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MEMES ON MEMES AND THE NEW CREATIVITY*

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* *Timothée Chalamet, Wes Anderson, Tilda Swinton and Bill Murray at Cannes*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/timothee-chalamet-wes-anderson-tilda-swinton-and-bill-murray-at-cannes> [<https://perma.cc/PF2D-KC2A>].

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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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how it started



how it's going

INTRODUCTION¹

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.² 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

¹ See *How It Started vs. How It's Going*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/how-it-started-vs-how-its-going> [<https://perma.cc/LM76-YV7K>] (explaining the format of the “How It Started vs. How It’s Going” type of meme).

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.³ 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 disconnect between memes and copyright law's assumptions. Therefore, cop-

³ See *infra* Part II; see also David Ryan Polgar, *Why Understanding Memes Is Important to Grasping What People Are Really Saying in 2020*, FORBES (June 4, 2020), <https://www.forbes.com/sites/davidryanpolgar/2020/06/04/why-understanding-memes-and-internet-humor-is-important-to-grasping-what-people-are-really-saying-in-2020> [<https://perma.cc/88GK-YEPR>] (recognizing memes as a component of “the language people are speaking on the web”).

right 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.⁴ 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.



I

COPYRIGHT ON CREATIVITY, COMMERCIALIZATION, AND
DISTRIBUTION⁵

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.⁶ A copyright holder receives, among other things, the exclusive right to reproduce the work, distribute copies, and prepare derivative works,⁷ typically until seventy years after the author's death.⁸ Copyright protection extends to the expression of particular ideas rather than to the ideas

⁵ *Grumpy Grandpa*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/grumpy-grandpa> [<https://perma.cc/Z7EQ-U4S8>].

⁶ 17 U.S.C. § 102(a).

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-

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.

¹² *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557–58 (1985) (reviewing past precedents characterizing copyright law as the best way to advance public welfare); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–77 (2009) (“[C]opyright law in the United States has undeniably come to be understood almost entirely in utilitarian, incentive-driven terms.”); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1750–52 (2012) [hereinafter Fromer, *Expressive Incentives*] (“The Supreme Court, Congress, and many legal scholars consider utilitarianism the dominant purpose of American copyright . . . law.” (footnote omitted)); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) (noting that intellectual property is distinguished by its “‘public good’ aspect”).

¹³ *See Stewart E. Sterk, Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1203 (1996).

¹⁴ *Id.* at 1204.

¹⁵ Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997).

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.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.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.²¹ Others argue that in certain markets, copyright law is unnecessary because the social norm of authenticity incentivizes creativity.²² Some scholars hypothesize that people would create works absent copyright incentives, owing to intrinsic motivation to do so.²³ Yet others think this skepticism is wrong or incomplete, arguing that copyright's incentive does encourage both creation and distribution of works.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.

¹⁹ See Lemley, *supra* note 15, at 999.

²⁰ *Id.* at 996–97.

²¹ See, e.g., Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008); Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, in LAW AND MAGIC: A COLLECTION OF ESSAYS 123 (Christine A. Corcos ed., 2010).

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).

²³ E.g., Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011). For a survey of this literature and some theoretical and empirical skepticism about it, see Christopher Buccafusco, Zachary C. Burns, Jeanne C. Fromer & Christopher Jon Sprigman, *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 92 TEX. L. REV. 1921, 1931–43 (2014).

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*²⁵

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.²⁶ 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."²⁷ A work must merely evidence "intellectual production, . . . thought, and conception."²⁸ 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.²⁹ As Judge Learned Hand observed, "[I]f by some magic a man who had

²⁵ *Left Exit 12 Off Ramp*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/left-exit-12-off-ramp> [<https://perma.cc/PKW2-4MAK>].

²⁶ 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.").

²⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

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."³⁰ 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.³¹ Hence, a defendant's independent creation is a full defense to an infringement claim.³² 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."³³

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.³⁴ 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.³⁵ 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.³⁶ 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).

³⁴ *See* Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 *Nw. U. L. Rev.* 1441, 1443–44 (2010) [hereinafter Fromer, *A Psychology of IP*] (explaining and analyzing the creativity that copyright and patent laws seek to promote).

³⁵ *See* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 85–91 (2003).

³⁶ *See id.* at 87–91.

morally: Copyists are culpable—such as for appropriating someone else’s creative labor—and ought to be discouraged.³⁷

Yet copyright’s reality is more complex. Copyright law sometimes condones copying, most notably with regard to fair uses of a work.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.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.⁴⁰ As suggested by the statutory directive on fair use⁴¹ and elaborated in case law, some prototypical cases include news reporting, critical reviews, and parodies.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.”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.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.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, *Star Trek* fan fiction, or a new software implementa-

³⁷ See Mala Chatterjee, *Lockean Copyright Versus Lockean Property*, 12 J. LEGAL ANALYSIS 136, 153 (2020) (explaining copyright law through the lens of Lockean theory); Patrick R. Goold, *Moral Reflections on Strict Liability in Copyright*, 44 COLUM. J.L. & ARTS 123 (2021) (exploring how intuitive moral evaluations about copying are challenged and subverted by the strict liability rules in copyright doctrine).

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

³⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 590–94 (1994) (discussing how courts should consider market harms on the copyrighted work which result from the copyright infringement in question).

⁴⁰ See Pierre N. Leval, *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).

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

⁴² See *Campbell*, 510 U.S. at 578–85 (parodies); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (news reporting); *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 206 (4th Cir. 1998) (critical review).

⁴³ Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982).

⁴⁴ *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)).

⁴⁵ See, e.g., Fromer, *A Psychology of IP*, *supra* note 34, at 1461–62.

tion of the Java application program interface.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.”⁴⁷

Despite this scholarly recognition that fair use exists as one among several important statutory exceptions to copyright infringement,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.⁴⁹



B. *Morality and Economics of Copying*⁵⁰

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

⁴⁶ See, e.g., *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021) (Java); Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 567–72 (2016) [hereinafter Adler, *Fair Use*] (contemporary art); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997) (fan fiction).

⁴⁷ Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1530 (2019) (footnote omitted).

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

⁴⁹ Cf. Shyamkrishna Balganesh, *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’”).

⁵⁰ Steven Crowder’s “Change My Mind” Campus Sign, KNOW YOUR MEME, <https://knowyourmeme.com/memes/steven-crowders-change-my-mind-campus-sign> [<https://perma.cc/N6WP-SPT3>].

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 lazy⁵³ and by some scholars as immoral.⁵⁴



C. Profiting from Copyright⁵⁵

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,

⁵¹ See LANDES & POSNER, *supra* note 35, at 85–91.

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”).

⁵⁴ Balganes, *supra* note 49, at 1679; Abraham Drassinower, *Copyright Infringement as Compelled Speech*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* 203, 205 (Annabelle Lever ed., 2012) (“[U]nauthorized use of another’s speech . . . den[ies] an author] the very autonomy manifested in and through her speech.”).

⁵⁵ *Shut Up and Take My Money!*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/shut-up-and-take-my-money> [<https://perma.cc/A8B8-XAXG>].

⁵⁶ 17 U.S.C. § 106.

⁵⁷ *Id.*

authors can typically sell their works at higher prices than they would be able to without them.⁵⁸ 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.



D. Idea and Expression as Distinct⁵⁹

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.⁶⁰ For example, the expression in a play about star-crossed lovers would be copyrightable, but the idea of star-crossed lovers would not.⁶¹ 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.⁶² Courts attribute this principle to protecting First Amendment values.⁶³

⁵⁸ See Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185, 1224–25 (1986).

⁵⁹ *Zoom Cat Lawyer / I'm Not a Cat*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/zoom-cat-lawyer-im-not-a-cat> [<https://perma.cc/M6N7-42LA>].

⁶⁰ See *supra* note 9 and accompanying text.

⁶¹ See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121–22 (2d Cir. 1930).

⁶² See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991).

⁶³ 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.⁶⁴ 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.⁶⁵

Judge Hand then concludes, "Nobody has ever been able to fix that boundary, and nobody ever can."⁶⁶ Even so, courts have established a doctrinal framework of abstraction and filtration to distinguish idea from expression.⁶⁷

Despite the difficulty of distinguishing between the two categories, copyright law understands the categories to be distinct: one protectable, the other not.⁶⁸ 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.

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.*

This meme is from the future
You don't get the reference yet



E. *The Long Duration of Copyright*⁶⁹

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.⁷⁰ As a policy matter, duration is premised on the period of time over which an author can recoup value for their work.⁷¹ 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.⁷² 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.⁷³

⁶⁹ *This Meme Is from the Future*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/this-meme-is-from-the-future> [perma.cc/ES49-32CU].

⁷⁰ See *supra* text accompanying note 8.

⁷¹ See *Eldred v. Ashcroft*, 537 U.S. 186, 205–08 (2003).

⁷² Fromer, *Expressive Incentives*, *supra* note 12, at 1799–1800.

⁷³ 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, *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

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.*

⁷⁷ See Fromer, *Expressive Incentives*, *supra* note 12, at 1799 (citing statutes); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

⁷⁸ *The Simpsons*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/subcultures/the-simpsons> [<https://perma.cc/NZ4J-P7QN>].

their exclusive rights to third parties.⁷⁹ The law also permits copyright owners to enforce their rights by bringing an action for copyright infringement.⁸⁰ 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.⁸¹

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.⁸² 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.⁸³ Moreover, even without granting third parties permission to use a work, copyright owners may tolerate infringing uses.⁸⁴ 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."⁸⁵

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.").

⁸³ See *id.*; cf. Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1255 (2014) (arguing that copyright and other intellectual property regimes "should require proof of both sufficient technical similarity and market substitution" to find infringement).

⁸⁴ See generally Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

⁸⁵ *Id.* at 619.



G. *The Author's Centrality*⁸⁶

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.⁸⁷ This grant follows from the constitutional grant of power to Congress to confer copyright protection on authors for their writings.⁸⁸

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.⁸⁹ 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.⁹⁰

⁸⁶ *Cartman Respect My Authoritah South Park*, YOUTUBE, at 0:08 (Oct. 28, 2013), <https://www.youtube.com/watch?v=XBebjUYItKw> [<https://perma.cc/HMN5-FJ46>]; *South Park*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/subcultures/south-park> [<https://perma.cc/CLW7-52SH>].

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.”).

⁸⁹ *E.g.*, MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 8 (1993) (noting that authors “produce texts through complex processes of adaptation and transformation”); THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994) (collection of papers on the issue of the author's role in copyright law); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186 (2008).

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.⁹¹ Jane Ginsburg and Luke Budiardjo understand authorship to be the conjunction of devising a creative plan for a work and physically executing the work.⁹²

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



II MEMES⁹³

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

⁹¹ Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1232–33 (2016).

⁹² Jane C. Ginsburg & Luke Ali Budiardjo, *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).

⁹³ *Draw 25, 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. Overview⁹⁴

“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.”⁹⁵ The term’s origins stem from the conceptual analogy Dawkins drew between cultural and biological evolution; Dawkins chose the word to sound like “gene.”⁹⁶ 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.”⁹⁷

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

⁹⁴ *Is This a Pigeon?*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/is-this-a-pigeon> [https://perma.cc/8PBP-424X].

⁹⁵ RICHARD DAWKINS, *THE SELFISH GENE* 249 (Oxford U. Press, Inc. 2016) (1976).

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.⁹⁸ Debates about the definition and nature of memes have entered multiple disciplines, including psychology, communications, linguistics, anthropology, and philosophy.⁹⁹ Scholars routinely note the word’s imprecision.¹⁰⁰

The colloquial usage of the term has shifted in the digital era to become inextricably associated with the internet and digital life.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 trend¹⁰² or TikTok dances,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.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.”¹⁰⁵ Indeed, some sources use the phrase “meme culture” as a synonym for internet culture more broadly.¹⁰⁶

⁹⁸ *Id.* at 249–50.

⁹⁹ *E.g.*, SUSAN BLACKMORE, *THE MEME MACHINE* 63–66 (1999); DANIEL C. DENNETT, *DARWIN’S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE* 339–69 (1995); KATE DISTIN, *THE SELFISH MEME: A CRITICAL REASSESSMENT* (2005). For summaries of scholarly debates in memetics about the definition and conceptual foundation of memes, see Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 340–47 (2005); David A. Simon, *Culture, Creativity, & Copyright*, 29 CARDOZO ARTS & ENT. L.J. 279, 354–60 (2011).

¹⁰⁰ See sources cited *supra* note 99.

¹⁰¹ See Olivia Solon, *Richard Dawkins on the Internet’s Hijacking of the Word ‘Meme,’* WIRED UK (June 20, 2013), <https://www.wired.co.uk/article/richard-dawkins-memes> [<https://perma.cc/64CQ-C5ND>]. The term had not yet acquired its present digital valence in the early days of the internet. Writing in 1998, well before our current meme-driven culture, Jack Balkin defined memes to include “skills, norms, ideas, beliefs, attitudes, values, and other forms of information.” JACK M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 43 (1998).

¹⁰² See *Planking*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/planking> [<https://perma.cc/77EZ-ZV4V>].

¹⁰³ See *infra* Section V.B.

¹⁰⁴ See *So, White Supremacists Ruined Another Shirt*, INSTYLE (Sept. 30, 2020), <https://www.instyle.com/fashion/clothing/fred-perry-proud-boys-polo> [<https://perma.cc/KF3S-C2BY>].

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>].

¹⁰⁶ See, *e.g.*, Helen Lewis, *The Joke’s on Us*, ATLANTIC (Sept. 30, 2020), <https://www.theatlantic.com/international/archive/2020/09/how-memes-lulz-and-ironic-bigotry-won-internet/616427> [<https://perma.cc/F4TX-T3UT>].

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,”¹⁰⁷ by mixing images together, or by referring, sometimes obliquely, to previous images.¹⁰⁸ 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.”¹⁰⁹ 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.”¹¹⁰ 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.¹¹¹

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.¹¹² 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.¹¹³ Thus, as we explore in Part III, the challenge memes pose to copyright law could not be starker or more fundamental: Copyright

¹⁰⁷ See, e.g., Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. RICH. L. REV. 387, 389 (2018); see also David Tan, *Digital Memes, Fair Use, and the First Amendment*, J. INTERNET L., May 2021, at 1, 23 (quoting BRADLEY E. WIGGINS, *THE DISCURSIVE POWER OF MEMES IN DIGITAL CULTURE: IDEOLOGY, SEMIOTICS, AND INTERTEXTUALITY* 11 (2019)) (noting the “remixed, iterated” nature of digital memes).

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.

¹¹¹ Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 237 (2013).

¹¹² See SHIFMAN, *supra* note 96, at 2–6.

¹¹³ See Terrica Carrington, *Grumpy Cat or Copy Cat? Memetic Marketing in the Digital Age*, 7 GEO. MASON J. INT’L COM. L. 139, 153 (2015).

law at its core views unauthorized copying as a threat to creativity. Yet memes, a paradigm of contemporary creativity,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.



Creating
memes

Creating
art and poetry

B. Why Memes Matter¹¹⁵

It may be tempting for academics to dismiss meme culture.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.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

¹¹⁴ See *infra* Section II.B.

¹¹⁵ *Tuxedo Winnie the Pooh*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/tuxedo-winnie-the-pooh> [<https://perma.cc/57BP-8939>].

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.”).

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

¹¹⁸ See, e.g., Joan Donovan, *How Memes Got Weaponized: A Short History*, MIT TECH. REV. (Oct. 24, 2019), <https://www.technologyreview.com/2019/10/24/132228/political-war-memes-disinformation> [<https://perma.cc/F6DP-5FZ7>] (noting the use of memes to create misinformation both by domestic political activists and foreign operatives); Douglas Haddow, *Meme Warfare: How the Power of Mass Replication Has Poisoned the US Election*, GUARDIAN (Nov. 4, 2016), <https://www.theguardian.com/us-news/2016/nov/04/political-memes-2016-election-hillary-clinton-donald-trump> [<https://perma.cc/7AM6-9637>] (“[M]emes are ruining democracy.”); Kaitlyn Tiffany, *The Story of the Internet, as Told by Know Your Meme*, VERGE (Mar. 6, 2018), <https://www.theverge.com/2018/3/6/17044344/know-your-meme-10-year-anniversary-brad-kim-interview> [<https://perma.cc/TE8H-FMHP>] (quoting a technology journalist who describes Donald Trump as a “meme president” and discusses the power of memes in “shaping public opinion”).

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).

¹²² MARTIN GURRI, *THE REVOLT OF THE PUBLIC AND THE CRISIS OF AUTHORITY IN THE NEW MILLENNIUM* 48 (2018).

2011.¹²³ 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 2020.¹²⁴ As Kaitlyn Tiffany explains, “[m]emes and pop culture go hand-in-hand now. They don’t sit in subforums and subreddits; they crop up in group chats and on your local diner’s Instagram account.”¹²⁵

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.



I. Newness¹²⁶

As observed in Part I, the overarching goal of copyright is to stimulate new works and to “create and disseminate ideas.”¹²⁷ Here we briefly explore various ways in which memes fulfill this goal.

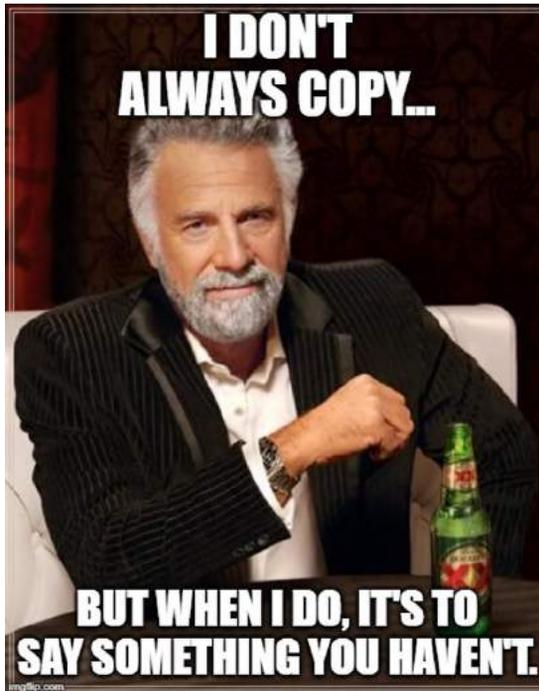
¹²³ Madeline Farber, *The Internet Officially Cares More About Memes than Jesus*, FORTUNE (Oct. 27, 2016), <https://fortune.com/2016/10/27/google-trends-memes-jesus> [<https://perma.cc/R7FK-LRJD>].

¹²⁴ *Instagram Year in Review: How Memes Were the Mood of 2020*, INSTAGRAM (Dec. 10, 2020), <https://about.instagram.com/blog/announcements/instagram-year-in-review-how-memes-were-the-mood-of-2020> [<https://perma.cc/KAT6-4LX3>].

¹²⁵ Tiffany, *supra* note 118.

¹²⁶ *CNN Breaking News Template Meme Generator*, IMGFLIP, <https://imgflip.com/memegenerator/79385373/cnn-breaking-news-template> [<https://perma.cc/T3CN-D2AT>]; see also *Breaking News Parodies*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/breaking-news-parodies> [<https://perma.cc/VA3Q-YV8Q>].

¹²⁷ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).



a. New Content¹²⁸

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.”¹²⁹ 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.¹³⁰ 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.¹³¹ The meme’s copying and spread facilitated new content itself that was consumed widely.

¹²⁸ *The Most Interesting Man in the World*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/the-most-interesting-man-in-the-world> [<https://perma.cc/D7E3-D3N2>].

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*



b. Recontextualization¹³²

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.¹³³ 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.*¹³⁴

¹³² *Joseph Ducreux / Archaic Rap*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/joseph-ducreux-archaic-rap> [<https://perma.cc/CD6T-HWJR>].

¹³³ *Id.*

¹³⁴ 510 U.S. 569, 569, 594–97 (1994).

I can't believe
you copied me!

Yep - together,
we're a supermeme.



c. Combinations¹³⁵

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).

¹³⁹ See Giedre Vaiciulaityte, *Artist Gives the “Woman Yelling at a Cat” Meme a Deep Twist*, BORED PANDA, <https://www.boredpanda.com/woman-yelling-at-cat-comic-unfins> [<https://perma.cc/7DTE-8RYW>] (featuring a four-part comic series giving backstory to the characters of the iconic meme).



2. *Common Culture, Common Ground*¹⁴⁰

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.¹⁴¹ In light of this aspect of memes, linguists James Willmore and Darryl Hocking call memes “fundamentally conversational in nature.”¹⁴² 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.”¹⁴³

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

¹⁴⁰ *Jack Sparrow Being Chased*, IMGFLIP, <https://imgflip.com/memegenerator/Jack-Sparrow-Being-Chased> [<https://perma.cc/6X6D-GNHC>].

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.”).

¹⁴² James Willmore & Darryl Hocking, *Internet Meme Creativity as Everyday Conversation*, 2 J. ASIA-PAC. POP CULTURE 140, 163 (2017).

¹⁴³ *Id.*

. . . a select group of people can understand.”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.”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.”¹⁴⁶ Willmore 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.”¹⁴⁷



3. *Participatory Culture*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:

¹⁴⁴ Emily Zemler, *The Expansive Power of the Internet Meme*, SHONDALAND (Oct. 15, 2020), <https://www.shondaland.com/inspire/a34362565/instagram-10th-anniversary-power-of-internet-meme> [<https://perma.cc/9EY4-CPJL>] (quoting Ortiz).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Willmore & Hocking, *supra* note 142, at 163.

¹⁴⁸ Oprah’s “You Get a Car,” KNOW YOUR MEME, <https://knowyourmeme.com/memes/oprahs-you-get-a-car> [<https://perma.cc/5QLZ-ANQM>].

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 Meme¹⁵²

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 wildfire¹⁵⁴ and in no time, others were placing

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).

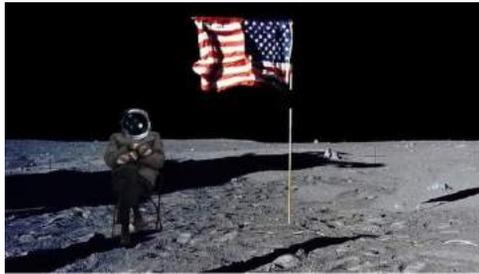
¹⁵¹ Alice Bucknell, *What Memes Owe to Art History*, ARTSY (May 30, 2017), <https://www.artsy.net/article/artsy-editorial-memes-owe-art-history> [<https://perma.cc/NW7X-M5L6>] (arguing that memes, similar to 1960s performance art, “offer a highly accessible and interactive platform of production that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

¹⁵² *Bernie Sanders Wearing Mittens Sitting in a Chair*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/bernie-sanders-wearing-mittens-sitting-in-a-chair> [<https://perma.cc/9E2L-XTR5>].

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 Meme¹⁵⁵

¹⁵⁵ *Bernie Sanders Wearing Mittens Sitting in a Chair – Chairman Bernie’s on the Moon*, KNOW YOUR MEME, <https://knowyourmeme.com/photos/1998652-bernie-sanders-wearing-mittens-sitting-in-a-chair> [<https://perma.cc/UUJ5-2QGW>]; *Chicago Claims Dibs on Best Sanders Memes*, WTTW (Jan. 21, 2021), <https://news.wttw.com/2021/01/21/chicago-claims->



4. *The Attention Economy*¹⁵⁶

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,¹⁵⁷ we are now drowning in information.¹⁵⁸ 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.¹⁵⁹ Immediately recognizable, funny, and attention-grabbing, memes can be consumed almost instantaneously by viewers suffering from shorter and shorter

dibs-best-sanders-memes [<https://perma.cc/QWF5-YPHT>]; *Bernie Sanders Wearing Mittens Sitting in a Chair – Skyscraper Lunch*, KNOW YOUR MEME, <https://knowyourmeme.com/photos/1998018-bernie-sanders-wearing-mittens-sitting-in-a-chair> [<https://perma.cc/Y98U-BFVW>]; Amit Paranjape (@aparanjape), TWITTER (Jan. 23, 2021, 2:31 AM), <https://twitter.com/aparanjape/status/1352881716273111041> [<https://perma.cc/W8CW-AXDH>].

¹⁵⁶ *Calvin Candie Meme Generator*, IMGFLIP, <https://imgflip.com/memegenerator/49576512/calvin-candie> [<https://perma.cc/CM7D-W483>]; see also *Calvin Candie*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/calvin-candie> [<https://perma.cc/WW4A-ENYV>].

¹⁵⁷ See Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 507 (2015) (“Once creation is cheap enough, people may do it without the need for any IP incentive.”); cf. Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143 (2020) (considering how preserving copyright protection can lower attention costs).

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-cl1e9c225-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.”).

attention spans.¹⁶⁰ 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.”¹⁶¹ 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.¹⁶²

Indeed, mathematical studies of memes show how they compete, often effectively, for limited user attention.¹⁶³

In the First Amendment context, Tim Wu and others have famously observed that the digital age has ushered in a new “attention economy”¹⁶⁴ in which it is no longer speech that is scarce, but rather listeners’ attention.¹⁶⁵ While Wu focuses on the rise of “attention merchants”—businesses like Facebook and others that exploit and resell our limited attention (and privacy)¹⁶⁶—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.

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?

¹⁶¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (discussing this idea with respect to flags and emblems).

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).

¹⁶⁴ Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 *ANTITRUST L.J.* 771 (2019).

¹⁶⁵ See Wu, *supra* note 158, at 548; see also Ellen P. Goodman, *Media Policy out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 *BERKELEY TECH. L.J.* 1389, 1392–93 (2004) (explaining that digital innovations have “multiplied content and freed audiences from network schedules”); G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 *MINN. L. REV.* 2157, 2160 (2020) (arguing that the “marketplace for ideas” theory in First Amendment analysis should be built around attention).

¹⁶⁶ See generally TIM WU, *THE ATTENTION MERCHANTS: THE EPIC STRUGGLE TO GET INSIDE OUR HEADS* (2016).



Marked Safe From
a meme
Today

5. *The Dangers of Memes*¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ 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."¹⁷¹ The alt-right's mastery of the

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, *Mememes 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.

¹⁷¹ DALE BERAN, IT CAME FROM SOMETHING AWFUL: HOW A TOXIC TROLL ARMY ACCIDENTALLY MEMED DONALD TRUMP INTO OFFICE (2019); *see also* Dale Beran, *4chan: The Skeleton Key to the Rise of Trump*, MEDIUM (Feb. 14, 2017), <https://medium.com/@DaleBeran/4chan-the-skeleton-key-to-the-rise-of-trump-624e7cb798cb> [<https://perma.cc/>]

memes genre is captured by a meme itself: the alt-right insult meme called “The Left Can’t Meme.”¹⁷²

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.¹⁷³ 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.¹⁷⁴ And to the extent copyright law is thought to embody First Amendment values,¹⁷⁵ 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).

¹⁷³ E.g., Joshua Citarella, *Marxist Memes for TikTok Teens: Can the Internet Radicalize Teenagers for the Left?*, GUARDIAN (Sept. 12, 2020), <https://www.theguardian.com/commentisfree/2020/sep/12/marxist-memes-tiktok-teens-radical-left> [<https://perma.cc/8ULJ-MQSF>] (suggesting that social media can, in addition to radicalizing the far-right, be a tool for progressive politicization); KAREN KORNBLUH & ELLEN P. GOODMAN, REPORT, SAFEGUARDING DIGITAL DEMOCRACY: DIGITAL INNOVATION AND DEMOCRACY INITIATIVE ROADMAP 8 (2020) (discussing how internet platforms “became hosts for third-party, politically motivated influence campaigns”); Andrew Moshirnia, *Countering Pernicious Images: Memetic Visual Propaganda and the 2018 Elections*, 50 SETON HALL L. REV. 79 (2019).

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).

¹⁷⁵ E.g., *Golan v. Holder*, 565 U.S. 302, 327–35 (2012) (“[T]he Framers . . . saw copyright as an ‘engine of free expression.’” (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003))). But see, e.g., Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 4 (2001) (exploring how copyright law has “imposed an increasingly onerous burden on speech”).

and generally urges “more speech” as the solution to dangerous speech unleashed in our free-for-all marketplace of ideas.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.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.¹⁷⁸ As an emerging wave of First Amendment scholars grapples with the dangers of online communication (primarily focused on platforms),¹⁷⁹ we think memes deserve close scrutiny in this conversation.¹⁸⁰

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).

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)).

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).

¹⁷⁹ E.g., WU, *supra* note 166.

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*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*¹⁸²

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

¹⁸¹ *Lawyer Dog*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/lawyer-dog> [<https://perma.cc/B8XU-8WBS>].

¹⁸² *Evil Kermit*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/evil-kermit> [<https://perma.cc/G7KQ-Y9VJ>].

meme copyists to control the spread of their memes.¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ 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.”¹⁸⁶ These memes' creators sued Warner Bros. and 5th Cell Media for copyright and trademark infringement for using these characters in their Scribblenauts vide-

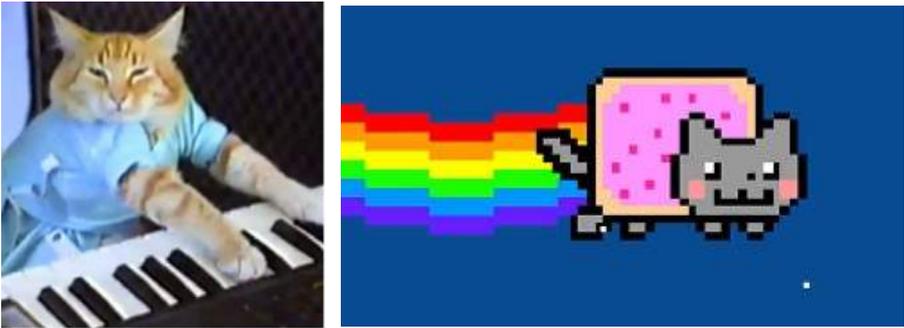
¹⁸³ Someone pictured in a meme might also assert a claim for violation of their rights of publicity or privacy, which involve different bodies of law than copyright. Lantagne, *supra* note 107, at 420–23. See generally JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 1–7* (2018) (exploring laws that protect the right of publicity—defined as the right to prevent the unwanted commercial use and copying of one's name, likeness, and identity—and examining intersections with copyright, property, and privacy laws); Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805 (2010) (proposing a modern approach to privacy torts that accounts for the longevity of harm stemming from digital-age privacy violations). For a comedic take on the dignitary and other harms someone depicted in a meme might suffer, see *Saturday Night Live* (NBC television broadcast Feb. 29, 2020) (Uncle Meme), https://www.youtube.com/watch?v=A_mhtXadceM [<https://perma.cc/LMQ7-HCDT>]. For a more serious take, see Sirin Kale, *Life Beyond the Meme: What Happens After You Go Viral*, BBC (Mar. 7, 2019), <https://www.bbc.co.uk/bbcthree/article/e6511d6a-ea8c-4e27-aac3-728205903635> [<https://perma.cc/JZB5-66YG>]; Neetzan Zimmerman, ‘Star Wars Kid’ Breaks Silence, Says Online Fame Made Him Suicidal [UPDATE], GAWKER (May 10, 2013, 9:41 AM), <https://gawker.com/star-wars-kid-breaks-silence-says-online-fame-made-h-499800192> [<https://perma.cc/EF4Q-KRYQ>] (relating how the unwitting subject of a popular meme experienced extreme cyber-bullying, leading to his hospitalization for severe depression).

¹⁸⁴ See *infra* notes 216–22 and accompanying text.

¹⁸⁵ *Keyboard Cat*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/keyboard-cat> [<https://perma.cc/M6X8-WJZA>].

¹⁸⁶ *Nyan Cat*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/nyan-cat> [<https://perma.cc/24C3-TTNN>].

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



Keyboard Cat¹⁸⁹ (left) and Nyan Cat¹⁹⁰ (right)



ACCUSED IMAGES FROM DEFENDANTS' VIDEOGAME

Screenshot from Scribblenauts Videogame¹⁹¹

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

¹⁸⁷ Complaint, *Schmidt v. Warner Bros. Ent., Inc.*, No. CV13-02824-JFW, 2013 WL 1728009 (C.D. Cal. Apr. 22, 2013); Milord A. Keshishian, *Keyboard Cat and Nyan Cat's Attorneys Sue Scribblenauts Videogame for Copyright and Trademark Infringement*, MILORD L. GRP. (Apr. 30, 2013), <https://www.iptrademarkattorney.com/los-angeles-copyright-trademark-sue-attorney-keyboard-cat-nyan-cat-meme-viral-videos> [<https://perma.cc/N6FQ-PX2S>].

¹⁸⁸ Katie Van Syckle, *Keyboard Cat and Nyan Cat Come Out Ahead in Lawsuit Against Warner Bros.*, N.Y. MAG. (Sept. 26, 2013), <https://nymag.com/intelligencer/2013/09/keyboard-cat-nyan-cat-win-warner-bros-lawsuit.html> [<https://perma.cc/BC4R-ZCRV>].

¹⁸⁹ *Keyboard Cat*, *supra* note 185.

¹⁹⁰ *Nyan Cat*, *supra* note 186.

¹⁹¹ This videogame screenshot is displayed in Keshishian, *supra* note 187.

Reddit (shown below)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.¹⁹³



Grumpy Cat¹⁹⁴ (left), and Grumpy Cat Grumppuccino Beverages¹⁹⁵ (right)

In a similar scenario, the mother (and photographer) of Success Kid (shown below)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).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

¹⁹² *Grumpy Cat*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/grumpy-cat> [<https://perma.cc/686U-UPT8>].

¹⁹³ Scott Neuman, *Grumpy Cat Awarded \$710,000 in Copyright Infringement Suit*, NPR (Jan. 25, 2018), <https://www.npr.org/sections/I-way/2018/01/25/580588088/grumpy-cat-awarded-710-000-in-copyright-infringement-suit> [<https://perma.cc/ACF5-933W>].

¹⁹⁴ *Grumpy Cat*, *supra* note 192.

¹⁹⁵ Eun Kyung Kim, *Will Grumpy Cat Coffee Drinks Turn That Frown Upside Down?*, TODAY (July 29, 2013), <https://www.today.com/food/will-grumpy-cat-coffee-drinks-turn-frown-upside-down-6c10788643> [<https://perma.cc/6FKD-Z2VT>].

¹⁹⁶ *Success Kid / I Hate Sandcastles*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/success-kid-i-hate-sandcastles> [<https://perma.cc/R6DS-F668>].

¹⁹⁷ Complaint at 7–9, *Griner v. Jake's Fireworks, Inc.*, No. 15-cv-162-Orl-22, 2015 WL 777621 (M.D. Fla. Feb. 3, 2015); John McCarthy, *Viral Meme Success Kid's Mum Sues Fireworks Firm Using Her Son's Likeness*, DRUM (Feb. 25, 2015), <https://www.thedrum.com/news/2015/02/25/viral-meme-success-kids-mum-sues-fireworks-firm-using-her-sons-likeness> [<https://perma.cc/2RM7-DQP2>].

Cola.”¹⁹⁸ 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.”¹⁹⁹ The case subsequently settled.²⁰⁰



Success Kid²⁰¹ (left), and Back Off Fireworks²⁰² (right)

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),²⁰³ sued Alex Jones and Infowars for copyright infringement for making and selling Make America Great Again posters featuring Pepe the Frog (also shown below).²⁰⁴ This came in the wake of members of the alt-right movement and Donald Trump adopting and repeatedly meming Pepe the Frog.²⁰⁵ 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.²⁰⁶ When Jones

¹⁹⁸ Complaint, *supra* note 197, at 1–2.

¹⁹⁹ Todd Wasserman, *Boom! Success Kid’s Mom Sues Fireworks Company for Using His Image*, MASHABLE (Feb. 25, 2015), <https://mashable.com/archive/success-kid-lawsuit> [<https://perma.cc/8HMZ-9UCY>].

²⁰⁰ Joint Notice of Settlement, *Griner v. Jake’s Fireworks, Inc.*, No. 15-cv-162-Orl-22 (M.D. Fla. July 6, 2015).

²⁰¹ *Success Kid / I Hate Sandcastles*, *supra* note 196.

²⁰² McCarthy, *supra* note 197.

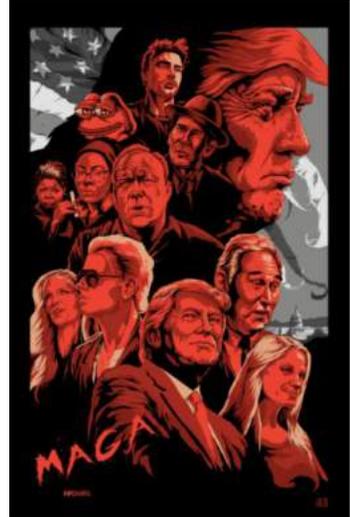
²⁰³ *Pepe the Frog*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/pepe-the-frog> [<https://perma.cc/29CA-ECC5>].

²⁰⁴ Complaint, *Furie v. Infowars, LLC*, No. CV 18-1830 (C.D. Cal. Mar. 5, 2018).

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.²⁰⁷ 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.²⁰⁸



Pepe the Frog²⁰⁹ (left), and Alex Jones Poster Featuring Pepe the Frog²¹⁰ (right)

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.²¹¹ She stated that King—whom she thought displayed bigotry and whom she called “vile”—was antithetical to the Success Kid meme, which “is about

²⁰⁷ *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 969–78 (C.D. Cal. 2019).

²⁰⁸ Martin Macias, Jr., *Infowars Settles ‘Pepe the Frog’ Spat for \$15,000*, COURTHOUSE NEWS SERV. (June 10, 2019), <https://www.courthousenews.com/infowars-settles-pepe-the-frog-spat-for-15000> [<https://perma.cc/BTS6-YL2S>].

²⁰⁹ *Pepe the Frog*, *supra* note 203.

²¹⁰ Benjamin Sutton, *Artist Who Created Pepe the Frog Sues InfoWars for Copyright Infringement*, HYPERALLERGIC (Mar. 6, 2018), <https://hyperallergic.com/430717/pepe-the-frog-artist-sues-infowars-copyright-infringement> [<https://perma.cc/WJ2G-59RZ>].

²¹¹ Paul Brennan, *Success Kid's Latest Success? Shutting Down Steve King*, LITTLE VILLAGE (Jan. 30, 2020), <https://littlevillagemag.com/success-kids-latest-success-shutting-down-steve-king> [<https://perma.cc/6YFX-ALSP>].

positivity and celebrates achievement,”²¹² further arguing that “bigotry is just the antithesis of what we want to be the association with the meme.”²¹³



Steve King's Use of Success Kid²¹⁴

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.²¹⁵ 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).²¹⁶ After the claim received news coverage that was unfavorable to Getty,²¹⁷ Getty Images defended its right to protect its copyright interests.²¹⁸ The blog paid up, but even

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

²¹³ Alan Yuhas, *Mother of 'Success Kid' Demands Steve King Stop Using His Meme*, N.Y. TIMES (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/us/politics/steve-king-success-kid-meme.html> [<https://perma.cc/LG3S-LLS5>].

²¹⁴ *Id.*

²¹⁵ See Neda Ulaby, *Will Posting Memes or Pro Wedding Pics Land You in Copyright Small Claims Court?*, NPR (Mar. 12, 2021), <https://www.npr.org/2021/03/12/957054009/will-posting-memes-or-pro-wedding-pics-land-you-in-copyright-small-claims-court> [<https://perma.cc/92XB-6LHJ>].

²¹⁶ *Socially Awkward Penguin*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/socially-awkward-penguin> [<https://perma.cc/W4CL-MNPN>].

²¹⁷ See, e.g., Mike Masnick, *Getty Images Goes Copyright Trolling After a Meme Penguin* (Sept. 8, 2015), <https://www.techdirt.com/articles/20150908/00155432189/getty-images-goes-copyright-trolling-after-meme-penguin.shtml> [<https://perma.cc/3GJX-LAQW>] (referring to Getty Images' behavior as “particularly stupid” and “absolutely ridiculous”).

²¹⁸ Kevin Collier, *Getty Claims Copyright on Socially Awkward Penguin, Forces Site to Pay \$868*, DAILY DOT (May 28, 2021), <https://www.dailydot.com/unclick/socially-awkward-penguin-meme-getty-lawsuit> [<https://perma.cc/R7UZ-B6L9>] (quoting a *Getty*

though Getty Images asked that the settlement be kept confidential, the blog posted about the demand and how unreasonable it thought the terms were.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.²²⁰ *Techdirt* referred to Getty Images's behavior as "shaking down a blog" rather than protecting copyright.²²¹ *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 *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].²²²



Socially Awkward Penguin Meme²²³ (left), and Blog's Substitute Meme²²⁴ (right)

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

²¹⁹ *Getty Images Demands License Payment for Awkward Penguin!*, GETDIGITAL.DE, <https://www.getdigital.de/blog/getty-images-wants-license-fees-for-the-awkward-penguin-meme> [<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.").

²²⁰ *Id.*

²²¹ Masnick, *supra* note 217.

²²² *Id.*

²²³ *Socially Awkward Penguin*, *supra* note 216.

²²⁴ *Getty Images Demands License Payment for Awkward Penguin!*, *supra* note 219.

Unfollow
@fuckjerry
 They have a history of
 stealing people's comedy
 content, not crediting them,
 and then monetizing it. All
 while getting wildly
 successful and getting giant
 corporate gigs because of
 it.
#fuckfuckjerry

2. *Credit*²²⁵

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.²²⁶ FuckJerry's Instagram account mainly posted jokes and memes to its 14.3 million followers, but also made money from sponsored posts.²²⁷ Comedians and meme creators became upset upon realizing that the account would post their jokes and memes to advertise products without creator credit.²²⁸ 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."²²⁹

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

²²⁵ #fuckfuckjerry Meme, ME.ME (Feb. 2, 2019), <https://me.me/i/unfollow-fuckjerry-they-have-a-history-of-stealing-peoples-comedy-57837f237c804c25b8fa6705dc10228c> [<https://perma.cc/AC6S-3EPV>].

²²⁶ Meghan O'Keefe, *What Is F*ckJerry? Why Hulu and Netflix Are Battling over This Company's Role in the Fyre Festival Scam*, DECIDER (Jan. 15, 2019), <https://decider.com/2019/01/15/fyre-festival-fuck-jerry> [<https://perma.cc/VLQ2-4AAF>].

²²⁷ Ashley Carman, *Comedians Are Coming for One of Instagram's Biggest Joke Aggregators*, VERGE (Feb. 1, 2019), <https://www.theverge.com/2019/2/1/18206914/fuckjerry-jerry-media-comedian-backlash-joke-stealing-vulture> [<https://perma.cc/B6N4-VPD8>].

²²⁸ *Id.*

²²⁹ #FuckFuckJerry, KNOW YOUR MEME, <https://knowyourmeme.com/memes/events/fuckfuckjerry> [<https://perma.cc/F62F-YPMV>].

#fuckfuckjerry and asked the public to unfollow the account.²³⁰ 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.²³¹



Example of Request to FuckJerry for Credit²³²

²³⁰ *Id.*; Megh Wright, *How the #FuckFuckJerry Movement Was Born*, VULTURE (Feb. 6, 2019), <https://www.vulture.com/2019/02/fuck-jerry-instagram-comedians-unfollow-campaign-elliott-tebele.html> [<https://perma.cc/3DR5-9HH4>].

²³¹ Nick Statt, *Fuckjerry Founder Apologizes for Stealing Jokes and Pledges to Get Creator Permission*, VERGE (Feb. 2, 2019), <https://www.theverge.com/2019/2/2/18208446/fuckjerry-elliott-tebele-meme-joke-aggregator-repost-new-policy-change> [<https://perma.cc/7J2J-5LFY>].

²³² #FuckFuckJerry, *supra* note 229.



3. *Licensing*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.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.²³⁵

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>].

²³⁴ See *supra* text accompanying note 198.

²³⁵ See Jazmin Duribe, *T-Mobile's Super Bowl Ad Was Accused of Ripping Off a Viral Meme*, POPBUZZ (Feb. 4, 2019), <https://www.popbuzz.com/tv-film/news/t-mobile-super-bowl-commercial-2019-meme> [<https://perma.cc/KJ4Y-ZXKL>] (compiling examples of public outrage over the T-Mobile tweet).



Original Meme²³⁶ (left), and Public Outrage over T-Mobile Ad²³⁷ (right)



T-Mobile CEO Tweet²³⁸

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.

²³⁶ @DecentBirthday, TWITTER (Dec. 14, 2017, 12:25 PM), <https://twitter.com/decentbirthday/status/94135847779329024> [<https://perma.cc/NL9L-TU4A>].

²³⁷ Raj Mahal (@RajMahal06), TWITTER (Feb. 3, 2019, 8:44 PM), <https://twitter.com/RajMahal06/status/1092237322974871554> [<https://perma.cc/NZJ7-76UE>].

²³⁸ John Legere (@JohnLegere), TWITTER (Feb. 3, 2019, 9:50 PM), <https://twitter.com/JohnLegere/status/1092254115965460480> [<https://perma.cc/ULX8-FAE2>].



III

HOW MEMES UPEND COPYRIGHT'S NOTIONS OF CREATIVITY, COMMERCIALIZATION, AND DISTRIBUTION²³⁹

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,²⁴⁰ owe their very existence to limitless, unauthorized, viral copying.

²³⁹ *Ben Shapiro DESTROYS Liberals*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/ben-shapiro-destroys-liberals> [<https://perma.cc/KJZ9-5WR2>].

²⁴⁰ See *supra* Section II.B.



A. *The Norms of Copying and Transformation*²⁴¹

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

²⁴¹ *Mr. Bean*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/subcultures/mr-bean> [<https://perma.cc/PKB4-9NRR>].

²⁴² *See supra* Part I.

²⁴³ *See supra* Sections II.A–B.

²⁴⁴ *But see infra* notes 420–23 and accompanying text.



1. Copying²⁴⁵

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.²⁴⁶ 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.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰ 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.²⁵¹ 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,²⁵² 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 *USA Today* and *Time* wrote articles about the best “Hotline Bling” memes.²⁵³ The memes bled into real life: A football player for the Baltimore Ravens

²⁴⁸ See *supra* Section II.A.

²⁴⁹ Cf. *infra* Section V.C (discussing this phenomenon in the context of non-fungible tokens (NFTs)).

²⁵⁰ Pamela Vaughan, *How to Make a Meme That Will Make People Cry (with Laughter)*, HUBSPOT (June 12, 2018), <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, *The Growth, Spread, and Mutation of Internet Phenomena: A Study of Memes*, RESULTS APPLIED MATHEMATICS, May 2020 (analyzing different models for tracking and explaining meme virality, popularity, and behavior).

²⁵¹ Connor O’Brien, *Case Study: How Artists and Songs Go Viral*, EDMPROD (Feb. 24, 2021), <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, *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”).

²⁵² We create one such “Hotline Bling” meme below in Section IV.A.

²⁵³ Eliza Berman, *Drake’s ‘Hotline Bling’ Video Inspired Some Incredible Dancing Memes*, TIME (Oct. 20, 2015), <https://time.com/4079654/drake-hotline-bling-dancing-memes> [<https://perma.cc/9RGU-K6X9>]; Maevie McDermott, *The Best ‘Hotline Bling’ Drake Memes, from A to Z*, USA TODAY (Oct. 20, 2015), <https://www.usatoday.com/story/life/entertainthis/2015/10/20/best-hotline-bling-memes-drake/74267298> [<https://perma.cc/XX67-DQL8>].

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.²⁵⁴



Still from Drake's "Hotline Bling" Video²⁵⁵

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!"²⁵⁶ Writing in the *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.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."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."²⁵⁹ Lacking

²⁵⁴ Jamison Hensley, *Justin Tucker's Celebration Dance Is a Shoutout to Drake*, ESPN BLOG (Nov. 1, 2015), https://www.espn.com/blog/baltimore-ravens/post/_id/23253/justin-tuckers-celebration-dance-is-a-shoutout-to-drake [<https://perma.cc/E6FF-PPYE>]; Nick Schwartz, *Mark Ingram Celebrates TD with Drake's 'Hotline Bling' Dance*, USA TODAY (Oct. 25, 2015), <https://ftw.usatoday.com/2015/10/mark-ingram-drake-dance-hotline-bling> [<https://perma.cc/4NQG-BBYF>]; Marissa Payne, *Antoine Griezmann Sends France to Euro Final, Dances like Drake*, WASH. POST (July 7, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/07/07/antoine-griezmann-sends-france-to-euro-final-dances-like-drake> [<https://perma.cc/ZR8S-NQZG>].

²⁵⁵ Drake, *Hotline Bling*, YOUTUBE, at 01:38 (Oct. 26, 2015), <https://www.youtube.com/watch?v=UXpDa-c-4Mc> [<https://perma.cc/W4KT-DWGF>].

²⁵⁶ Lauren Nostro, *Interview: Tanisha Scott Talks Choreographing Drake's "Hotline Bling" Video*, COMPLEX (Oct. 22, 2015), <https://www.complex.com/music/2015/10/tanisha-scott-interview-on-choreographing-drake-hotline-bling-video> [<https://perma.cc/EG7G-AYYK>] (quoting Drake's collaborator Tanisha Scott).

²⁵⁷ Jon Caramanica, *Drake: Rapper, Actor, Meme*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/24/arts/music/drake-rapper-actor-meme.html> [<https://perma.cc/PS8W-9VUC>].

²⁵⁸ *Id.*

²⁵⁹ *Id.*

contemporary references and characterized by “small moves that [Drake] repeats,” the music video presented readymade GIFs of Drake for his copiers.²⁶⁰



2. Transformation²⁶¹

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

²⁶⁰ *Id.*

²⁶¹ *My Parents Are Dead / Batman Slapping Robin*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/my-parents-are-dead-batman-slapping-robin> [<https://perma.cc/8AJ2-PHPM>].

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

²⁶³ Legacy Russell, *Amy Adler*, BOMB MAG. (Mar. 12, 2013), <https://bombmagazine.org/articles/amy-adler> [<https://perma.cc/M2Y3-2RR7>] (“[D]igital culture [is] . . . where art is put out in a way that invites its own re-working.”).

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



B. *The Creation of Value for Underlying Works Through Copying*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.”²⁶⁶ *RealityGif*, a website that posts images from numerous reality television shows including *The Real Housewives of Beverly Hills*,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.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

²⁶⁴ See *infra* Section V.A.

²⁶⁵ *Money Cat Template*, IMGFLIP, <https://imgflip.com/memetemplate/131896771/Money-cat> [<https://perma.cc/KG6Q-HAF3>]; see also *CashCats*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/cashcats> [<https://perma.cc/8WKF-9GKL>] (explaining the format of the “CashCats” type of meme).

²⁶⁶ Anna Rabe, *Do Memes Violate Copyright Law?*, LAW TOG, <https://thelawtog.com/memes-violate-copyright-law> [<https://perma.cc/GY38-64WN>] (citation omitted).

²⁶⁷ *Id.*; see also *supra* Section II.B (discussing memes, including one based on a scene from *The Real Housewives of Beverly Hills*).

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.*

²⁷⁰ Agnes Harkness Winking, KNOW YOUR MEME, <https://knowyourmeme.com/memes/agnes-harkness-winking> [<https://perma.cc/E6G8-BSKM>].

²⁷¹ See *supra* Section I.C.

²⁷² See 3 Stats That Show What Memes Mean to Gen Z & Millennials, YPULSE (Mar. 5, 2019), <https://www.ypulse.com/article/2019/03/05/3-stats-that-show-what-memes-mean-to-gen-z-millennials> [<https://perma.cc/UHH6-W6E8>] (highlighting statistics regarding the frequency and ubiquity of meme sharing across younger demographics, and presenting survey data to show that the majority of meme sharers do so to elicit smiles, laughs, or reactions (citing *Q1 2018 YPulse Trend Report: Home Sweet Home, Talk the Talk, Ain’t Nobody Got Time for That*, YPULSE (Mar. 30, 2018), <https://www.ypulse.com/report/2018/03/30/q1-2018-ypulse-quarterly-talk-the-talk-home-sweet-home-aint-nobody-got-time> [<https://perma.cc/L87S-XFYA>])).

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."²⁷⁴ 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.²⁷⁵ 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.²⁷⁶ 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.²⁷⁷ That in turn can generate profit opportunities for these meme creators and sharers. For example, in 2016, the FuckJerry Instagram account discussed earlier²⁷⁸ 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.²⁷⁹ 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.²⁸⁰

²⁷⁴ Jane C. Hu, *The Legal Netherworld of Meme Accounts*, SLATE (Aug. 8, 2019), <https://slate.com/technology/2019/08/copyright-law-meme-accounts-instagram-reposts.html> [<https://perma.cc/CFS7-QBAJ>].

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.

²⁷⁹ Madeline Berg, *How FuckJerry Wants to Go from Instagram to Empire*, FORBES (Apr. 8, 2016), <https://www.forbes.com/sites/maddieberg/2016/04/08/how-fuckjerry-wants-to-go-from-instagram-to-empire> [<https://perma.cc/5UDH-LU3B>].

²⁸⁰ Kam Dhillon, *Here's How Much Money You Can Make with Memes*, HIGH-SNOBIETY, <https://www.highsnobiety.com/p/how-to-make-money-with-memes> [<https://perma.cc/WV22-746G>] (“While many devotees heralded the [Gucci] campaign as the grizzly death of meme culture, for marketing teams everywhere the campaign proved

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.²⁸¹ 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 Activity²⁸²

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.²⁸³ 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.

²⁸² Daily Struggle, KNOW YOUR MEME, <https://knowyourmeme.com/memes/daily-struggle> [<https://perma.cc/T3AF-XK9B>].

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.”²⁸⁴ 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.”²⁸⁵ That so-called explanation has mystified courts and scholars, particularly because “profit from exploitation” seems inextricably tied to using copyrighted work without paying.²⁸⁶

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).

²⁸⁴ 17 U.S.C. § 107(1).

²⁸⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

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.²⁸⁷ This haziness might make fair use determinations in this context yet less predictable.²⁸⁸



E. Breakdown of Idea-Expression Distinction²⁸⁹

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.²⁹⁰ 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."²⁹¹ 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.²⁹² To the extent that this SpongeBob

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.").

²⁸⁸ Compare Deidré A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RESV. L. REV. 511, 520 (2012) (finding fair use to be unpredictable), and Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 401 (2009) (same), with Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1530 (2004) (thinking there are patterns and coherence in fair use), and Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009) (same).

²⁸⁹ *Mocking SpongeBob*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/mocking-spongebob> [<https://perma.cc/VG5L-KCWF>].

²⁹⁰ See *supra* Section I.D.

²⁹¹ *Mocking SpongeBob*, *supra* note 289.

²⁹² "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



F. Scale and Pace of Copying²⁹⁴

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.”).

²⁹⁴ *Very Fast*, IMGFLIP, <https://imgflip.com/meme/178062637/Very-Fast> [<https://perma.cc/62KZ-2UZM>].

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.”²⁹⁷ 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.²⁹⁸



G. Staleness of Memes²⁹⁹

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 years³⁰⁰ seems like a misfit for memes that can hit it big and go stale all in the matter of weeks.³⁰¹ Many memes decay with a quick half-life—on the order of

²⁹⁷ Madison, *What Makes a Meme Go Viral?*, MEDIUM (Jan. 21, 2018), <https://madisonnicole.medium.com/meme-ology-studying-patterns-in-viral-media-f1931b3d1c7e> [<https://perma.cc/6DV6-YVLX>].

²⁹⁸ For a look at what copying looked like in a pre-internet era, see Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

²⁹⁹ *Distracted Boyfriend*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/distracted-boyfriend> [<https://perma.cc/9FXC-LY6X>].

³⁰⁰ 17 U.S.C. § 302(a).

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.³⁰²



H. Selective Enforcement³⁰³

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.³⁰⁴ 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,³⁰⁵ 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

³⁰² See Eileen Brown, *The Maths Behind the Memes: Why We Share on Social Media*, ZDNET (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); Lonngberg, Xiao & Wolfinger, *supra* note 250 (modeling how memes “are spread rapidly by internet users, often for a relatively short period of time”).

³⁰³ *Pepe the Frog*, *supra* note 203.

³⁰⁴ See *supra* Section I.F.

³⁰⁵ 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.” *What We Do*, CREATIVE COMMONS, <https://creativecommons.org/about> [<https://perma.cc/RDS4-5WBYY>].

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.³⁰⁶

Meme licensing differs from these scenarios in terms of the selectivity of enforcement. Writ large, copying and transforming memes is tolerated and typically encouraged,³⁰⁷ an opposite scenario from copyright's assumed default.³⁰⁸ 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.³⁰⁹ In these situations, only very few have no permission to use the copyrighted 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*³¹⁰

Another way in which memes undermine copyright's core tenets is that they decentralize the author³¹¹ 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

³⁰⁶ For an exploration of these types of licenses side by side, see JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, *COPYRIGHT LAW: CASES AND MATERIALS* v.3.0, at 654–65 (2021).

³⁰⁷ See *supra* Sections III.A–B.

³⁰⁸ See *supra* Section I.F.

³⁰⁹ See *supra* Section II.C.

³¹⁰ *Bye Felicia*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/bye-felicia> [<https://perma.cc/PTY8-T3JG>].

³¹¹ See *supra* Section I.G.

works importantly with their respective authors. People understand these works as shaped by the authors' particular circumstances and viewpoints.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.³¹³ But despite the possibility of legal authorship recognition, even the most well-known memes, like *Distracted Boyfriend*,³¹⁴ are identifiable not by any of these creators but rather are 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 *Know Your Meme* reference site sometimes does. Moreover, authorship lacks centrality even though the multiple layers of contributions offer potential opportunities for individual identification.³¹⁵ Memes are dissociated from their creators; authors rarely—if ever—receive personal recognition. As literary scholar Marta Figlerowicz explains:

[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.³¹⁶

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

³¹³ See *supra* Section I.G.

³¹⁴ See *Distracted Boyfriend*, *supra* note 299.

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).

³¹⁶ Marta Figlerowicz, *It Me: The Trouble with Memes*, *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*.³¹⁷ 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.³¹⁸ That is not necessarily to strip the agency from the humans involved in the creation and spread of memes,³¹⁹ 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.³²⁰

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.³²¹ Indeed, the moral rights interpretation of copyright—in Europe and also enshrined in American copyright law in the Visual Artists Rights Act³²²—pictures the author's relationship to the work as even deeper.³²³ The work of art is pictured metaphorically as the artist's child. As the Second Circuit explained, the parent/author

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.”).

³¹⁹ See Henry Jenkins, *A Meme Is a Terrible Thing to Waste: An Interview with Limor Shifman (Part One)*, CONFESSIONS OF AN ACA-FAN (Feb. 17, 2014), <https://henryjenkins.org/blog/2014/02/a-meme-is-a-terrible-thing-to-waste-an-interview-with-limor-shifman-part-one.html> [<https://perma.cc/2HGL-DVLN>] (emphasizing the meaning and structures people build around memes).

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).

³²² 17 U.S.C. § 106A (granting rights of attribution and integrity to authors of works of “visual art”); see also Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353 (2006) (exploring the European origins of moral rights); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 556–57 (1940) (analyzing moral rights laws in Europe).

³²³ See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263 (2009) [hereinafter Adler, *Against Moral Rights*] (exploring and contesting the central assumption in moral rights law that artists, unlike other authors, have especially profound bonds to their creations).

“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.”).

³²⁸ As one technology blog explains, “Web 2.0 refers to rich web applications, web-oriented architecture, and social web.” Lipika, *What Is Web 2.0?*, ZNETLIVEBLOG (May 13, 2016), <https://www.znetlive.com/blog/web-2-0> [<https://perma.cc/C7Y2-DYAQ>].

³²⁹ See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008); Olufunmilayo B. Arewa, *YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431, 449 (2010). See generally Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841 (2008); Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated*

internet has advanced many versions to integrate—among other things—smartphone-generated content and social-media interconnectivity,³³⁰ 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.³³¹ 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.³³² 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.³³³ Moreover, the scale of copying in memes proceeds at a pace unknown even in Web 2.0.³³⁴ 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.

Content, 11 VAND. J. ENT. & TECH. L. 841 (2009); Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921 (2009); Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843 (2010); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459.

³³⁰ See Kris Spisak, *Eras of the Web—Web 0.0 Through Web 5.0*, BUS. 2 CMTY. (Sept. 13, 2019), <https://www.business2community.com/tech-gadgets/eras-of-the-web-web-0-0-through-web-5-0-02239654> [<https://perma.cc/35JF-R8FW>] (defining the “Mobile Web” as a new “Web 4.0”).

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

³³⁵ *Running Away Balloon*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/running-away-balloon> [<https://perma.cc/XS4S-QFJH>].

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.



Copyright

Copy left,
up, down,
right.
Copy, copy, copy.

A. *Keep Copyright Law Away from Memes?*³³⁹

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.³⁴⁰ Many of these new forms are swept into copyright law, sometimes evaluated under pre-existing rules and other times under modified rules.

³³⁹ *Drakeposting*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/drakeposting> [<https://perma.cc/6EFW-PXKD>].

³⁴⁰ *E.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (photography); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (VCR); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (DVR); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (search engine); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018) (social media); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (internet); *see also* Jeanne C. Fromer & Jessica Silbey, *Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J.L. & ARTS 341, 370–71 (2021) (summarizing Congress's expansions of copyrightable subject matter over time to include musical compositions and photographs, among other things).

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.³⁴¹ Studied categories of works excluded from copyright protection where creativity prospers include stand-up comedy,³⁴² cuisine and recipes,³⁴³ and magic.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.³⁴⁵

Creativity also prospers without reliance on copyright law in some spaces in which it is likely available, such as tattoos³⁴⁶ and makeup designs for clowns.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.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.”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).

³⁴⁷ David Fagundes & Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313 (2019).

³⁴⁸ See, e.g., Perzanowski, *supra* note 346, at 513; Fagundes & Perzanowski, *supra* note 347, at 1318.

³⁴⁹ Perzanowski, *supra* note 346, at 515.

distributors.³⁵⁰ 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,³⁵¹ the Supreme Court in 2017 established a more protective framework for copyrightability of fashion designs.³⁵² Although it is still an open question whether copyright claims regarding fashion designs will significantly increase,³⁵³ 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.³⁵⁴ This latter type of “mash up” sampling, exemplified by the Beastie Boys' widely-praised album *Paul's Boutique*,³⁵⁵ has mostly been abandoned in favor of the former

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).

³⁵³ Compare David E. Shipley, *All for Copyright Stand Up and Holler! Three Cheers for Star Athletica and the U.S. Supreme Court's Perceived and Imagined Separately Test*, 36 CARDOZO ARTS & ENT. L.J. 149, 174–76 (2018) (expecting an increase in claims), with David Jacoby, ‘Star Athletica’ *Three Years On*, N.Y. L.J., Aug. 28, 2020 (expressing some skepticism about such an increase).

³⁵⁴ Ryan Lloyd, Note, *Unauthorized Digital Sampling in the Changing Music Landscape*, 22 J. INTELL. PROP. L. 143, 153–54 (2014). For a more comprehensive typology of hip hop sampling, see Amanda Sewell, *A Typology of Sampling in Hip-Hop* (May 2013) (Ph.D. dissertation, Indiana University), <https://hcommons.org/deposits/objects/hc:18432/datastreams/CONTENT/content> [<https://perma.cc/24VD-BEM3>].

³⁵⁵ See Nate Patrin, *Beastie Boys Paul's Boutique*, PITCHFORK (Feb. 13, 2009), <https://pitchfork.com/reviews/albums/12671-pauls-boutique> [<https://perma.cc/42VR-UFLZ>]; *How the Beastie Boys Made Their Masterpiece*, ROLLING STONE (Mar. 12, 2013), <https://www.rollingstone.com/music/album-reviews/how-the-beastie-boys-made-their-masterpiece-20130312>.

type because of a few copyright rulings against samplers.³⁵⁶ As *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."³⁵⁷ 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 \$250,000.³⁵⁸ 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.³⁵⁹ 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.³⁶⁰ Some have argued this result is good, as those who are sampled get paid,³⁶¹ while some have argued the opposite in that it has stifled valuable creativity.³⁶² 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

www.rollingstone.com/music/music-news/how-the-beastie-boys-made-their-masterpiece-186788 [https://perma.cc/7MCN-DA93].

³⁵⁶ The most notable such ruling is *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), which held that there is no *de minimis* exception to infringement liability for copying sound recordings.

³⁵⁷ ROLLING STONE, *supra* note 355.

³⁵⁸ Casey C. Sullivan, *How Litigation Changed Hip Hop Sampling*, GREEDY ASSOCIATES (July 28, 2015), https://blogs.findlaw.com/greedy_associates/2015/07/how-litigation-changed-hip-hop-sampling.html [https://perma.cc/SUSB-BNVV].

³⁵⁹ *Id.*

³⁶⁰ *Cf.* Lloyd, *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, *supra* note 358 (concluding that sample-heavy music has become more difficult and expensive).

³⁶¹ *E.g.*, Terry Hart, *License to Remix*, 23 GEO. MASON L. REV. 837 (2016).

³⁶² *E.g.*, Lloyd, *supra* note 354, at 170 (arguing that increased litigation involving unauthorized sampling will deter artists from crafting certain creative works).

collective shaming upon those who opt to bring legal claims, as occurred in the Socially Awkward Penguin meme dispute described above.³⁶³ Such shaming can help keep the copyright nonenforcement norm relatively intact.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.



B. *An Attribution Regime?*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.³⁶⁶ Credit for creative work is generally something creators consider desirable both for expressive and

³⁶³ See *supra* Section II.C.1.

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

³⁶⁵ *Be Like Bill*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/be-like-bill> [<https://perma.cc/AX82-9PFX>].

³⁶⁶ See *supra* Section II.C.2.

pecuniary reasons.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.³⁶⁸ As analyzed above, memes can lead to financial opportunities for their creators,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,³⁷⁰ the Kale Salad Instagram account that traces memes to their creators and provides credit,³⁷¹ and the *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,³⁷² but it still has some disconnects and impracticalities. In particular, the fast pace of copying and spread of memes³⁷³ 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 decentered³⁷⁴—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,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.

³⁶⁷ See Fromer, *Expressive Incentives*, *supra* note 12, at 1790–92.

³⁶⁸ *Id.*

³⁶⁹ See *supra* Section III.C.

³⁷⁰ See *supra* Section II.C.2.

³⁷¹ See *supra* note 320.

³⁷² Cf. Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 *LAW & CONTEMP. PROBS.* 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)).

³⁷³ See *supra* Section III.F.

³⁷⁴ See *supra* Section III.I.

³⁷⁵ See Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 *HOUS. L. REV.* 263, 304 (2004); Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 *UTAH L. REV.* 789, 800–16 (2007).



Sample Texts from Hillary Meme³⁷⁶

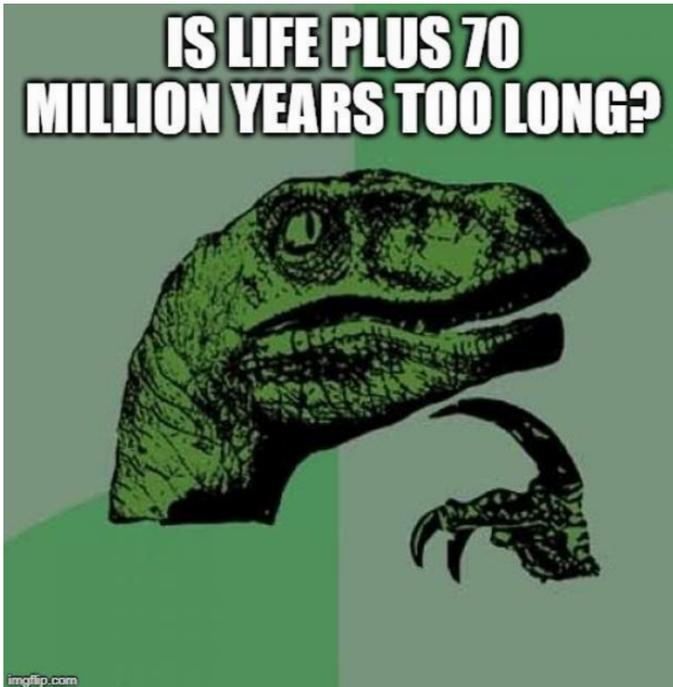
Consider the Texts from Hillary meme that was popular in 2012, in which a photograph of then-Secretary of State Hillary Clinton in an airplane wearing sunglasses texting on her phone was juxtaposed with another photograph of someone to hypothesize a text conversation between them.³⁷⁷ An example of the 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.³⁷⁸ 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

³⁷⁶ *Texts from Hillary*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/texts-from-hillary> [<https://perma.cc/9FFP-R7YU>].

³⁷⁷ *Id.*

³⁷⁸ See Emily Heil, ‘Texts from Hillary’ Photographer Didn’t LOL—at First, WASH. POST: BLOG (Apr. 11, 2012), https://www.washingtonpost.com/blogs/in-the-loop/post/texts-from-hillary-photographer-didnt-lol-at-first/2012/04/11/gIQApNcZAT_blog.html [<https://perma.cc/WN5S-Q8QE>].

gallery, originated.).”³⁷⁹ 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

³⁷⁹ Feifei Sun, *The Photograph That Has Everyone Texting Hillary Clinton*, TIME (Apr. 10, 2012), <https://time.com/3787649/texting-hillary-clinton> [<https://perma.cc/LA8L-LTSR>].

³⁸⁰ *Philosoraptor*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/philosoraptor> [<https://perma.cc/ERY9-3LMW>].

³⁸¹ See *supra* Part I.

³⁸² See *supra* Section I.E.

which memes become stale—on an order of days, weeks, or months³⁸³— 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.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.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.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.³⁸⁷

³⁸³ See *supra* Sections III.F–G.

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.

³⁸⁵ See *supra* Part I.

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.

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?*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.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.³⁹⁰ When that is the case, memes should be denied protection as they are not the requisite "works of authorship."³⁹¹ While a meme might represent "original intellectual conceptions" of its creator as doctrinally

³⁸⁸ *Community*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/subcultures/community> [<https://perma.cc/7MUK-EJH7>].

³⁸⁹ See *supra* Section III.E.

³⁹⁰ See *supra* Section III.I.

³⁹¹ 17 U.S.C. § 102(a).

required for authorship,³⁹² as a meme spreads, the creator's conceptions can frequently dissipate into nothingness as a meme is absorbed into culture.³⁹³ 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.³⁹⁴

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.³⁹⁵ 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.³⁹⁶ And a work that is found to be transformative is frequently found to be a fair use of a copyrighted work.³⁹⁷

³⁹² *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

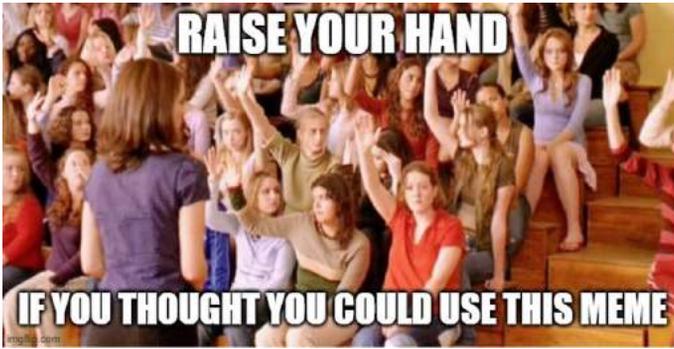
³⁹³ See *supra* Section III.I. Stacey Lantagne makes a related argument, that memes can lack the authorship copyright law requires because “a mutating meme scatters authorship so widely that the resulting creative output is so effectively crowd-sourced as to be a *de facto* common good outside of copyright 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).

³⁹⁴ Cf. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 12:25–12:29 (5th ed. 2021) (discussing how trademarks may become generic as generic use of the mark spreads).

³⁹⁵ See *supra* Section III.D.

³⁹⁶ See Lantagne, *supra* note 107, at 414–15; David Tan & Angus Wilson, *Copyright Fair Use and the Digital Carnavalesque: Towards a New Lexicon of Transformative Internet Memes*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 864, 909–14 (2021); Elizabeth Rocha, Case Note & Comment, *Y U No Let Me Share Memes?!—How Meme Culture Needs a Definitive Test for Noncommercial Speech*, 28 DEPAUL J. ART, TECH. & INTELL. PROP. L. 37, 42 (2017); cf. Patel, *supra* note 111, at 252–54 (suggesting that memes support cultural interchange, which ought to favor fair use).

³⁹⁷ See, e.g., *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202–04 (2021); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–83 (1994); see Beebe, *supra* note 286, at 603–06 (finding this effect of transformativeness in a comprehensive empirical study of courts’ fair use decisions).



E. Addressing Selective Enforcement³⁹⁸

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.³⁹⁹ 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 *Mean Girls* Victimized, IMGFLIP, <https://imgflip.com/meme/25246414/mean-girls-victimized> [<https://perma.cc/VCN6-RGZA>]; see also *Mean Girls*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/subcultures/mean-girls> [<https://perma.cc/86XE-VUHU>].

³⁹⁹ See *supra* Section III.H.

that the work would be used for a specific purpose.”⁴⁰⁰ 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.⁴⁰¹ 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.⁴⁰² Even so, the legal test for copyright abandonment is the same as for chattel: intent to abandon and an overt act demonstrating that intent.⁴⁰³ An abandoned copyright cannot be owned by someone new; instead, works once protected by that copyright immediately and irrevocably fall into the public domain.⁴⁰⁴ 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.⁴⁰⁵ 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?⁴⁰⁶

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.⁴⁰⁷ 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

⁴⁰⁰ WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:131 (2021).

⁴⁰¹ See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03[a][7] (2021); PATRY, *supra* note 400, § 5:131.

⁴⁰² 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).

⁴⁰³ See *id.* at 493.

⁴⁰⁴ 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).

⁴⁰⁵ Fagundes & Perzanowski, *supra* note 402, at 540–52.

⁴⁰⁶ See *id.* at 549–52 (citing *Micro Star v. FormGen, Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998)).

⁴⁰⁷ See *supra* Section II.C.1.

unbothered acknowledgement that “he had lost control over the character.”⁴⁰⁸ For instance, Furie told *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.”⁴⁰⁹ And when asked in an *Atlantic* interview about how he felt about the alt-right adopting Pepe, Furie responded:

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.⁴¹⁰

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 *Esquire* in which he asserted that “Pepe the Frog is copyrighted by me” and made other statements indicating a desire to enforce his copyright.⁴¹¹ Based on the statements, the district court ruled that there was a dispute of material facts and denied summary judgment on abandonment,⁴¹² after which the case settled.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.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.

⁴⁰⁸ *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 965 (C.D. Cal. 2019).

⁴⁰⁹ *Id.* (alteration in original).

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 966.

⁴¹² *Id.*

⁴¹³ *See supra* Section II.C.1.

⁴¹⁴ *Furie*, 401 F. Supp. 3d at 968–69.



1. *The Worry of Forcing Creators to Allow Universal Use*⁴¹⁵

One can see the motivation behind granting copyright owners control to decide who should be allowed to use their work.⁴¹⁶ 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.⁴¹⁷ 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.⁴¹⁸ 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.⁴¹⁹ 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,⁴²⁰ 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

⁴¹⁵ *Evil Toddler*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/evil-toddler> [<https://perma.cc/H5RN-L9HQ>].

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).

⁴¹⁸ See ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 53–55 (2010).

⁴¹⁹ See Fromer, *Expressive Incentives*, *supra* note 12.

⁴²⁰ See *supra* notes 407–14 and accompanying text.

anti-Semites was, to Furie, “completely insane” and “a nightmare.”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*.”⁴²² Even further, Furie forewent economic opportunities by ceasing to sell Pepe merchandise to avoid it being worn by groups he found hateful.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.



2. *The Worry of Selective Silencing*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—

⁴²¹ Matt Furie, *Pepe the Frog’s Creator: I’m Reclaiming Him. He Was Never About Hate*, TIME (Oct. 13, 2016), <https://time.com/4530128/pepe-the-frog-creator-hate-symbol> [https://perma.cc/R5E2-GGNU].

⁴²² *Id.* Not dissimilar is the pain actress Cindy Lee Garcia felt after her lines spoken in a film—*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).

⁴²³ See Sam Thielman, *Matt Furie on Life After Pepe the Frog: ‘You Have to Lead by Example,’* GUARDIAN (Oct. 29, 2020), <https://www.theguardian.com/books/2020/oct/29/matt-furie-on-life-after-pepe-the-frog-lead-by-example-mindviscosity> [https://perma.cc/7S7L-CJ77]. This is not the only meme adopted by the alt-right. Alt-right groups have also adopted brands, such as Fred Perry (for shirts), that quickly disowned them. Jon Jackson, *Marvel’s Punisher Problem*, NEWSWEEK (Mar. 10, 2021), <https://www.newsweek.com/marvels-punisher-problem-1574579> [https://perma.cc/UBN2-5EWA].

⁴²⁴ Jon Stewart, KNOW YOUR MEME, <https://knowyourmeme.com/memes/people/jon-stewart> [https://perma.cc/W9MC-7Y7V].

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.⁴²⁵ This circumstance creates worries heretofore generally unseen in copyright law, principally to free speech values.



a. Nearly Everyone Gets to Use a Meme⁴²⁶

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.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.

⁴²⁵ See *supra* Sections I.F, III.H.

⁴²⁶ *Thanks for Coming to My TED Talk*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/thanks-for-coming-to-my-ted-talk> [<https://perma.cc/ZT88-7NV9>].

⁴²⁷ See *supra* Part II.



b. Except a Select Few⁴²⁸

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,⁴²⁹ Donald Trump, various pro-Trump memists, and alt-right figures.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.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

⁴²⁸ *Shut the Fuck Up, Liberal, KNOW YOUR MEME*, <https://knowyourmeme.com/memes/shut-the-fuck-up-liberal> [<https://perma.cc/TDC3-WKLH>].

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

⁴³⁰ E.g., *Lawsuit Against Carpe Donktum over Pro-Trump Meme Dismissed*, POST MILLENNIAL (July 9, 2021), <https://thepostmillennial.com/lawsuit-against-carpe-donktum-over-pro-trump-meme-dismissed> [<https://perma.cc/S3CM-74LX>].

⁴³¹ See *supra* Section II.C.1.

and safeguards.”⁴³² Copyright not only plays a role in “spurring the creation and publication of new expression,”⁴³³ but as the Court has explained, there are also “First Amendment protections already embodied” in copyright law.⁴³⁴ 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.’”⁴³⁵ 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.”⁴³⁶

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.⁴³⁷ 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,⁴³⁸ 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 are⁴³⁹—and because they serve as ideas in critical ways—which ought to be unprotectable by copyright⁴⁴⁰—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

⁴³² *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

⁴³³ *Id.*

⁴³⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

⁴³⁵ *Id.* at 556 (alteration in original) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).

⁴³⁶ *Eldred*, 537 U.S. at 219–20; *accord Golan v. Holder*, 565 U.S. 302, 327–30 (2012).

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 EMORY 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.

currency.⁴⁴¹ 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.”⁴⁴²

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 rejiggering copyright law to put it in better accordance with meme culture and free speech values.

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 MEMES⁴⁴³

As we have shown, memes depart from several of the most basic pillars of copyright theory.⁴⁴⁴ 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.⁴⁴⁵ 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.⁴⁴⁶ 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

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 emblemize.



A. *Traditional Works Can Be Like Memes*⁴⁴⁷

Traditional works fit copyright's foundational assumptions much better than memes do.⁴⁴⁸ 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,

⁴⁴⁷ *They're the Same Picture*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/theyre-the-same-picture> [<https://perma.cc/L8TA-RMXW>].

⁴⁴⁸ See *supra* Part I.

themes, and allusions that characterize the literary tradition,⁴⁴⁹ the history of art,⁴⁵⁰ music,⁴⁵¹ and many other creative practices.⁴⁵² 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*,⁴⁵³ which reimaged through the lens of race Manet's *Olympia*,⁴⁵⁴ whose meaning in turn depended on its reference to Titian's *Venus of Urbino*,⁴⁵⁵ which in turn had drawn on Giorgione's *Sleeping Venus*.⁴⁵⁶ 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."⁴⁵⁷ 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."⁴⁵⁸

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).

⁴⁵³ Mickalene Thomas, *A Little Taste Outside of Love*, BROOKLYN MUSEUM (2007), <https://www.brooklynmuseum.org/opencollection/objects/5044> [<https://perma.cc/Q2JK-EC27>].

⁴⁵⁴ Édouard Manet, *Olympia*, PBS: FLASHPOINTS (1865), https://www.pbs.org/wgbh/cultureshock/flashpoints/visualarts/olympia_a.html [<https://perma.cc/9LAJ-VMWW>].

⁴⁵⁵ Titian, *Venus of Urbino*, LE GALLERIE DEGLI UFFIZI (1538), <https://www.uffizi.it/en/artworks/venus-urbino-titian> [<https://perma.cc/5ZWW-KVLW>].

⁴⁵⁶ Giorgione, *The Sleeping Venus*, WIKIART (1508–1510), <https://www.wikiart.org/en/giorgione/the-sleeping-venus-1510> [<https://perma.cc/U86J-B3L8>].

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.



Mickalene Thomas, *A Little Taste Outside of Love*⁴⁵⁹ (left); Édouard Manet, *Olympia*⁴⁶⁰ (right)



Titian, *Venus of Urbino*⁴⁶¹ (left); Giorgione, *Sleeping Venus*⁴⁶² (right)

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.⁴⁶³ Ronson shows how it gave birth to a lineage of songs, including music by Snoop Dogg, the Notorious B.I.G., and Miley Cyrus.⁴⁶⁴

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

⁴⁵⁹ *Id.*

⁴⁶⁰ Manet, *supra* note 454.

⁴⁶¹ Titian, *supra* note 455.

⁴⁶² Giorgione, *supra* note 456.

⁴⁶³ See Mark Ronson, TED TALK, *How Sampling Transformed Music* (Mar. 2014), https://www.ted.com/talks/mark_ronson_how_sampling_transformed_music [<https://perma.cc/M76A-B9ZB>].

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

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*).

⁴⁶⁶ See generally Devon Ivie, *The Ongoing History of Musicians Saying 'Hell No' to Donald Trump Using Their Songs*, VULTURE, <https://www.vulture.com/article/the-history-of-musicians-rejecting-donald-trump.html> [<https://perma.cc/NL23-V4LD>].

⁴⁶⁷ See Arlen W. Langvardt, *Musicians, Politicians, and the Forgotten Tort*, 27 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 429, 431, 433 (2017).

⁴⁶⁸ E.g., Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010); Browne v. McCain, 611 F. Supp. 2d 1062 (C.D. Cal. 2009).

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).

⁴⁷¹ See Al Roundtree, Note, *Graffiti Artists "Get Up" in Intellectual Property's Negative Space*, 31 CARDOZO ARTS & ENT. L.J. 959, 964, 981 (2013) (discussing the reasons behind and norms associated with painting over previously existing graffiti).

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

⁴⁷³ *Id.*

work.⁴⁷⁴ 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.”⁴⁷⁵



B. Memes as a Paradigm of a New Model of Creativity⁴⁷⁶

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.⁴⁷⁷ 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.⁴⁷⁸ 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.

⁴⁷⁶ *The Future Is Now, Old Man*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/the-future-is-now-old-man> [<https://perma.cc/EZA7-X55K>].

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.⁴⁷⁹ 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.⁴⁸⁰ Digital marketers, well aware of this shift, emphasize visual content to exploit the power and speed of visual images.⁴⁸¹ While legal scholars track the explosion of content in the attention economy and the emergence of “cheap speech,”⁴⁸² 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.⁴⁸³

Second, consider that copying, the foundation of meme culture,⁴⁸⁴ 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.⁴⁸⁵ But now in digital culture, the role of copying in

⁴⁷⁹ See *supra* Sections II.A–B.

⁴⁸⁰ See Gerald C. Kane & Alexandra Pear, *The Rise of Visual Content Online*, MIT SLOAN MGMT. REV. (Jan. 4, 2016), <https://sloanreview.mit.edu/article/the-rise-of-visual-content-online> [<https://perma.cc/5KYPST2U>].

⁴⁸¹ E.g., Linette Fonseca, *Visual Content vs Text: Visual Content Is Worth a Thousand Words*, MARKITORS (Aug. 23, 2018), <https://markitors.com/visual-content-vs-text-communication> [<https://perma.cc/X4H2-BKX4>]; Kai Tomboc, *Text vs. Images: Which Content Format Is Effective?*, EASEL.Y (May 30, 2019), <https://www.ease.ly/blog/text-vs-images-which-content-format-effective> [<https://perma.cc/9Z76-BXB3>] (citing Anne Trafton, *In the Blink of an Eye*, MIT NEWS (Jan. 16, 2014), <https://news.mit.edu/2014/in-the-blink-of-an-eye-0116> [<https://perma.cc/55WQ-2QNL>] (describing an MIT study finding that the brain can identify images seen for as little as thirteen milliseconds)).

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.⁴⁸⁶ 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.⁴⁸⁷ 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.⁴⁸⁸ Memes in this sense are just the tip of the iceberg.

We are now overwhelmed by images and information.⁴⁸⁹ 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.⁴⁹⁰

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.”⁴⁹¹ Moreover, artists have always tried to depict our world, and our world now looks like Google Images.⁴⁹² 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.⁴⁹³ Let’s return to hip hop.⁴⁹⁴ Mark Ronson, who explores the history of sampling, describes the pivotal role copying technology played in the birth of this art form, explaining

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[ing] 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.⁴⁹⁵ 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.”⁴⁹⁶

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.⁴⁹⁷ And it has leveled the playing field for creativity.⁴⁹⁸ 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.⁴⁹⁹

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 visibility, 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

⁴⁹⁵ Ronson, *supra* note 463, at 06:00.

⁴⁹⁶ *Id.* at 05:15.

⁴⁹⁷ Cf. Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 581 (1964) (calling the readymade “a contribution to artists’ materials, as oil paint was”).

⁴⁹⁸ For example, see the proliferation of music software now available for free. See, e.g., Daryl Baxter, *The Best Free Music-Making Software 2022*, TECHRADAR (Dec. 13, 2021), <https://www.techradar.com/best/free-music-making-software> [<https://perma.cc/VDE6-B2JP>] (discussing free music software competing with expensive professional alternatives).

⁴⁹⁹ *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).⁵⁰⁰ Some popular dances (often called “dance challenges,”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.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.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.”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.”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-

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/LFY4CVU5>]. 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. IRVINE L. REV. (forthcoming 2022).

⁵⁰¹ Moore & Haasch, *supra* note 500.

⁵⁰² *Id.*; Cat Zhang, *The Latest TikTok Trend Is . . . Vietnamese Music About the Countryside?*, PITCHFORK (Aug. 5, 2021), <https://pitchfork.com/thepitch/the-latest-tiktok-trend-is-vietnamese-music-about-the-countryside> [<https://perma.cc/C8BQ-3F9C>].

⁵⁰³ See Charlotte Barnett, *How the Obsession with TikTok Dances Spilled out of the App and into the World*, OBSERVER (Jan. 29, 2020), <https://observer.com/2020/01/tiktok-dance-moves-choreography-history> [<https://perma.cc/8FAW-CQXB>] (discussing TikTok dance choreography that focuses on the upper body and simplistic, easy-to-learn movements); Siobhan Burke, *What Makes a TikTok Dance Go Viral?*, DANCE MAG. (Dec. 27, 2020), <https://www.dancemagazine.com/popular-tiktok-dances-2649519038.html> [<https://perma.cc/HTV6-Q7ST>] (noting that simplistic dances and exaggerated facial expressions contribute to a TikTok dance’s popularity); Koh Ewe, *Yes, TikTok Dances All Look the Same. Here’s Why.*, VICE (Apr. 14, 2021), <https://www.vice.com/en/article/4avgmm/why-tiktok-dances-look-same> [<https://perma.cc/3ERJ-H5GF>] (observing the simplicity, energy, and personality common to trendy TikTok dances).

⁵⁰⁴ Ewe, *supra* note 503 (quoting dancer Rhiam Bichri).

⁵⁰⁵ *Id.* (quoting dance instructor Nika Kermani).

bution harder than in traditional spaces.⁵⁰⁶ Even so, popular TikTokers can make substantial money not directly from their creative content but from being paid to post sponsored content.⁵⁰⁷

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.⁵⁰⁸ Perhaps the most successful has been *Ratatouille the Musical*, based on the 2007 Disney-Pixar animated film *Ratatouille* about Remy, a Parisian rat who dreams of becoming a chef. The crowdsourced musical version began on TikTok with *Le Festin*, a song from the *Ratatouille* movie soundtrack, frequently used as background in users' cooking videos.⁵⁰⁹ A parody version of the song—featuring nonsensical

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?,"* 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, *Jimmy Fallon Addresses His TikTok Dance Segment with Addison Rae. Here's Why It Sparked Backlash,* 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, *The TikToker Who Created the Viral "Savage" Dance Is Copyrighting the Moves,* 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.

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, *TikTok Music & Royalties: How Does It Work?,* 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.

⁵⁰⁸ See Laura Wheatman Hill, *What's The Deal With All These TikTok Musical?,* 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 *Grocery Store: The Musical* and *Ratatouille the TikTok musical*, and asking whether this phenomenon is “the future of content creation”); see, e.g., Jeff Lunden, *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 *Bridgerton* that went viral on TikTok).

⁵⁰⁹ Rebecca Alter, *Broadway Is Closed, but Ratatouille the Musical Is Cooking on TikTok,* VULTURE (Nov. 19, 2020), <https://www.vulture.com/2020/11/ratatouille-musical-tiktok.html> [<https://perma.cc/EMC5-7GXZ>].

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.”⁵¹⁰ 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.⁵¹¹ TikTok user Daniel Mertzluft then adapted the song into an all-out Broadway number with arrangement and orchestration.⁵¹² 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.⁵¹³ 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.⁵¹⁴ 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.⁵¹⁵ Other TikTok users created songs that went beyond

⁵¹⁰ *Id.*; see, e.g., JoKo entertainment, *CEO of Speaking French (Ratatouille) TikTok TREND COMPILATON — FAILS, YOUTUBE* (May 17, 2020), <https://www.youtube.com/watch?v=3WIC2ybFjkY> [<https://perma.cc/V32S-KARE>] (YouTube compilation of these TikTok videos).

⁵¹¹ Alter, *supra* note 509; Emily Jacobsen (@e_jaccs), TIKTOK (Aug. 8, 2020), https://www.tiktok.com/foryou?referer_url=https%3A%2F%2Fcdn.embedly.com%2F&referer_video_id=6859521038418447622&refer=embed&is_copy_url=1&is_from_webapp=v1&item_id=6859521038418447622#@e_jaccs/video/6859521038418447622 [<https://perma.cc/U89K-W6JM>].

⁵¹² Alter, *supra* note 509; Daniel Mertzluft (@danieljmertzluft), TIKTOK (Oct. 19, 2020), <https://www.tiktok.com/@danieljmertzluft/video/6885475193410620678?refer=embed> [<https://perma.cc/Y96G-F9DK>].

⁵¹³ Alter, *supra* note 509; see, e.g., Shoebox Musicals (@shoeboxmusicals), TIKTOK (Oct. 21, 2020), <https://www.tiktok.com/@shoeboxmusicals/video/6886267112373947653?refer=embed> [<https://perma.cc/GP5D-XZR5>] (set design); Nic (@still_nic), TIKTOK (Nov. 15, 2020), https://www.tiktok.com/@still_nic/video/6895476547000585477?refer=embed [<https://perma.cc/HY5X-8J45>] (cast party); Tristan McIntyre (@tristanmichaelmcintyre), TIKTOK (Nov. 13, 2020), <https://www.tiktok.com/@tristanmichaelmcintyre/video/6894839741158608134?refer=embed> [<https://perma.cc/6K2T-SELW>] (choreography); Jess Siswick (@siswij), TIKTOK (Nov. 14, 2020), <https://www.tiktok.com/@siswij/video/6894854586293669126?refer=embed> [<https://perma.cc/L96A-9994>] (playbill); Morgaine (@morgainemade), TIKTOK (Nov. 16, 2020), <https://www.tiktok.com/@morgainemade/video/6895753331688426753?lang=EN> [<https://perma.cc/S3JG-T7VJ>] (makeup).

⁵¹⁴ Alter, *supra* note 509; Acacia (@acaciapressley), TIKTOK (Oct. 29, 2020), <https://www.tiktok.com/@acaciapressley/video/6889238341120789766?refer=embed> [<https://perma.cc/Z2CP-W5WT>].

⁵¹⁵ Alter, *supra* note 509; Emily Maskell, *A Complete Guide to the 'Ratatouille' TikTok Musical*, PAPER (Nov. 26, 2020), <https://www.papermag.com/a-complete-guide-to-the-ratatouille-tiktok-musical-2649046202.html> [<https://perma.cc/35P5-5KHX>] (publishing an act-by-act guide to the musical's songs); see, e.g., Rocky Paterra (@rockysroad), TIKTOK

the film, such as a song adopting the view of Remy's mother, a character that does not appear in the movie.⁵¹⁶ Then Broadway actors began performing these songs online.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 charity⁵¹⁸ and was reviewed in traditional media outlets like the *Chicago Tribune*.⁵¹⁹ Not only did Disney not use copyright to challenge these works, but it supported the charity performance.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.⁵²¹ Sea shanties are folk songs that typically have lyrics about whaling, winds, and harpoons.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

(Oct. 28, 2020), <https://www.tiktok.com/@rockysroad/video/6888784128276286725?refer=embed> [<https://perma.cc/G2VZ-YUQE>] (Lin-Manuel Miranda parody).

⁵¹⁶ Maskell, *supra* note 515.

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).

⁵¹⁸ *Ratatouille: The TikTok Musical*, <https://ratatousical.com> [<https://perma.cc/4QE4-GKUM>]; see also *TikTok's Ratatouille: The Musical Makes It to Broadway and Streams on TikTok*, TIKTOK (Jan. 8, 2021), <https://newsroom.tiktok.com/en-us/tiktok-ratatouille-the-musical-makes-it-to-broadway-and-streams-on-tiktok> [<https://perma.cc/6DA2-3MEH>].

⁵¹⁹ E.g., Michael Phillips, *Even with One Composer Missing, Here's Why 'Ratatouille: The TikTok Musical' Points Straight to Broadway*, CHI. TRIB. (Jan. 2, 2021), <https://www.chicagotribune.com/entertainment/movies/michael-phillips/ct-mov-ratatouille-tiktok-0104-20210102-4rkqjwllffewbln6ocpyrow4ki-story.html> [<https://perma.cc/B2ET-7A8A>].

⁵²⁰ Greg Evans, 'Ratatouille: The TikTok Musical': How Broadway Cooked up the Perfect Appetizer for a New Year That Can't Start Soon Enough, DEADLINE (Jan. 1, 2021), <https://deadline.com/2021/01/ratatouille-tiktok-musical-benefit-disney-seaview-emily-jacobsen-tituss-burgess-actors-fund-1234663746> [<https://perma.cc/WDE8-5HJK>].

⁵²¹ *Sea Shanty TikTok*—@nathanevanss, TIKTOK (Jan. 25, 2021), <https://newsroom.tiktok.com/en-gb/sea-shanty-tiktok-nathanevanss> [<https://perma.cc/Y59C-TFXE>]; see also Rebecca Renner, *Everyone's Singing Sea Shanties (or Are They Whaling Songs?)*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/style/sea-shanty-tiktok-wellerman.html> [<https://perma.cc/845L-7VAB>].

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>].

performing a sea shanty, and even an electronic dance music version of this new shanty genre.⁵²³ Famous musicians got involved, with Sir Andrew Lloyd Webber layering his piano playing atop, and boy bands harmonizing with, Evans's performance.⁵²⁴

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.”⁵²⁵ 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.”⁵²⁶ 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.⁵²⁷ 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.⁵²⁸

⁵²³ E.g., Jason Heffler, *Here’s an EDM Remix of the Viral “Wellerman” TikTok Sea Shanty—and It’s Actually a Banger*, EDM (Jan. 15, 2021), <https://edm.com/music-releases/viral-wellerman-tiktok-sea-shanty-electronic-dance-music-remix> [<https://perma.cc/CN24-MKYD>]; @artmonkeyworld, TIKTOK (Jan. 11, 2021), <https://www.tiktok.com/@artmonkeyworld/video/6916564331928866054?lang=EN> [<https://perma.cc/A67Q-N5FY>] (Kermit sea shanty); Argules, *ARGULES – Wellerman (sea shanty) TikTok BUMP HOUSE Remix*, YOUTUBE (Jan. 7, 2021), <https://www.youtube.com/watch?v=ZDTaeqUEWNQ> [<https://perma.cc/5TMX-5VVW>] (sea shanty remix); see also Renner, *supra* note 521 (contextualizing the TikTok sea shanty phenomenon within history and modern-day life); VanArendonk, *supra* note 522.

⁵²⁴ *Shanty TikTok—@nathanevanss*, *supra* note 521; Andrew Lloyd Webber (@officialalw), TIKTOK (Jan. 18, 2021), https://www.tiktok.com/@officialalw/video/6919061058825063682?referer_url=https%3A%2F%2Fnewsroom.tiktok.com%2Fen-gb%2Fsea-shanty-tiktok-nathanevanss&referer_video_id=6919061058825063682&refer=embed [<https://perma.cc/WCD3-EKLL>] (Sir Andrew Lloyd Webber TikTok); Gary Barlow (@officialgarybarlow), TIKTOK (Jan. 18, 2021), https://www.tiktok.com/@officialgarybarlow/video/6919146558533422338?referer_url=https%3A%2F%2Fnewsroom.tiktok.com%2Fen-gb%2Fsea-shanty-tiktok-nathanevanss&referer_video_id=6919146558533422338&refer=embed [<https://perma.cc/3XUD-4G7V>] (boy band TikTok).

⁵²⁵ VanArendonk, *supra* note 522.

⁵²⁶ Kyle Piscioniere, *Sea Shanty TikTok Is on Fire*, SLATE (Jan. 23, 2021), <https://slate.com/culture/2021/01/sea-shanty-tiktok-wellerman-trend-explained.html> [<https://perma.cc/2JAN-Z5Z5>].

⁵²⁷ See Kerry Breen, *Why Is TikTok Obsessed with Sea Shanties? An Investigation*, TODAY (Jan. 14, 2021), <https://www.today.com/tmrw/here-why-tiktok-obsessed-sea-shanties-today-t205848> [<https://perma.cc/D344-F2SU>]; VanArendonk, *supra* note 522.

⁵²⁸ Adela Suliman, Kelly Cobiella & Kiko Itasaka, *TikTok Star Behind ‘Wellerman’ Sea Shanty Craze Quits Job as Mailman*, NBC NEWS (Jan. 24, 2021), <https://www.nbcnews.com/>

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.”⁵²⁹ 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”).⁵³⁰ Pinterest has users curating and sharing theme boards of everything from their favorite pink dresses to interior design to architecture details and wedding photos.⁵³¹ 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.⁵³² Twitch has users streaming aspects of their lives, including video game play, to others watching and interacting in real time.⁵³³ DeviantArt is a social network set up to share user artwork.⁵³⁴ 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

news/world/tiktok-star-behind-wellerman-sea-shanty-craze-quits-job-mailman-n1255426 [https://perma.cc/W5MX-K2K9]. Other musicians, including Justin Bieber, Shawn Mendes, and The Weeknd, launched their professional careers by sharing their music performances online. Morgan Greenwald, *5 Artists Who Got Their Start on YouTube*, IN THE KNOW, <https://www.intheknow.com/post/5-artists-who-got-their-start-on-youtube> [https://perma.cc/5JM2-Z7GH].

⁵²⁹ Camilla Westergaard, *The Best Instagram Challenges for Makers & Why You Should Be Taking Part*, FOLKSY, <https://blog.folksy.com/2017/06/07/best-instagram-challenges> [https://perma.cc/WM4U-7FL7].

⁵³⁰ Alexandra Pauly, *What Exactly Is the Pillow Challenge Taking Over Instagram?*, HYPEBAE (Apr. 16, 2020), <https://hypebae.com/2020/4/pillow-challenge-instagram-social-media-trend-quarantine-home-fashion-pillowcase-explained> [https://perma.cc/GFD8-BXP6]; Westergaard, *supra* note 529.

⁵³¹ *E.g.*, *Top 11 Pinterest Boards*, NEOREACH (June 14, 2019), <https://neoreach.com/top-pinterest-boards> [https://perma.cc/LH79-39RT]; *Pink Dresses*, PINTEREST, <https://www.pinterest.com/dressforwedding/pink-dresses> [https://perma.cc/VU2X-2XS7]; *see also* Amanda Fortini, *How Pinterest Became a Booming Factory for Creativity*, WIRED (July 22, 2014), <https://www.wired.com/2014/07/pinterest-creativity> [https://perma.cc/K7BG-FCED] (describing Pinterest, which allows users to curate their user experience to support their creative hobbies).

⁵³² *See* MEDIUM, <https://medium.com> [https://perma.cc/6VJM-TTPE] (“Medium is a place to write, read, and connect.”); TUMBLR, <https://www.tumblr.com> [https://perma.cc/63ZR-44LB] (“Make stuff, look at stuff, talk about stuff, find your people.”).

⁵³³ *See* TWITCH, <https://www.twitch.tv> [https://perma.cc/DJD6-VARY].

⁵³⁴ DEVIANTART, <https://www.deviantart.com> [https://perma.cc/Z9Q2-SRRQ].

publication or movie adaptation.⁵³⁵ 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.⁵³⁶

⁵³⁵ See WATTPAD, <https://www.wattpad.com> [<https://perma.cc/S32B-8327>] (homepage of Wattpad, describing itself as “[t]he world’s most-loved social storytelling platform”); see also Julia Alexander, *From Fanfiction to Netflix Hits*, VERGE, <https://www.theverge.com/2021/1/14/22215052/wattpad-authors-fanfiction-netflix-hulu-streaming-movies-romcom-teen-drama> [<https://perma.cc/32UW-GZXE>] (describing how Wattpad has been the launchpad for movie adaptations).

⁵³⁶ See *supra* Part III.



C. Trying to Make Memes More Like Traditional Works⁵³⁷

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.⁵³⁸ 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.”⁵³⁹ 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.⁵⁴⁰ Here we offer a novel interpretation: We see the craze for NFTs as a direct reaction to meme culture and what it represents.⁵⁴¹

As we have argued, memes encapsulate a distinctly modern condition of creativity in a world of unbounded copying. Memes proliferate

⁵³⁷ *Spiderman Pointing at Spiderman Meme Generator*, IMGFLIP, <https://imgflip.com/memegenerator/110133729/spiderman-pointing-at-spiderman> [<https://perma.cc/FLP7-8U95>].

⁵³⁸ See, e.g., Scott Reyburn, *JPG File Sells for \$69 Million, as ‘NFT Mania’ Gathers Pace*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/arts/design/nft-auction-christies-beeple.html> [<https://perma.cc/4UF2-PHV4>] (documenting the record-breaking sale of an NFT of a digital work of art for \$69 million, making it the third-highest price for a work of art sold at auction for a living artist).

⁵³⁹ Max Read, *There’s Nothing to Do Except Gamble*, N.Y. MAG. INTELLIGENCER (Apr. 12, 2021), <https://nymag.com/intelligencer/2021/04/nft-future-of-money.html> [<https://perma.cc/T926-B4S6>].

⁵⁴⁰ Mitchell Clark, *NFTs, Explained*, VERGE (Aug. 18, 2021), <https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq> [<https://perma.cc/36HR-RAKR>].

⁵⁴¹ Cf. Joshua Fairfield, *Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property*, 97 IND. L.J. (forthcoming) (manuscript at 1) (proposing a legal framework to analyze NFTs); Kal Raustiala & Christopher Jon Sprigman, *The One Redeeming Quality of NFTs Might Not Even Exist*, SLATE (Apr. 14, 2021), <https://slate.com/technology/2021/04/nfts-digital-art-authenticity-problem.html> [<https://perma.cc/86EU-FAN4>] (analyzing NFTs through the lens of status as “virtual Veblen goods”).

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 meme⁵⁴² just sold an NFT of her meme for \$500,000.⁵⁴³ In short, we see the market for NFTs as a reaction against the modern conditions of endless copying that memes emblemize.⁵⁴⁴ NFTs represent an attempt to cling to the concepts of uniqueness, originality, and authenticity in a world where those concepts no longer make sense.⁵⁴⁵ 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.⁵⁴⁶

Well before the advent of NFTs, Professor Barton Beebe described how intellectual property law created artificial scarcity in our post-rarity world.⁵⁴⁷ 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.⁵⁴⁸ 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.

⁵⁴³ Marie Fazio, *The World Knows Her as ‘Disaster Girl.’ She Just Made \$500,000 off the Meme*, N.Y. TIMES (May 1, 2021), <https://www.nytimes.com/2021/04/29/arts/disaster-girl-meme-nft.html> [<https://perma.cc/7Q55-MY4N>].

⁵⁴⁴ Amy Adler, *The Artifice of Authenticity* (Jan. 24, 2022) (unpublished manuscript) (on file with authors).

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).

⁵⁴⁷ Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 817 (2010).

⁵⁴⁸ *Id.* at 844.

norms and the market itself have superseded the role previously played by law, at least for the moment.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.



CONCLUSION⁵⁵⁰

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.

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

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.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 *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.⁵⁵² In the first few weeks of its release, it was used as the soundtrack to 300,000 TikTok videos⁵⁵³ (which have collectively been viewed over one billion times, with one video viewed over fifty million times⁵⁵⁴). It was also an unprecedented hit according to more traditional measurements⁵⁵⁵: 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.⁵⁵⁶ The flutter of TikTok creativity that resulted from cop-

⁵⁵¹ See *supra* Part IV.

⁵⁵² See Rachel E. Greenspan, Palmer Haasch, Kat Tenbarge & Moises Mendez II, ‘Drivers License’ by Olivia Rodrigo Is TikTok’s Latest Obsession. A Speculated Love Triangle Is Fueling Its Popularity., INSIDER (Jan. 25, 2021), <https://www.insider.com/drivers-license-olivia-rodrigo-lyrics-joshua-bassett-taylor-swift-tiktok-2021-1> [<https://perma.cc/TF9T-5M43>].

⁵⁵³ *Id.*

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

⁵⁵⁵ See Craig Jenkins, *Nothing Is Flattening Music Like TikTok*, 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 *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.”).

⁵⁵⁶ Tanzer, *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.⁵⁵⁷

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.

⁵⁵⁷ Greenspan et al., *supra* note 552; Jenkins, *supra* note 555; Tanzer, *supra* note 554.