in a world of unbounded copying. Memes prolif-
erate and mutate without limit and without anyone in control. Everyone is an author; every image is up for grabs. There is no original, no owner, no beginning, no end, and no moment of stasis. But in contrast to the limitless copies of meme culture, the NFT now manufactures a “unique” original. Instead of the endless flux of memes, the NFT artificially stops time. Unlike authorless and ownerless memes, the NFT privatizes the image. Whereas memes are free and only indirectly monetizable (if at all), the NFT creates a product to sell. No wonder some of the most famous and recognizable meme creators or subjects have cashed in. The subject of the famous Disaster Girl meme just sold an NFT of her meme for $500,000. In short, we see the market for NFTs as a reaction against the modern conditions of endless copying that memes emblemize. NFTs represent an attempt to cling to the concepts of uniqueness, originality, and authenticity in a world where those concepts no longer make sense. Whereas philosopher Walter Benjamin once hoped that the technology of reproduction would destroy the aura of the unique work of art, the NFT does the opposite: It manufactures ersatz uniqueness to counteract a world of limitless reproduction.

Well before the advent of NFTs, Professor Barton Beebe described how intellectual property law created artificial scarcity in our post-rarity world. Although he did not address meme culture, Beebe discussed the proliferation of copying technology and the responsive use of intellectual property law “to re-enchant copies, to render them as somehow unique or authentic” in a culture of copying. But unlike Beebe’s vision in which intellectual property law plays a role in creating false rarity, what we see with NFTs is a false rarity created and monetized strictly through the market, without any operation of law. As is increasingly the case with digital culture, social

542 Disaster Girl, supra note 443.
545 See Walter Benjamin, The Work of Art in the Age of Mechanical Reproduction (“From a photographic negative, for example, one can make any number of prints; to ask for the ‘authentic’ print makes no sense.”), in ILLUMINATIONS 174 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968) (1955); cf. Adler, The Artifice of Authenticity, supra note 544 (discussing these concepts in regard to the art market).
546 Benjamin, supra note 545 (discussing the “aura” of authenticity present in certain unique, original works and how that aura “withers” in response to mass-produced work like film).
548 Id. at 844.
norms and the market itself have superseded the role previously played by law, at least for the moment.\textsuperscript{549}

As we have seen, the misfit between memes and central tenets of copyright law signals a much larger problem for copyright law and theory. While traditional works already share certain features of memes, ultimately memes encapsulate a widespread emergence of a new mode of creativity in digital culture. Even contrary trends in digital culture, such as the NFT, demonstrate how pervasive meme culture has become.

\section*{Conclusion}\textsuperscript{550}

This Article sets out how memes upend so many of copyright law’s fundamental assumptions on creativity, commercialization, and distribution: that creativity should typically happen without copying, that copying is harmful, that creators directly profit from exercising copyright’s exclusive rights, that idea and expression are distinct categories, that copyright duration ought to be long to correspond to the longtime viability of works, that copyright holders should be able to select an exclusive few to exploit their works, and that the author is central. Copyright law is therefore a poor fit for this form of creativity, exemplified by memes but now characterizing a vibrant range of creativity, particularly online.

\textsuperscript{549} See Adler & Fromer, \textit{supra} note 47, at 1457 (noting the recent trend of those holding copyrights to seek relief outside of traditional legal systems); \textit{see also supra} Sections II.C, IV.A.

\textsuperscript{550} Path Split in Forest Meme Generator, IMGFLIP, https://imgflip.com/memegenerator/35673474/Path-split-in-forest [https://perma.cc/4Q9A-6NLT].
Though this new mode of creativity is surging, the more traditional creativity that copyright has long sought to protect is not dead—far from it. There are still and probably will long be blockbuster superhero movies, beach reads by authors like Stephen King, pop songs by the likes of Beyoncé, Adele, and Maroon 5, and so forth. What we are now seeing is a second important path of creativity, with memes being a paradigm case. Both paths can be understood to be important and in need of nurturing. While the traditional path might be cultivated best with copyright law, the new path should not be, at least with copyright law in its current form.\textsuperscript{551}

Although these two paths are distinct, they can nevertheless intertwine and affect one another. Individual creators might engage in both traditional and new creativity. New creators might also copy from traditional creators, as with underlying images used in memes or the plot and characters from the \textit{Ratatouille} movie used in a musical version. And sometimes, traditional creators will get a windfall from new creators’ activity.

Consider the recent success of nineteen-year-old actress and singer Olivia Rodrigo. Her song “Drivers License”—a heartbreak ballad—led to a myriad of TikTok copying and transformation.\textsuperscript{552} In the first few weeks of its release, it was used as the soundtrack to 300,000 TikTok videos\textsuperscript{553} (which have collectively been viewed over one billion times, with one video viewed over fifty million times\textsuperscript{554}). It was also an unprecedented hit according to more traditional measurements\textsuperscript{555}: It debuted at number one on the Billboard Hot 100 chart, where it remained for many weeks, and was streamed 76.1 million times and sold 38,000 downloads in the United States in its first week of release.\textsuperscript{556} The flutter of TikTok creativity that resulted from cop-

\textsuperscript{551} \textit{See supra} Part IV.


\textsuperscript{553} \textit{Id}.

\textsuperscript{554} Myles Tanzer, Olivia Rodrigo’s ‘Drivers License’ Became the World’s Biggest Song via TikTok, \textsc{WSJ Mag.} (Jan. 21, 2021), https://www.wsj.com/articles/olivia-rodrigo-drivers-license-tiktok-spotify-11611235409 [https://perma.cc/8QUR-6A4G].

\textsuperscript{555} \textit{See} Craig Jenkins, Nothing Is Flattening Music Like TikTok, \textsc{Vulture} (Feb. 12, 2021), https://www.vulture.com/2021/02/essay-drivers-license-tiktok-radio.html [https://perma.cc/R27V-ZG6Z] (“The last time [metrics like these] occurred with any regularity was in the early aughts, when the first post-show singles by \textit{American Idol} winners . . . arrived to nationwide attention after weeks of exposure to the prime-time audiences of one of the most-watched shows on television.”).

\textsuperscript{556} Tanzer, \textit{supra} note 554.
ying from or transforming “Drivers License” itself has been credited as the linchpin of the song’s success on these traditional metrics.\footnote{Greenspan et al., supra note 552; Jenkins, supra note 555; Tanzer, supra note 554.}

What this example demonstrates—as do those set out throughout the Article—is that both paths of creativity, traditional and new, can be vibrant and will need each other. Traditional creativity will engage with contemporary culture in part by intermixing with the new creativity, and the new creativity will draw on traditional creativity. Yet we must be sensitive to the misfit between the new creativity and existing copyright law if we want the new creativity to continue to thrive.