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FAMOUS ON THE INTERNET: THE SPECTRUM OF INTERNET MEMES AND THE LEGAL CHALLENGE OF EVOLVING METHODS OF COMMUNICATION

Stacey M. Lantagne *

INTRODUCTION

If you are one of the many people who use social media daily, chances are you have shared copyrighted photographs, retweeted copyrighted Vines, and reblogged copyrighted GIFs, all of celebrities or anonymous people you know only through the meme itself, and you have never paid a cent to anyone.¹

Social media is a huge and profitable business, and it is often stated that much of it is based on user-generated content. Facebook, Twitter, and Tumblr are nothing without the people who upload to the sites, but social media is frequently not about the posting of content you have generated yourself, but rather the reposting of content you have seen other people post, often without the knowledge or consent of either the rights-owner or the people in the content itself.²

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1. See Adam Remsen, *A Lawyer Digs into Instagram's Terms of Use*, PETAPIXEL (Dec. 7, 2016), <https://petapixel.com/2016/12/07/lawyer-digs-instagram-terms-use/> ("Social media have so thoroughly infused our everyday lives that calling them 'ubiquitous' seems inadequate.").

2. Indeed, the terms of service of social media sites are usually set up expressly to "encourage and permit broad re-use of Content." *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 303 (S.D.N.Y. 2011) (quoting *Terms of Service, Version 5*, TWITTER (June 1, 2011), https://twitter.com/it/tos/previous/version_5); see Terence J. Lau, *Towards Zero Net Presence*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 237, 269 (2012) (discussing the lack of privacy on social media sites).

These viral re-posts and sharing of other people's forms of creativity are often called internet memes. Recent European Union digital copyright proposals have exposed the tenuous legal nature of internet memes,³ and a number of confused legal disputes have further underlined the complicated tangle of laws implicated by internet memes.⁴

The problem begins with the very definition of the word "meme," which is used to encompass an enormous gamut of behavior. Previous articles have argued that meme usage is fair use, with an implication that meme usage is a single interchangeable activity, identical in all circumstances.⁵ This article denies this simplification of meme usage, which does a disservice to the vast amount of complexity that memes represent and which might permit meme usage to swallow up copyright law (or vice versa). Instead, this article identifies the reality that meme usage on the internet falls on a spectrum from static use to mutating use and examines how this spectrum of use has implicitly affected the legal arguments surrounding certain memes. It proposes that an overt understanding of the spectrum of meme usage can aid in delineating the unique characteristics possessed by certain memes, which cause them to deserve careful protection for their societal value while simultaneously challenging existing structures of legal analysis. The article concludes by highlighting how memes can be legally analyzed along the spectrum to best account for the often-clashing interests of three communities: (1) those who use memes, (2) those who create memes, and (3) those who become memes.

3. See Chris Spillane et al., *Banned! Taking Pictures of the Eiffel Tower at Night*, POLITICO (Sept. 26, 2016, 4:03 PM), <http://www.politico.eu/article/banned-taking-pictures-of-the-eiffel-tower-at-night-copyright-law-eu/>; Mix, *Mozilla Trolls the EU's Nonsensical Copyright Laws with Classic Memes*, NEXTWEB, <https://thenextweb.com/insider/2016/09/27/mozilla-eu-copyright-law/> (last visited Nov. 15, 2017); *Help Fix Copyright: Send a Rebellious Selfie to European Parliament (Really!)*, MOZILLA BLOG (Sept. 26, 2016), <https://blog.mozilla.org/blog/2016/09/26/help-fix-copyright-send-a-rebellious-selfie-to-european-parliament-really/>.

4. See, e.g., *KYM Office of Cease & Desist Records*, KNOW YOUR MEME, <http://knowyourmeme.com/forums/q-a/topics/15676-kym-office-of-cease-and-desist-records> (last visited Nov. 15, 2017) (showing the list of cease and desist letters Know Your Meme has received for questions of copyright).

5. See, e.g., Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 256 (2013); Aaron Schwabach, *Reclaiming Copyright From the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody*, 8 BUFF. INTELL. PROP. L.J. 1, 18 (2012); see also Jeff J. Roberts, *The Copyright Law Behind a \$600M Startup and Millennials' Favorite Form of Expression*, FORTUNE (Nov. 7, 2016), <http://fortune.com/2016/11/07/giphy-gifs-copyright/>.

I. THE SPECTRUM OF MEME USAGE

“Meme” is a word used in a very expansive and often imprecise way, on the internet and off it.⁶ Even websites dedicated to keeping a scholarly historical record of memes, like Know Your Meme, do not define the term.⁷ Richard Dawkins coined the word in 1976 and originally defined it as “any ‘unit of cultural transmission’ that stays alive by ‘leaping from brain to brain.’”⁸ Internet memes have been described as “the cultural parallel of genes,” characterized by imitative behavior.⁹

Some sources seem to imply that “meme” is synonymous with internet phenomenon or viral sensation¹⁰ while others reserve “meme” for a more specific subset of internet behavior that involves pasting captions onto other people’s photos.¹¹ Know Your Meme, meanwhile, straddles in between the two, showcasing basic caption manipulation as well as viral sensations with more complicated histories.¹² Tumblr’s librarian keeps an archive of the website’s fast-moving memes, using trends in meme development to identify corresponding societal trends.¹³

Memes can be virtually anything, and text-based memes focused on particular sentence structuring are increasingly common and popular.¹⁴ However, this article focuses on the particular subset of visual memes because visual media, such as a photograph or a

6. See Shontavia J. Johnson, *Memetic Theory, Trademarks & the Viral Meme Mark*, 13 J. MARSHALL REV. INTELL. PROP. L. 96, 104, 106 (2013) (discussing the many different definitions of “meme”).

7. See *About Know Your Meme*, KNOW YOUR MEME, <http://knowyourmeme.com/about> (last visited Nov. 15, 2017).

8. Andrew Marantz, *Trolls for Trump*, NEW YORKER (Oct. 31, 2016), <http://www.newyorker.com/magazine/2016/10/31/trolls-for-trump> (quoting RICHARD DAWKINS, *THE SELFISH GENE* 206 (1976)); see also Johnson, *supra* note 6, at 101.

9. Johnson, *supra* note 6, at 100.

10. See Julia Carpenter, *Meme Librarian Is a Real Job—and It’s the Best One on the Internet*, WASH. POST (Dec. 21, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/12/21/tumblrs-meme-librarian-has-the-best-job-on-the-internet/> [hereinafter Carpenter, *Meme Librarian*].

11. See, e.g., MEME GENERATOR, <https://memegenerator.net/> (last visited Nov. 15, 2017).

12. See generally *Know Your Meme*, <http://knowyourmeme.com> (last visited Nov. 15, 2017).

13. Carpenter, *Meme Librarian*, *supra* note 10.

14. Julia Carpenter, *The Best Memes of 2015 Were All About Language Showing They Have a Deeper Meaning Than Just Being Funny*, INDEP. (Dec. 22, 2015, 10:43 GMT), <http://www.independent.co.uk/life-style/gadgets-and-tech/the-best-memes-of-2015-were-all-about-language-a6782686.html>.

drawing, are far more likely to be copyrighted and to raise a number of legal issues not necessarily implicated by text-based memes. Specifically, visual memes, more than text-based memes, cause a collision of three clashing interests: (1) those who use the meme, (2) those who created the visual image at the heart of the meme (and thus often own the legal copyright to it), and (3) those who were depicted in the visual image (and thus might have recourse to privacy or publicity rights). For the first interest, the visual internet meme is often a vital communicative tool expressing particular ideas that cannot be expressed in any other way. For the second interest, the visual internet meme can be seen as a work of their own creativity whose co-option by the internet at large is an act of infringement. For the last interest, the visual internet meme can be a violation of their privacy, resulting in severe emotional distress.

This article proposes that these visual memes are not used in one universal way but instead are used in a spectrum of ways that affect how society and the law thinks about each one. At one end of the spectrum are “static” uses of memes; at the other end of the spectrum are “mutating” uses of memes. Depending on the meme’s location on the spectrum, the different interests of these three stakeholders should gain different amounts of prominence in a legal analysis of the meme.

A. *Static Memes*

Static memes are those uses of visual images that are mere reproductions of an image without altering it in any way or imbuing it with any new meaning. In this use, nothing of recognizable value has been added to the visual image beyond the fact of the visual image itself. The visual image may be altered slightly but it remains just a posting of the visual image in the context that the image was originally intended.

A good example of a static use of a meme is the prevalence on social media of a well-known photograph of the aftermath of the World Trade Center terrorist attacks, which calls to mind the well-known photograph of United States Marines raising the American flag during the Battle of Iwo Jima in World War II.¹⁵ The posting

15. See *N. Jersey Media Grp. Inc. v. Pirro*, 74 F. Supp. 3d 605, 609 (S.D.N.Y. 2015).

of that photograph to remember 9/11 adds nothing to the photograph itself; it is the use of the photograph in the way that it was intended.¹⁶ The use of the photograph in this way communicates nothing new beyond the photograph's original context.

Another slightly different example of a static use of a meme is one in which the visual image does not communicate *anything* without an accompanying text to explain the point that the user is making. This is different from the first example, where there is indeed some instantaneous communication. A picture, after all, is frequently worth a thousand words. But in some situations, a picture is worth no words except the ones added to explain it. Take, for example, a tweet of a photograph of a bowl of Skittles. That, in and of itself, tells you not much. Maybe the user really likes Skittles? Maybe the user really hates Skittles? It is only if the photograph is juxtaposed with explanatory text that the Skittles photograph can be used to communicate something. For instance, if you tweet the photograph of a bowl of Skittles with the caption "If I had a bowl of skittles [sic] and I told you just three would kill you. Would you take a handful? That's our Syrian refugee problem,"¹⁷ the photograph about the Skittles becomes about the Syrian refugee crisis. However, *on its own*, that visual image has communicated nothing.

B. *Mutating Memes*

Static memes stand in stark contrast to mutating memes. Mutating memes are those uses of visual images that have morphed beyond their origin to act as their own form of communicative shorthand.¹⁸ The re-posting of a mutating meme does not merely re-use the image in its original context, nor does it compel the user to read further to learn the full picture. The mutating meme itself is the entire communication, a new one that has been imbued with meaning beyond that intended by the original creator, buoyed by

16. See *id.* at 610–11 (noting that the photographer immediately recognized the similarity exploited in later social media postings).

17. See Patrick Evans, *Donald Trump Jr Tweet: 'I'm a Refugee' Says Skittles Photographer*, BBC NEWS (Sept. 20, 2016), <http://www.bbc.com/news/world-us-canada-37421886>; Daniel White, *Donald Trump Jr.'s Skittles Meme Was Taken Down Thanks to a Copyright Claim*, TIME (Sept. 28, 2016), <http://time.com/4511789/donald-trump-jr-skittles-image-removed>.

18. See Olivia Solon, *Richard Dawkins on the Internet's Hijacking of the Word 'Meme'*, WIRED (June 20, 2013), <http://www.wired.co.uk/article/richard-dawkins-memes>.

the collaborative creativity of its replication through varied internet communities, all of them adding their own stamp and commentary.¹⁹ A mutating use of a meme is a very different creature from the static uses described above, such that it makes little sense to treat them as legally the same thing. Mutating memes may be “copied,” but this act of copying is actually a mutation (or an evolution) rather than an exact replica.²⁰

Take, for example, Pepe the Frog.²¹ Pepe originated in a comic strip.²² In this original guise, it “embodie[s] the philosophy of ‘Feels good man.’”²³ It then became a classic mutating meme, evolving to represent instead a variety of emotions, from sadness to smugness.²⁴ The meme was so pervasive and popular that a group of people decided to undercut its popularity by associating it with unsavory things.²⁵ Arguably, these people were “ironically” associating Pepe with white supremacy, but soon, genuine white supremacists co-opted the meme to be a symbol for white supremacy,²⁶ at which point they began posting it online; it was then shared by Donald Trump, Jr.²⁷ Pepe the Frog was then declared a hate symbol by the Anti-Defamation League, ranking it among swastikas.²⁸ This is a long journey from Pepe’s humble beginnings. The creator of Pepe the Frog, who had been silent during most of the meme life

19. See Caitlin Dewey, *How Copyright Is Killing Your Favorite Memes*, WASH. POST (Sept. 8, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/?utm_term=.98966469c8a6 (“[Memes are] the cornerstone of a thriving, mash-up culture, one that transforms even the most staid nature photography into commentaries on politics, technology and modern life”); Patel, *supra* note 5, at 252.

20. See Johnson, *supra* note 6, at 100.

21. See *Pepe the Frog*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/pepe-the-frog> (last visited Nov. 15, 2017).

22. See *id.*; see also Tod Perry, #ImWithKer Aims to Fight Racist Pro-Trump Memes, DAILY GOOD (Oct. 3, 2016), <https://www.good.is/articles/im-with-ker>; Aja Romano, *How Pepe the Frog and Dilbert Explain the Culture Wars of the 2016 Election, in One Comic*, VOX (Oct. 25, 2016, 9:30 AM), <http://www.vox.com/culture/2016/10/25/13341168/pepe-the-frog-alt-right-scott-adams> [hereinafter Romano, *Culture Wars*].

23. See Perry, *supra* note 22.

24. *Id.*

25. Olivia Nuzzi, *How Pepe the Frog Became a Nazi Trump Supporter and Alt-Right Symbol*, DAILY BEAST (May 26, 2016, 1:00 AM ET), <http://www.thedailybeast.com/how-pepe-the-frog-became-a-nazi-trump-supporter-and-alt-right-symbol>.

26. See Romano, *Culture Wars*, *supra* note 22.

27. See Perry, *supra* note 22; Romano, *Culture Wars*, *supra* note 22.

28. Sheena Goodyear, *Pepe the Frog Joins Swastika and Klan Hood in Anti-Defamation League’s Hate Symbol Database*, CBC NEWS (Oct. 5, 2016, 5:23 PM ET), <http://www.cbc.ca/news/world/pepe-the-frog-hate-symbol-adl-1.3782035>; see Perry, *supra* note 22; Romano, *Culture Wars*, *supra* note 22.

of his illustration, intended Pepe as an entertaining character for teenagers.²⁹ Instead, Pepe has now come to represent “hate speech and bigotry.”³⁰

Pepe has clearly evolved far beyond the original context of the comic strip and has become its own form of communication. In fact, Pepe is basically functioning as a “word” in and of itself, sufficient to stand on its own to communicate a message. You do not need to know more. Pepe, if you speak “meme,” tells you a lot. And if you do not speak “meme,” you can really run afoul by using Pepe in the wrong way.

Pepe is an extreme example of how mutating uses of memes can morph visual images into something completely different and new from what they started as.³¹ A less extreme example of this would be the Socially Awkward Penguin meme.³² This meme began life as a photograph of a penguin.³³ For reasons known only to the internet, it then morphed into a medium for communicating social awkwardness.³⁴ Like Pepe the Frog, only on a less extreme level, the Socially Awkward Penguin became, to someone in the know, a means of communicative shorthand to be used in conversation with others. It even developed its own conversational reply meme: Socially Awesome Penguin.³⁵ Importantly, the photographer of the penguin did not intend the penguin to stand as a symbol of social awkwardness. Unlike the use of the 9/11 photograph, the penguin photograph, like Pepe, has been completely removed from its orig-

29. See Sean T. Collins, *The Creator of Pepe the Frog Talks About Making Comics in the Post-Meme World*, VICE (July 28, 2015, 3:00 PM), https://www.vice.com/en_us/article/avy3aj/feels-good-man-728 (identifying the subject matter of Matt Furie’s Pepe comics as “simultaneously satiriz[ing] and celebrat[ing] the lifestyle of 20-something bros, capturing their lives full of junk food, catchphrases, and bodily fluids with horrifying and hilarious accuracy”); Matt Fusie, *Pepe the Frog’s Creator: I’m Reclaiming Him. He was Never About Hate*, TIME: IDEAS (Oct. 13, 2016), <http://time.com/4530128/pepe-the-frog-creator-hate-symbol/> (identifying Pepe’s fanbase as “mostly kids, teens and college-dwellers”); *Pepe the Frog*, *supra* note 21.

30. Romano, *Culture Wars*, *supra* note 22.

31. See Furie, *supra* note 29 (“Pepe the Frog spent years mutating online into the many-faced Mickey Mouse God of the Internet. . . . To zillions of people, mostly kids, teens and college-dwellers, it meant many things . . .”).

32. See *Socially Awkward Penguin*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/socially-awkward-penguin> (last visited Nov. 15, 2017).

33. See *id.*

34. See *id.*

35. See *Socially Awesome Penguin*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/socially-awesome-penguin> (last visited Nov. 15, 2017).

inal context and imbued with an additional (and, indeed, unexpected) meaning. And, like Pepe, this new meaning was the end result not of a single mastermind, but of a collaboration across communities on the internet.³⁶

A final, slightly different example of a mutating use of a meme involved Kimberly Wilkins, who was interviewed for a local news report.³⁷ The news report was uploaded to YouTube, where it went viral.³⁸ It was made into a GIF and promptly moved to Tumblr, Twitter, and Facebook, where it morphed into a mutating meme through the use of endless replication and use, becoming a communicative shorthand employed in conversation.³⁹ Eventually, someone wrote a song that remixed the phrases she became famous for in the viral video.⁴⁰ The mutation here is a less abstract example than in the previous two examples, which focused on mutating meanings and instead is mutating on a more literal level. Wilkins's catchphrase ("Ain't nobody got time for that") retained its meaning; its medium was what mutated.

II. MEMES AND THE LAW SO FAR

While visual memes have generated a fair amount of legal squabbling, there has not been much legal precedent involving them yet. The abbreviated legal record dealing with memes, however, illustrates the number of differing interests clashing over the use of visual memes. It also illustrates how a lack of acknowledgment of the spectrum of meme usage has led to scattershot legal understanding of how memes are functioning on the internet.

36. See *Socially Awkward Penguin*, *supra* note 32.

37. See *Sweet Brown/Ain't Nobody Got Time for That*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/sweet-brown-aint-nobody-got-time-for-that> (last visited Nov. 15, 2017).

38. See Lucasmarr, *Sweet Brown: No Time for Bronchitis*, YOUTUBE (Apr. 9, 2012), <https://www.youtube.com/watch?v=JaAd8OuwWpk>.

39. See *Sweet Brown/Ain't Nobody Got Time for That*, *supra* note 37; see, e.g., Wayward penguinchopshop (@waywardpenguinchopshop), TUMBLR (Dec. 13, 2016), <http://waywardpenguinchopshop.tumblr.com/post/154439452758>; *Ain't Nobody Got Time for That*, FACEBOOK, <https://www.facebook.com/aintnobodygottimeforthat25/> (last visited Nov. 15, 2017); Sweet Brown (@realsweetbrown), TWITTER, <https://twitter.com/realsweetbrown?lang=en> (last visited Nov. 15, 2017).

40. See Randomfilms, *I Got Bronchitis (Music Video) feat. Sweet Brown*, YOUTUBE (June 29, 2012), <https://www.youtube.com/watch?v=om5Y2GBbZg0>.

A. *Memes and Intellectual Property*

One of the first bodies of law implicated in visual meme disputes, unsurprisingly, has been intellectual property law.⁴¹ However, copyright law has always been tricky to apply in the computer context,⁴² and internet memes are no different. Especially problematic is the fact that memes can frequently seem like nothing more than ideas, which have a long history in copyright law as unprotected.⁴³ But ideas are appearing in a new medium that challenges the applications of the old doctrines.⁴⁴ The flourishing of meme culture seems to exist in direct opposition to the tradition of copyright law.⁴⁵

Copyright protection has never been absolute. Rather, there are a number of situations where use of an otherwise copyrighted work is appropriate without permission of the original copyright holder. Looming large among these is fair use, a judicially created doctrine that evaluates a number of factors to determine if a certain use of a work is permitted.⁴⁶ The factors of a copyright fair use analysis seem at home when applied to static memes but do a poor job of capturing the full value of mutating memes.⁴⁷ Without an open acknowledgment of the many different things memes are used to accomplish, cases risk simplifying memes into a single type of use.

41. See *KYM Office of Cease & Desist Records*, *supra* note 4 (listing cease and desist orders filed against Know Your Meme for copyright violations).

42. See *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1354 (Fed. Cir. 2014); *Agence France Presse v. Morel*, No. 10-cv-2730 (AJN), 2015 U.S. Dist. LEXIS 189008, at *10–11 (S.D.N.Y. Mar. 23, 2015).

43. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

44. See Tonya M. Evans, *User “Safe Harbor” from Statutory Damages: Remixing the DOC’s IP Task Force White Paper*, 54 SAN DIEGO L. REV. 79, 82–83 (2017) (discussing how commonly accepted uses of works on the internet may be copyright infringement); see also Aja Romano, *Plagiarism Claims Against BuzzFeed Video: A Complicated Tale of Originality on the Internet*, VOX (July 14, 12:00 PM EDT), <https://www.vox.com/2016/7/14/12072552/buzzfeed-video-akilah-hughes-plagiarism-accusations-explained> (highlighting accusations against BuzzFeed for stealing ideas for its videos from other people’s videos on the internet) [hereinafter Romano, *Plagiarism Claims Against BuzzFeed Video*].

45. See Evans, *supra* note 44, at 82–83; Romano, *Plagiarism Claims Against BuzzFeed Video*, *supra* note 44.

46. See Stacey M. Lantagne, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. & TECH. L. REV. 263, 285 (2015).

47. Cf. Schwabach, *supra* note 5, at 24 (arguing certain “transformative” works do not violate copyright and are considered fair use).

For instance, the court in *North Jersey Media Group Inc. v. Pirro*⁴⁸ applied a fair use analysis in the copyright infringement case over Fox News's Facebook post of the previously discussed photograph of 9/11.⁴⁹ Fox News's main argument was that it used the photograph on social media to participate in a "global conversation taking place on social media that day," and so that use should be treated differently from other uses of a photograph.⁵⁰ In effect, Fox News seemed to be arguing that "memage," in and of itself, is a transformative use that fair use should protect. Commentators seemed to agree by referring to the photograph as a "meme."⁵¹ But to characterize it that way ignores the complex spectrum of meme usage that exists. And, even more troubling, it ignores the fact that Fox News's use of the photograph was a particularly static example of meme usage. Arguing for a single meme exception is both inappropriate and dangerous when a static meme is used to represent all memes.

The district court was hesitant to accept Fox News's premise of how it used the meme. The district court found a genuine question of material fact and appeared to conclude that Fox News may have used the meme to engage with its constituents in a way that would earn it more profits, making its use commercial and thus, in fair use jurisprudence, less likely to be protected by the courts.⁵² The court was skeptical that Fox News's use of the photograph was transformative.⁵³ This makes sense, since Fox News's use was a static use. Fox News merely posted the original photograph, adding a hashtag phrase.⁵⁴ Because it was a static meme, the value seemed to be in the use of the photograph itself. There was no additional value being added by Fox News. The court was concerned that allowing Fox News's use of the photograph would gut the licensing market for photographs on the internet.⁵⁵ Again, this conclusion makes sense in the context of Fox News's static use of a

48. 74 F. Supp. 3d 605 (S.D.N.Y. 2015).

49. *See id.* at 611, 613–14.

50. *Id.* at 611.

51. *See, e.g.,* Rebecca Tushnet, *Fox Hurts America Yet Again, Losing Fair Use SJ Motion*, TUSHNET.COM (Feb. 13, 2015), <https://tushnet.com/2015/02/13/fox-hurts-america-yet-again-losing-fair-use-sj-motion/>.

52. *See N. Jersey Media Grp.*, 74 F. Supp. 3d at 618.

53. *Id.* at 617.

54. *See id.* at 611.

55. *Id.* at 622. This, indeed, is the result of any finding of fair use, so, theoretically, under such a conclusion, *no* use could be fair use. *See id.* This court, in effect, found harm in the very fact of the existence of a fair use defense in copyright law. *Id.* (quoting *Cariou v.*

meme, which was much less transformative than the mutating memes described above.

Understanding meme usage as a spectrum ranging from static to mutating helps to justify the *North Jersey Media Group* decision, while simultaneously leaving room for mutating memes to legally breathe. It also helps to explain the internet's response to a copyright case brought by the photographer of the famous dress photograph that, for a little while, dominated internet conversation.⁵⁶ The dress appeared to be white and gold to some people and blue and black to other people.⁵⁷ The disagreements between people spurred an endless amount of internet conversation on evolution, psychology, astrology, gullibility, and the Power Rangers.⁵⁸ The photographer of the dress appeared on *The Ellen DeGeneres Show*⁵⁹ and was even offered a free dress.⁶⁰

She also hired lawyers to talk to BuzzFeed about royalty payments for its use of the photograph.⁶¹ BuzzFeed was far from the only website on which photographs of the dress could be located, but BuzzFeed was one of the largest and, perhaps most importantly, a for-profit operation.⁶² BuzzFeed's posting of the dress photograph arguably increased the prevalence of the photograph

Prince, 714 F.3d 694, 709 (2d Cir. 2013)). However, the court might have been swayed by the fact that Fox News apparently makes a habit of utilizing photographs without paying for them in situations that are very clearly not meme usage. See, e.g., Tobias Burns, *Fox News Sued Over Use of Mexico Border Photo on Website*, HOLLYWOOD REP. (July 28, 2016, 2:08 PM PT), <http://www.hollywoodreporter.com/thr-esq/fox-news-sued-use-mexico-915435>. Fox News is not alone in its more questionable practices regarding photographs. See, e.g., *Getty Images Says Photographer Suing It For \$1 Billion Gave Up Her Right To Complain*, L.A. TIMES (Sept. 7, 2016, 2:05 PM), <http://www.latimes.com/business/la-fi-getty-images-ca-rol-highsmith-20160907-snap-story.html>.

56. See Mike Masnick, *'The Dress' a Year Later: The Meme Has Faded, but the Copyright Will Last Forever*, TECHDIRT (Feb. 26, 2016, 11:38 AM), <https://www.techdirt.com/articles/20160226/07381933721/dress-year-later-meme-has-faded-copyright-will-last-forever.shtml> [hereinafter Masnick, *'The Dress' a Year Later*].

57. See *id.*

58. See *#TheDress/What Color Is This Dress?*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/thedress-what-color-is-this-dress> (last visited Nov. 15, 2017).

59. See Rosalyn Oshmyansky, *Ellen DeGeneres Settles the Great Dress Debate Once and for All!*, ET (Mar. 3, 2015, 12:30 PM), http://www.etonline.com/news/160575_ellen_degeneres_settles_the_great_dress_debate_once_and_for_all/.

60. See Masnick, *'The Dress' a Year Later*, *supra* note 56.

61. See *id.*

62. See Jake Kanter, *BuzzFeed's UK Profits Quadrupled After a Period of Massive Investment*, BUS. INSIDER (Oct. 19, 2016, 1:04 PM), <http://www.businessinsider.com/buzzfeed-uk-profits-quadruple-2016-10>; Jonathan Mahler, *The White and Gold (No, Blue and Black!) Dress That Melted the Internet*, N.Y. TIMES (Feb. 27, 2015), <https://www.nytimes.com/2015/02/28/business/a-simple-question-about-a-dress-and-the-world-weighs-in.html>.

on the various social media platforms.⁶³ BuzzFeed eventually settled the case by buying the copyright from her.⁶⁴

What is striking about the case of BuzzFeed and the dress meme is the internet's reaction of outrage. The outrage can be understood as being rooted in the fact that the use of the dress photograph was a mutating meme usage, far from the static way Fox News used the photograph of 9/11. The photograph was important not because it was a photograph of a dress (it was actually a pretty terrible photograph of a dress in which color and contrast combine to form an illusion),⁶⁵ but because of the cultural conversation *around* the photograph. The copyright holder claimed to have "created something of immense value."⁶⁶ But the internet disagreed: "[W]hat created the value was the *ability of the internet to make it viral*."⁶⁷ The value of the photograph was not as a copyrighted image but as a meme—and, more importantly, a *mutating* meme. The dress case makes clear that it is not only the interests of the copyright holder that should be acknowledged; there is also a very real interest possessed by those who use the mutating meme for its complex conversational value: "The fun of the picture, wasn't really the picture at all, but the psychological, physiological, and even sociological aspects of it's [sic] [e]ffect."⁶⁸

Another mutating meme legal dispute provoked a similar bewildered reaction by internet users. Getty Images sent "a strongly worded copyright infringement notice" to a blogger who had used the Socially Awkward Penguin meme, alleging copyright infringement of the underlying penguin photograph.⁶⁹ The user had not been using the image commercially, and indeed, seemed indistinguishable from any of the many other internet users employing the Socially Awkward Penguin meme.⁷⁰ Faced with the enormous power of Getty Images and uncertain precedent regarding the legal

63. See Masnick, *'The Dress' a Year Later*, *supra* note 56.

64. See *id.*

65. See DB, Comment to Masnick, *'The Dress' a Year Later*, *supra* note 56.

66. Masnick, *'The Dress' a Year Later*, *supra* note 56.

67. *Id.*

68. Anonymous Coward, Comment to Masnick, *'The Dress' a Year Later*, *supra* note 56; see John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 49 (2011) (bemoaning intellectual property law being used "to regulate and control access to our most enduring cultural symbols") [hereinafter Tehranian, *Parchment, Pixels, & Personhood*].

69. Rich Haridy, *The Remix Wars: Copyright and the Socially Awkward Penguin*, NEW ATLAS (Oct. 17, 2016), <http://newatlas.com/internet-copyright-history-remix/45536/>.

70. See *id.*

uses of memes, the blogger in question paid the demanded fee but did not stay silent.⁷¹ Rather, the blogger took his case to the internet, using a different photograph of a penguin to offer commentary on Getty Images's behavior.⁷² The internet expressed confusion that Getty Images could be allowed to stifle meme usage this way⁷³: "In the six years that Getty and National Geographic have allowed the meme to flourish, it has far transcended Mobley's original photograph: It's a remix, a discourse, a pastiche assembled—like so much of popular Internet culture!—from the aggregated efforts of millions of people."⁷⁴ Many users of the internet do not understand memes as copyrighted things for which they have a privileged use. They understand them as "ideas" that are not "actually something you can steal."⁷⁵ This may be an understanding rooted in copyright law, but it requires an extra analytical step to see a copyrighted image as an idea, not a copyrighted image. The spectrum of meme usage can provide that analytical step: mutating memes, because of their unique characteristics, are more like ideas.

The attitudes of the district court toward Fox News's use of the 9/11 photograph and those of the internet toward the color-changing dress and Socially Awkward Penguin disputes are not irreconcilable. Rather, they can be seen as responding to different forms of use along the meme spectrum, one static and the other two mutating. These mutating uses increase the importance of the interests of the internet in using the memes, since the use of the meme is defined more by the internet than by the original user. In fact, one of the most noteworthy things about the Pepe the Frog meme is how explicitly the artist has acknowledged the interests of the internet at large in his decision *not* to pursue a judicial remedy.⁷⁶

71. *See id.*

72. Mark Frauenfelder, *Getty Charges Blog \$868 for Socially Awkward Penguin Meme Images, Demands Silence*, BOING BOING (Sept. 4, 2015, 9:56 AM), <http://boingboing.net/2015/09/04/getty-charges-blog-868-for-so.html>.

73. *See, e.g., id.*; Mike Masnick, *Getty Images Goes Copyright Trolling After a Meme Penguin*, TECHDIRT (Sept. 8, 2015, 9:18 AM), <https://www.techdirt.com/articles/20150908/00155432189/getty-images-goes-copyright-tr; Scumbag Getty Images Owns Socially Awkward Penguin>, 9GAG, <http://9gag.com/gag/agNOQ8W/scumbag-getty-images-owns-socially-awkward-penguin> (last visited Nov. 15, 2017).

74. Dewey, *supra* note 19.

75. Romano, *Plagiarism Claims Against BuzzFeed Video*, *supra* note 44.

76. *See* Furie, *supra* note 29 ("I understand that it's out of my control . . . Pepe is whatever you say he is . . ."); Jon Fingas, *Pepe the Frog Creator Battles the 'Alt-Right' Through Copyright Law*, ENGADGET (Sept. 18, 2017), <https://www.engadget.com/2017/09/18/pepe-the-frog-creator-takes-legal-action-against-the-alt-right/> (explaining how Pepe's creator only ended up pursuing legal action through a cease and desist letter to fight against the use of

Although Pepe's artist owns a copyright in him and could arguably try to selectively sue for copyright infringement in the use of the meme, Pepe's artist originally turned to the internet to try to fix his problems.⁷⁷ As has been stated previously, Pepe's artist was long silent on the subject of Pepe as a meme, but finally decided to step in and collaborate with the Anti-Defamation League, which had listed him as the creator of a hate symbol.⁷⁸ However, his desired choice to fight the situation was not to turn to the courts, but rather to turn to the collaborative communities who had turned Pepe into a meme in the first place, requesting that the internet try to drown out the bad Pepes with good Pepes.⁷⁹ This is an overt acknowledgment of how much meme users' interests stand out in a case of a mutating meme.

B. Memes and Privacy Law

The focus in an intellectual property law case is mostly on the wronged copyright holder. This focus makes sense in a static meme case, but downplays the contributions of those who use the meme in a mutating meme case. What it also does, however, is shortchange the rights of those depicted by the visual image. For instance, in the whole kerfuffle over the dress photograph, very little was mentioned about the actual designer of the dress.⁸⁰ The established precedent that the intellectual property rights belong to the *taker* of the photograph rather than the person depicted in the photograph leads to an inevitable splitting of interests regarding

Pepe by "alt-right" individuals).

77. See Furie, *supra* note 29; Jordan Darville, *Pepe The Frog's Creator Shares New Comic, Announces #SavePepe Campaign*, FADER (Oct. 17, 2016), <http://www.thefader.com/2016/10/17/pepe-the-frog-matt-furie-new-comic-alt-right>.

78. Romano, *Culture Wars*, *supra* note 22.

79. See Darville, *supra* note 77.

80. See, e.g., Leo Benedictus, *#Thedress: 'It's Been Quite Stressful Having to Deal With It . . . We Had a Falling-out.'* GUARDIAN (Dec. 22, 2015, 9:54 AM), <https://www.theguardian.com/fashion/2015/dec/22/thedress-internet-divided-cecilia-bleasdale-black-blue-white-gold> (mentioning the designer, Roman Originals, but focusing on the woman who took the picture of the dress and her family); Dana Ford, *What Color Is This Dress?*, CNN (Feb. 27, 2015, 5:33 PM ET), <http://www.cnn.com/2015/02/26/us/blue-black-white-gold-dress/index.html> (focusing on peoples' reaction to the dress without discussing the designer); Masnick, *'The Dress' a Year Later*, *supra* note 56 (discussing copyright concerns for the person who took the picture of the dress without mentioning anything about the person who designed the dress); Myles Udland, *Is the Dress White and Gold or Black and Blue*, BUS. INSIDER (Feb. 26, 2016, 8:44 AM), <http://www.businessinsider.com/is-the-dress-white-and-gold-black-and-blue-2015-2> (referencing the dress, how people reacted, and why people see it differently without mentioning the designer).

the photograph.⁸¹ The copyright holder is not the only person concerned about the photograph's use.⁸² The copyright holder, though, is the only one with intellectual property rights in the photograph. The person depicted in the photograph must turn to privacy rights to try to control spread of the photograph.⁸³

However, privacy rights (like intellectual property rights) have long had an uneasy relationship with the internet,⁸⁴ and, furthermore, there seems to be an essential misunderstanding regarding what intellectual property laws accomplish and why. Increasingly, people who become memes wish to use often non-existent intellectual property rights to stop a meme. What might be less remarkable is whether straightforward copyright infringement reads like censorship when done for non-copyright-related reasons, due to the weird First Amendment quirks surrounding intellectual property law.⁸⁵ This condemnation is unfair, though, when it would be equally unremarkable to allow the person to protect their privacy. They have merely chosen the wrong vehicle.

Take, for example, the case of Kimberly Wilkins, whose news interview was turned into a widespread meme.⁸⁶ Wilkins, by all accounts, was not thrilled with the attention that this viral video had

81. See Masnick, *'The Dress' a Year Later*, *supra* note 56; Tehranian, *Parchment, Pixels, & Personhood*, *supra* note 68, at 75–76.

82. See, e.g., Venkat Balasubramani, *Adding Derogatory Caption to Photo Meme Can Be False Light*—S.E. v. Chmerkovskiy, TECH. & MKTG. L. BLOG (Nov. 26, 2016), <http://blog.ericgoldman.org/archives/2016/11/adding-derogatory-caption-to-photo-meme-can-be-false-light-s-e-v-chmerkovskiy.htm> (discussing how the parents of a child with Down Syndrome wanted the viral picture of their child taken off of the internet); Keryn Donnelly, *This 13-Year Old Girl Became a Viral Internet Meme and No One Stood Up For Her*, MAMAMIA (Feb. 7, 2017), <http://www.mamamia.com.au/dr-phil-meme/> (discussing how a video of a thirteen-year-old girl that became a meme constituted bullying).

83. Balasubramani, *supra* note 82.

84. See Lau, *supra* note 2, at 240–41, 264 (highlighting the dangers to privacy created by use of the internet and the difficulty of privacy regulation); Sydney Ember & Rachel Abrams, *On Instagram and Other Social Media, Redefining 'User Engagement'*, N.Y. TIMES (Sept. 20, 2015), <http://www.nytimes.com/2015/09/21/business/media/retailers-use-of-their-fans-photos-draws-scrutiny.html> (discussing how photos posted on social media have implicated privacy rights).

85. See, e.g., Katz v. Google Inc., 802 F.3d 1178, 1184 (11th Cir. 2015); Lau, *supra* note 2, at 274; John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245, 263 (2015) [hereinafter Tehranian, *The New Censorship*]; Andy, *Axl Rose Sends DMCA Notices to Google Targeting 'Fat' Photo*, TORRENTFREAK (June 5, 2016), <https://torrentfreak.com/axl-rose-sends-dmca-notices-to-google-targeting-fat-photo-160605/>; Mike Masnick, *Skittles Photographer Actually Sues Trump Campaign Over Infringement*, TECHDIRT (Oct. 20, 2016, 6:25 AM), <https://www.techdirt.com/articles/20161019/17420635841/skittles-photographer-actually-sues-trump-campaign-over-infringement.shtml> [hereinafter Masnick, *Skittles Photographer Actually Sues*].

86. See *Sweet Brown / Ain't Nobody Got Time for That*, *supra* note 37.

garnered her. She decided to sue Apple Inc. and other entities, alleging copyright infringement,⁸⁷ but it is unlikely that Wilkins possessed a copyright in the everyday phrases at issue. Rather, it would appear she was alleging a copyright in the news report itself.⁸⁸ However, she did not own the copyright in the news report; that copyright belonged to the news channel. Wilkins's harm was not an intellectual property one because she did not own any intellectual property rights. Rather, her likeness was being used in a way that she found undesirable, akin to a defamation cause of action.⁸⁹

Wilkins is not alone in finding herself at the center of a meme controversy and turning to intellectual property law to try to fix it. Those depicted in photographs that go viral often try to find ways to stop the photograph from being used. In some instances, they do this by purchasing the copyright.⁹⁰ In other instances, though, they do not even bother and send cease and desist letters alleging copyright infringement without consulting the actual photographer.⁹¹

Even when not depicted in the meme itself, the copyright harm caused by memes is often more personal than the usual copyright infringement. For instance, the photographer of the photograph of Skittles that Donald Trump, Jr., used on Twitter to illustrate an argument against welcoming refugees sued for copyright infringement.⁹² Although he did possess the copyright in the photograph at issue, the complaint reads more like a privacy tort complaint, with allegations that the photograph is being associated with "offensive" ideas (understandably, because the photographer is himself a refugee).⁹³

87. *See id.*

88. *See id.*

89. *See id.*; *see also* Chase Hoffberger, *Sweet Brown Has the Time to File a Lawsuit Against Apple*, DAILY DOT (Mar. 12, 2013), <https://www.dailydot.com/news/sweet-brown-apple-lawsuit-kimberly-wilkins/>; Andrew Knittle, 'Sweet Brown' 'Ain't Got Time' to Sue Apple, NEWSOK (Sept. 24, 2013), <http://newsok.com/article/3886285>.

90. *See Katz*, 802 F.3d at 1181.

91. *See Andy*, *supra* note 85.

92. *See Masnick*, *Skittles Photographer Actually Sues*, *supra* note 85.

93. *See Evans*, *supra* note 17; *Masnick*, *Skittles Photographer Actually Sues*, *supra* note 85; *White*, *supra* note 17.

III. IDENTIFYING MEMES ALONG THE SPECTRUM

What is perhaps most telling about memes and the law are those situations where the parties seek to circumvent the law altogether, because those situations show that the law has ceased to be helpful in addressing the complicated questions at issue. Many copyright holders do not seem to consider the widespread usage of their memes to be actionable in court.⁹⁴ For example, creator of Pepe the Frog, faced with a meme that has gone so out of control that his name is now listed on hate symbol websites, did not go to court initially. Instead, he sought to fight the internet with the internet, asking for the same web culture that transformed his creation the first time to transform it back.⁹⁵

An open acknowledgment that memes exist along a spectrum of usage, some of which are seen by society as more worthy of protection than others, is a useful starting point for making the legal dialogue around memes more productive. Trying to classify all memes as equal risks outrage people with regard to usage on either side of the extreme. For instance, *North Jersey Media Group* might not be at all controversial, except for the possibility that it could be used to deter more mutating uses of memes that might otherwise be culturally valuable. Likewise, the assumption of many commentators that fair use would protect BuzzFeed's color-changing dress photograph is rooted in some assumption that that meme is different from others because it is a mutating meme.⁹⁶

Pepe is an especially interesting example because it is one where application of a fair use analysis without an understanding of the mutating memes on the spectrum of meme usage would be harmful. Frequently in fair use analyses, courts have seemed hesitant to endorse use of a copyrighted work when the commentary being provided was not on the work *itself*.⁹⁷ Pepe was used as a vehicle to

94. See, e.g., Furie, *supra* note 29 (noting that Pepe's copyright holder believes the situation is "out of [his] control"); see also Haridy, *supra* note 69 (discussing the recent controversy over Richard Prince's use of Instagram photos and out-of-court resolutions to that controversy).

95. See Darville, *supra* note 77.

96. See Masnick, 'The Dress' a Year Later, *supra* note 56.

97. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) ("If . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly . . ."); *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (holding that since the defendants were not using the copyrighted song as an object of their song, there was "no

discuss other things.⁹⁸ It was imbued with a separate symbolic meaning divorced from the original copyrighted work. Very few of the many people who have been involved with the Pepe the Frog meme through its many iterations ever knew the origin of Pepe the Frog.⁹⁹ Therefore, it would be difficult to argue that they were using Pepe the Frog with the intent to comment on the original Pepe the Frog message. In this situation, a fair use analysis of a meme could get mired in questions like: Why did they choose *that* particular image? Would not another one be just as good? Is it really an effective parody if it has become divorced from the original source?¹⁰⁰

Fair use's effect on the market factor is also challenging in a mutating meme situation. Very few people who employ memes are doing so "in order to secure access" to the underlying creative work.¹⁰¹ Rather, they are using the meme *as a meme*. However, would their use qualify as a market substitute? Much like Fox News in *North Jersey Media Group*, could the users have just paid the copyright holder to license the character to have the same discussion?

Mutating memes are important to the cultural conversation, as social media has made clear.¹⁰² Their continued development on the internet acts as an important record of ongoing social values and debate,¹⁰³ and they allow communication between different in-

need to conjure it up" and therefore, their use of the song's melody was not fair use, but plagiarism).

98. See Furie, *supra* note 29 (discussing Pepe the Frog's origin as a peaceful frog before being turned into a hate symbol).

99. See *id.* This is not a situation unique to the Pepe the Frog meme. In a recent *New Yorker* article, Andrew Marantz notes that people keep throwing the name "Harambe" into political conversation. Marantz, *supra* note 8. Harambe was the name of a gorilla that was killed at the Cincinnati Zoo in 2016. When Marantz asked someone to explain the Harambe meme to him, rather than saying anything about the dead gorilla, the man replied, "It's a funny thing people say, or post, or whatever . . . It's just a thing on the internet." *Id.*

100. See Darville, *supra* note 77 (discussing how Pepe the Frog was divorced from its original meaning).

101. See *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 820 (1st Cir. 1995) (Boudin, J., concurring).

102. See Patel, *supra* note 5, at 251–52.

103. See *id.* at 252; see, e.g., SHIRA CHESS & ERIC NEWSOM, FOLKLORE, HORROR STORIES, AND THE SLENDER MAN: THE DEVELOPMENT OF AN INTERNET MYTHOLOGY 19 (2015); Drunkarmadillo (@drunkarmadillo), TUMBLR (Mar. 23, 2016, 10:12 PM), <http://drunkarmadillo.tumblr.com/post/141565080338/runawaymarbles-a-z-memes>; Vivian Kane, *What the Year's Most-Used GIFs Tell Us About 2016*, PAJIBA (Dec. 7, 2016), <http://www.pajiba.com/miscellaneous/what-the-years-mostused-gifs-tell-us-about-2016.php>; Legend-of-sora (@legend-of-sora), TUMBLR (May 26, 2016), <http://legend-of-sora.tumblr.com/post/144961457080/kittyseb>

terest groups on a level that is otherwise difficult to achieve. However, this also makes them unique, and as such, not necessarily a good fit for how we traditionally deal with intellectual property. Copyright law is slow to adapt to new technologies.¹⁰⁴ As one court noted in a different computer-related context, memes might “look hauntingly like the familiar stuff of copyright,” but “[a]pplying copyright law . . . is like assembling a jigsaw puzzle whose pieces do not quite fit.”¹⁰⁵ If we cannot even define memes properly, it is difficult to anticipate that we will apply the law to them properly.

An acknowledgment that meme usage exists on a spectrum can allow the law to make more careful decisions about which memes should be protected and encouraged, and which memes deserve less protection. It would also provide more room for the privacy law issues that such memes raise, rather than trying to squeeze those issues into an intellectual property box.

“[C]ase law development is *adaptive*: it allows new problems to be solved with help of earlier doctrine, but it does not preclude new doctrines to meet new situations.”¹⁰⁶ Rather than applying pre-existing laws as if they are blunt instruments, the spectrum of meme usage can be used to identify the factors that will allow a more careful slicing of protection limits. Static memes are not the type of meme most in need of encouragement for the continued flourishing of internet culture. Static memes look more like the typical use of a visual image that fair use is most adept at addressing. Mutating memes, however, deserve extra thought, as a number of their characteristics make them unique in today’s discourse. These characteristics can be used by courts to help identify and place mutating memes on a spectrum that might necessitate more flexible legal protection.

sebastian-the-internet-is-insane; Payeehay (@payeehay), TUMBLR (Oct. 14, 2016), <https://payeehay.tumblr.com/post/151811015468/wehaveallgotknives-brinnzana-my-favorite>.

104. See *Agence France Presse v. Morel*, No. 10-cv-2730 (A.J.N.), 2015 U.S. Dist. LEXIS 189008, at *10 (S.D.N.Y. Mar. 23, 2015); Melinda J. Schlinsog, Comment, *Endermen, Creepers, and Copyright: The Bogeymen of User-Generated Content in Minecraft*, 16 TUL. J. TECH. & INTELL. PROP. 185, 205 (2013); Haridy, *supra* note 69 (“21st century digital technology has given artists a set of tools that have dismantled traditional definitions of originality and is challenging the notions of copyright that came to dominate much of the 20th century.”); Spillane et al., *supra* note 3.

105. *Lotus*, 49 F.3d at 820 (Boudin, J., concurring).

106. See *id.*

A. *Evolution of Communicative Nature*

The most important legal hallmark of mutating meme usage is that it evolves or “mutates” beyond the visual image’s original context to communicate something different. For example, users use Pepe the Frog for its mutated message. What makes mutating memes so especially unique is that they are functioning as forms of communicative shorthand with lives far beyond their creator. Pepe might be a copyrighted image, but the use of Pepe as a mutating meme is much more like the use of an especially evocative word than the sharing of an image. Pepe, in fact, really only has the meaning that has been placed on it collaboratively by the users of the meme, giving it a life well beyond a simple illustration of a frog, and a meaning that, like our language itself, continues to evolve.¹⁰⁷ In fact, responding to the hatred evolution of the Pepe meme triggered people not to use words, but to use another frog with a different communicative message.¹⁰⁸

Pepe has, in part, stopped functioning as a creative copyrighted work and started functioning as a building block of a language, a method of communication.¹⁰⁹ Those who are merely reblogging or retweeting the altered meme are using it to indicate that they agree with the meme’s new and continually evolving message, divorced from the original photograph itself. The expressive Pepe is now telling a very different story than it did originally.¹¹⁰ In the static use of a meme, such as in *North Jersey Media Group*, the copyrighted work in question is not being used as a shorthand expressive symbol for *some other concept* that may otherwise be difficult to articulate. The user of the copyrighted work is not using the meme to communicate a new and different idea than originally intended; instead, it seems like the use of the image is merely functioning as a substitution for the original copyrighted work.

In a mutating meme case, the visual image has been imbued with meaning beyond the original. It is no longer a substitution for

107. See Furie, *supra* note 29.

108. See Perry, *supra* note 22 (showing an example of someone responding with Kermit the Frog).

109. See Schlinsog, *supra* note 104, at 197 (discussing the uncopyrightability of the “building blocks” of a video game).

110. Cf. *id.* (describing how a video game was subject to copyright when it told the same story as another game).

the original copyrighted work because it has morphed into something completely different, detached entirely from that origin. The internet has added expressive power to the image, tweaking it to serve the communicative needs of a particular community or perspective. Mutating memes become the way in which many different smaller hot topics get expressed back into the bigger whole. A person who recognizes the meme can understand the communication, but without knowledge of the particular meaning of the particular meme, the communication might as well be in another language.

These mutating memes, therefore, are a communicative tool used to interact more productively, more efficiently, and more effectively with the world around us. They are pure engines of expression with their own symbolic vocabulary;¹¹¹ they are a way in which humans interact. Like other invented languages, they began as the creative effort of a single human, but quickly, through collaborative efforts, expanded beyond their creator and took on a life of their own.¹¹² Although memes are a way of communicating that may not have existed a few decades ago, they can now be used fluently if one invests the time and effort. As essential building blocks of a communicative form,¹¹³ these mutating memes fit uncomfortably into the existing intellectual property legal structure. They have ceased to function as intellectual property and have instead become more like a language. This is not an argument that they are uncopyrightable because they are popular;¹¹⁴ rather, it is an argument that they are uncopyrightable because they are no longer creative protectable *expressions*, but rather communicative unprotectable *ideas*.

The way that inventors of languages speak of such languages emphasizes both their similarities to the way mutating memes function and the essential inability to own them:

111. See Patel, *supra* note 5, at 252; see also Roberts, *supra* note 5.

112. See Brief for Language Creation Society as Amici Curiae Supporting Defendants, Paramount Pictures Corp. v. Axanar Prod., Inc., No. 2:15-CV-09938-RGK-E, 2017 U.S. Dist. LEXIS 19670 (C.D. Cal. Apr. 27, 2016) (arguing that the Klingon language used and partially created by Paramount Pictures “has taken on a life of its own”).

113. See Just-shower-thoughts (@just-shower-thoughts), TUMBLR (Feb. 19, 2017), <http://just-shower-thoughts.tumblr.com/post/157468197314/our-society-has-reverted-back-to-using-hieroglyphs> (“Our society has reverted back to using hieroglyphs to communicate.”).

114. See Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1372 (Fed. Cir. 2014) (“[C]opyright works [do not] lose protection when they become popular . . .”).

How does one own a language, given that languages are alive only so far as people use them? . . . Are Klingon and Na'vi and Dothraki speakers using a language owned by someone else, or do they in fact own it by virtue of their being the ones who use it for real communication?¹¹⁵

A [constructed language] can't be copyrighted, and neither can a vocabulary; otherwise one could publish a dictionary, copyright all the words, and sue everyone who uses that language for royalties—even if the language is English. A specific definition can be copyrighted (the wording used to define a term), but not the word or its meaning in the abstract sense.¹¹⁶

The issue here is not whether the piece of creativity is expressive, it is that, *even though* it is expressive, no one can own it¹¹⁷: “We do not think that the Court’s statement that ‘copyright assures authors the right to their original expression’ indicates that all expression is necessarily copyrightable; while original expression is necessary for copyright protection, we do not think that it is alone sufficient.”¹¹⁸ The fact that a meme might be a piece of creative expression should not prevent its use as a word in and of itself by those using it to communicate.¹¹⁹ Many meme definitions refer to memes as “basic unit[s]” or “atom like” entities,¹²⁰ which seems to support the internet’s view that memes are no longer pieces of creative expression so much as they are the basic building blocks of cultural communication.

The idea that a piece of creativity that might otherwise be owned has become to some degree co-opted by the public at large is already explicitly recognized by copyright law’s merger doctrine,

115. Cezary J. Strusiewicz, *When Hollywood Needs a Made-Up Language, They Come to Us*, CRACKED (Aug. 25, 2016), <http://www.cracked.com/personal-experiences-2130-i-invented-dothraki-my-life-creating-fantasy-languages.html> (quoting Dr. Paul Frommer, creator of the Na’vi language used in *Avatar*).

116. *Id.* (quoting David Peterson, creator of Dothraki and Valyrian, the languages used on *Game of Thrones*).

117. See *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 815 (1st Cir. 1995) (stating that, in determining whether a piece of computer software is copyrightable, the initial inquiry is not whether the elements are expressive, but rather whether it can be copyrighted as a whole).

118. *Id.* at 818 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991)).

119. See *id.* at 816–17 (holding that expressive choices made in the design of a computer program do not preclude the expressions from being an uncopyrightable “method of operation”); see also Roberts, *supra* note 5 (“[M]emes all become part of the alphabet, enabling richer, funnier, more contextual, more personalized communication than ever before . . .”).

120. See Johnson, *supra* note 6, at 104.

which prohibits ownership of expression when there are only a limited number of ways to express the underlying idea.¹²¹ Under the merger doctrine, “an idea and its particular expression become inseparable.”¹²² The doctrine allows people to communicate a very specific idea that they would not be able to express as effectively in any other way. Where the meme has become “necessarily incidental to [a] function,” then it has stepped outside the realm of copyright.¹²³

In this way, mutating memes are like very quickly established *scènes à faire*. Courts are already familiar with the fact that certain scenes become standard means used by storytellers to communicate a certain idea in quick shorthand.¹²⁴ In such a case, no one can own the *scène à faire*; it is a creative expression in which copyright ownership is prohibited.¹²⁵ So, much like a meme, a *scène à faire* is an expression that has become more like an idea.¹²⁶ However, each *scène à faire* started somewhere; someone was the first person to employ such a scene.¹²⁷ Over time, these scenes developed into clichés that could no longer be protected.¹²⁸ The same process happens to memes, only at the accelerated rate typical of the twenty-first-century internet.¹²⁹

An analysis of a text-based meme, “staring into the camera like you’re on the *The Office*,” illustrates exactly how much memes become a communicative shorthand, like a *scène à faire*. This meme

121. See *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1359 (Fed. Cir. 2014); *Libertas Techs., L.L.C. v. Cherryhill Mgmt., Inc.*, No. 1:10-cv-935, 2012 U.S. Dist. LEXIS 67846, at *8 (S.D. Ohio May 15, 2012).

122. *Tetris Holding, L.L.C. v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 403 (D.N.J. 2012); see also *Libertas*, 2012 U.S. Dist. LEXIS 67846, at *8.

123. *Oracle*, 750 F.3d at 1355 (quoting *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 705 (2d Cir. 1992)); see *Baker v. Selden*, 101 U.S. 99, 103 (1879).

124. See *Tetris*, 863 F. Supp. 2d at 403 (“[S]cènes à faire’ (literally meaning a scene that must be done), applies to expression that is so associated with a particular genre, motif, or idea that one is compelled to use such expression.”).

125. See *Oracle*, 750 F.3d at 1363; *Tetris*, 863 F. Supp. 2d at 403.

126. See *Oracle*, 750 F.3d at 1363.

127. Some courts have stated that the *scène à faire* must be judged as such at the time that it is used by the creator of it. See *id.* at 1364. However, the doctrine, in action, seems to belie such a contention.

128. See *id.* at 1363.

129. See *CHESSE & NEWSOM*, *supra* note 103, at 9; *Lau*, *supra* note 2, at 254; *Schwabach*, *supra* note 5, at 11. There is a circuit split as to whether pieces of creativity subject to the merger or *scènes à faire* doctrines are either uncopyrightable or copyrightable, but not infringed because of the merger or *scènes à faire* defense. See *Oracle*, 750 F.3d at 1358 (explaining the circuit split regarding the application of the merger and *scènes à faire* doctrines). Either way, the effect is the same as to render use of mutating memes permissible.

represents “the use of commonly known fictional situations to indicate an emotion or context that is *extremely specific* and can’t necessarily be communicated with language alone.”¹³⁰ The meaning of the meme is defined as:

[W]e’re in a situation that any objective viewer would find inherently ridiculous, and are seeking acknowledgment from an invisible but much larger group that would agree with us, even though nobody in the situation would do so. [W]e’re putting ourselves in an outsider position, a less emotional position, and inherently a more powerful position, because we’re not vulnerable to being laughed at like all the ridiculous people we’re among. [W]e’re among them, but we’re not with them, and the millions of people watching us on theoretical tv would be on our team, not theirs.¹³¹

It is much easier to just encourage people to communicate this very specific idea and concept that is so difficult to articulate in “pure language,” with “staring into the camera like we’re on *The Office*.”

Mutating memes have developed into useful items, being used to express very complex ideas that would be inefficient to force people to express otherwise.¹³² In fact, so ingrained is the idea of using memes as a unique form of expression that, when asked to express themselves differently, internet users turn to other memes.¹³³ Courts have recognized the challenges presented by pieces of creativity that develop utility. “Utility does not bar copyright . . . but it alters the calculus.”¹³⁴ Fair use analyses can take into account the usefulness of a given piece of expression.¹³⁵

130. Belinsky (@belinsky), TUMBLR (Apr. 27, 2016), <http://belinsky.tumblr.com/post/143487933353/staring-into-the-camera-like-youre-on-the>.

131. *Id.*

132. See *Cohen v. California*, 403 U.S. 15, 26 (1971) (expressing support for the idea that communication can be chosen for “emotive” force and that the Constitution protects “that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated”); see also Carpenter, *Meme Librarian*, *supra* note 10 (describing the “mmm whatcha say” meme as “what you do when someone dies in a ridiculous way”); Johnson, *supra* note 6, at 105 (quoting RICHARD BRODIE, *VIRUS OF THE MIND: THE NEW SCIENCE OF THE MEME* 8 (2009) (describing a meme as a “complex idea that forms itself into a distinct memorable unit”).

133. See, e.g., *The Creative Olympics: 8 Ways The Online Community Adapted to the Ban on GIFs*, BUZZFEED (Aug. 24, 2016), https://www.buzzfeed.com/recreate/the-creative-olympics-8-ways-the-online-community-272y0?utm_term=.esDgyYB00#.fjQwdlKry.

134. *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 819 (1st Cir. 1995) (Boudin, J., concurring).

135. See *Katz v. Google Inc.*, 802 F.3d 1178, 1184 (11th Cir. 2015).

Unique protection for mutating memes can also find support in trademark law's genericism doctrine. This doctrine strips words of trademark value when they become the best way to describe the product or service at issue, like "escalator" or "aspirin," where forcing people to resort to some other way to communicate that idea would be undesirable.¹³⁶ Likewise, mutating memes are like pieces of expression for which there are few other equally effective ways of making the point, pieces of expression whose public value should be recognized.¹³⁷

In recent years, judges have recognized that the expressive value of trademarks must be given breathing room for public use. Beyond their traditional commercial value, trademarks have been recognized to "have significant societal and cultural value" that gives the general public "an interest in using the cultural and expressive facet of some trademarks."¹³⁸ "[W]hen a trademark owner asserts a right to control how we express ourselves—when we'd find it difficult to describe the product any other way (as in the case of aspirin), or when the mark (like Rolls Royce) has taken on an expressive meaning apart from its source-identifying function," then the law cannot be applied mechanically, but must recognize the public's interest in speech.¹³⁹ "[T]he trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function."¹⁴⁰ In a similar way, memes are otherwise protected phenomena that have gained such value that the public's interest in using them must be given special weight.

Mutating memes derive their cultural power from the fact that they evolve so heavily, but this also creates one of the most potent challenges to applying existing copyright law to them. While there are sensible doctrines rendering mutating meme usage permissible, copyright infringement is theoretically supposed to be judged at the time of the creation of the underlying work, not at the time of infringement.¹⁴¹ This rule of law ignores all of the value that is

136. See, e.g., Deven R. Desai & Sandra L. Rieron, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789, 1790, 1811 (2007).

137. Patel, *supra* note 5, at 252.

138. Johnson, *supra* note 6, at 98–99.

139. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002).

140. *Id.*

141. *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1361 (Fed. Cir. 2014).

built up in the mutating meme by those who use it after its creation. As such, courts should take into account special circumstances when they recognize a meme as mutating.

B. *Collaboration*

Another important characteristic of a mutating meme is collaboration. The best examples of mutating memes, like Pepe the Frog and Socially Awkward Penguin, spring from the input of many disparate strangers scattered across the globe.¹⁴² Mutating memes do not always mean the same exact thing to all subsets of users on the internet,¹⁴³ nor should they. Part of the impact of memes is their ability to make new and different points across communities.¹⁴⁴ The dynamic nature of the mutating meme should be encouraged, not viewed with suspicion.¹⁴⁵ Additionally, because memes mutate and spread so quickly, their collaborative nature should become readily apparent. It is through use that language develops its meaning,¹⁴⁶ and that particular memes mutate to mean more than just the original communication.

Copyright law has long done a poor job of recognizing the value of creative collaboration. The “mastermind” theory of copyright law, which has been ascendant since *Burrow-Giles Lithographic Co. v. Sarony*,¹⁴⁷ has established a built-in bias against the idea that the voices of many can have an equal contribution in an act of creation.¹⁴⁸ For this reason, mutating memes’ collaboration—one of their hallmark characteristics—also places them in an uneasy relationship with the way to determine copyright ownership. Much as evolution makes these memes difficult to analyze under existing

142. See Johnson, *supra* note 6, at 100 (“[T]he meme is no longer controllable by any one individual.”); see, e.g., *Pepe the Frog*, *supra* note 21; *Socially Awkward Penguin*, *supra* note 32.

143. See, e.g., *Furie*, *supra* note 29 (noting that Pepe the Frog has symbolized various emotions and ideals).

144. See Patel, *supra* note 5, at 252 (describing how memes increase “avenues of expression” improving the ability to communicate).

145. Cf. Tehranian, *Parchment, Pixels, & Personhood*, *supra* note 68, at 83 (explaining the negative impact of copyrights controlling cultural expressions).

146. See Gretchen McCulloch, *A Linguist Explains Emoji and What Language Death Actually Looks Like*, TOAST (June 29, 2016), <http://the-toast.net/2016/06/29/a-linguist-explains-emoji-and-what-language-death-actually-looks-like/> (“[A] changing language isn’t a dying one, it’s a living one.”).

147. 111 U.S. 53, 61 (1884).

148. See Abraham Bell, *Copyright Trust*, 100 CORNELL L. REV. 1015, 1036 (2015); Tehranian, *Parchment, Pixels, & Personhood*, *supra* note 68.

law, because it converts them to something more like a word than a copyrightable visual image, collaboration undermines the overriding copyright presumption that a discrete number of owners underlies every act of creativity.¹⁴⁹ Courts have noticed this phenomenon in other contexts, raising concerns when the value of a creative work “come[s] to reside more in the investment that has been made by *users*.”¹⁵⁰ In such a situation, copyright law seems ill-equipped to recognize that value.

Part of the special value of mutating memes is their heavy collaboration. Those who seek to defend memes often make the argument that the value of memes comes from the users, not the original creator.¹⁵¹ This is a point of controversy that courts have flagged before, but it should not be considered automatically problematic. Rather, this conflict should be recognized as limiting the effectiveness of applying existing law to memes as well as being part of what should be encouraged about these memes.

IV. USING THE MEME SPECTRUM TO GUIDE LEGAL ANALYSIS

Identifying meme usage across the spectrum should be merely the first step to determining the legal status of the meme. Not all static meme usages immediately infringe on copyrights, nor do all mutating meme usages immediately become permissible. Rather, identifying a meme as mutating or static helps the court determine whether the use at issue is one deserving special consideration because of its important function as a communicative tool, as opposed to one that would ordinarily be considered a licensing issue if it did not occur on social media. This approach is similar to that applied to computer programming languages. In such a context, there are no bright-line rules, but rather “nuanced assessment[s]” on a case-by-case basis, deserving of heightened examination because of the uniqueness of the communicative creativity at issue.¹⁵² Because

149. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000) (denying someone co-authorship even though he made “very valuable contributions to the movie” because he was not the mastermind); Bell, *supra* note 148, at 1047 (explaining that the *Aalmuhammed* decision rested on the “default preference for a single owner” of a copyright); Tehranian, *Parchment, Pixels, & Personhood*, *supra* note 68, at 42, 83 (arguing that the presumption of single authorship is problematic in a world where work is made collaboratively).

150. See *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 819 (1st Cir. 1995) (Boudin, J., concurring).

151. See *supra* notes 65–68 and accompanying text.

152. *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1357 (Fed. Cir. 2014).

memes sit at the center of the controversy over how far copyright extends to things that have become indispensable to daily use, as has been debated in previous technology-centric cases,¹⁵³ perhaps mutating meme usage should be added to the list of privileged uses most protected by the fair use doctrine.¹⁵⁴ A fair use analysis *can* adequately protect memes, but the best fair use analysis would acknowledge the uniqueness of each meme along the spectrum of use.

To the extent that the function of copyrights is to incentivize creativity, it does not seem like preventing the use of *mutating* memes is necessary. Moreover, it makes less sense to consider mutating memes as part of the traditional licensing scheme because of their special characteristics. Leaving the curation of mutating memes to big corporations would eliminate the multiplicity of voices that help give mutating memes their cultural value.¹⁵⁵ In striking a balance, after all, it is better in circumstances like these to allow some copying than lose an entire method of communication.¹⁵⁶ Courts should therefore keep the meme use spectrum in mind as they consider other factors.

A. *Transformativeness*

As the first fair use factor, transformativeness may look a great deal like a mutating meme usage. After all, a mutating meme is “altering the first [use] with new expression, meaning or message,” as transformativeness is defined.¹⁵⁷ However, in a mutating meme case, this factor should not require that the meme be commenting *on* the original. The fact that a mutating meme has become something beyond a mere copyrighted work should be explicitly acknowledged in this factor. In the context of internet memes, the utility of using a particular communicative tool to make more general social observations should be recognized. Languages, after all,

153. See *Lotus*, 49 F.3d at 814–15 (discussing copyright concerns for common computer commands such as “copy” and “print”).

154. See *id.* at 821 (Boudin, J., concurring) (proposing a privileged use exception to deal with new copyright challenges).

155. See Roberts, *supra* note 5. Already, copyright enforcement is skewed by privileging certain voices over others. See Haridy, *supra* note 69.

156. See *Tetris Holding, L.L.C. v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 403 (D.N.J. 2012).

157. See *Oracle*, 750 F.3d at 1374; see also Patel, *supra* note 5, at 237 (“The end goal of an Internet meme is usually to make a joke or comment . . .”).

talk about different subjects. Klingon can be used in an episode of *Star Trek* or in a legal brief.

Nor should this factor focus on identifying who made the original commentary. The court in *North Jersey Media Group* chastised Fox News's posting of the 9/11 photograph for not containing any

original idea on the part of [Fox News]; some other person first thought to combine the two photographs, and the phrase “#neverforget” was a ubiquitous presence on social media that day. Thus Fox News' [sic] commentary, if such it was, merely amounted to exclaiming “Me too.” Analyzed from that perspective, the posting does not begin to constitute the creation of “new information, new aesthetics, new insights and understandings” required for finding a transformative purpose.¹⁵⁸

In the context of the static meme usage at issue in *North Jersey Media Group*, this evaluation makes sense. However, users should not be punished for reposting mutating memes in their evolved communicative sense just because they were not the original trigger of the new meaning imposed on the work in question. Indeed, memes often originate anonymously, suggesting that there is no association with any one point of origin.¹⁵⁹

B. Commercialism

It might be straightforward to use commercial intent to try to decide what happens with a certain meme. Commercialism, after all, is another factor that is already important to copyright analyses.¹⁶⁰ BuzzFeed and Fox News are both for-profit enterprises.¹⁶¹ Their purposes are never entirely going to be to engage in the cultural conversation of the internet in the way that an average Facebook user might, because they always have an additional purpose of using their engagement in the conversation to make more money. Therefore, it might be tempting to immediately consider it less likely that BuzzFeed and Fox News are truly using memes to fulfill a communicative function that needs to be protected.

158. See *N. Jersey Media Grp. Inc. v. Pirro*, 74 F. Supp. 3d 605, 617 (S.D.N.Y. 2015).

159. See Patel, *supra* note 5, at 237.

160. See *Oracle*, 750 F.3d at 1375–76.

161. See *N. Jersey Media Grp.*, 74 F. Supp. 3d at 618; Kanter, *supra* note 62. Indeed, many copyright owners do focus on for-profit enterprises when they bring suits. See Ernesto, *Photographers Take “Pirating” News Outlets to Court*, TORRENTFREAK (July 16, 2016), <https://torrentfreak.com/photographers-take-pirating-news-outlets-court-160716/>. In most of these cases, the photographs were used merely to illustrate news stories and were not really used as memes at all, or at best, were used as extremely static memes. See *id.*

Commercial purposes can indicate that a meme is not being used for a true mutating meme function as a means of communicative shorthand. When corporations take photographs posted online of users wearing their clothes and then put those photographs on their own websites, for instance, such postings would not be considered a mutating meme usage deserving of protection.¹⁶² Many mutating memes become so widespread that they are co-opted for use in the advertising of disconnected, unrelated businesses,¹⁶³ including independent merchandising.¹⁶⁴ This commercial use should cut against a finding that the use of the meme is mutating and protected. If consumers would believe a meme is being used in a way to encourage the purchase of a particular product—as opposed to just regular conversational engagement—then that is not a mutating meme use that should be protected. If a mutating meme is indeed functioning like a language, then it should not be monetized by an entity without justification, and a proper balance should be struck between the intent of the meme’s source and those trying to exploit *monetary* value from the meme, as opposed to *expressive* value.

But commercial use on the internet—especially on social media—can be a complicated question.¹⁶⁵ Social media users are curating and developing their own particular brands, which they are presenting to the rest of social media, and use memes to achieve that purpose in the same way that corporations do.¹⁶⁶ In

162. See Patel, *supra* note 5, at 237 (discussing the recent use of memes by companies for advertising purposes); Ember & Abrams, *supra* note 84 (describing clothing and retail brands featuring photos from consumers’ social media accounts).

163. See Matt Silverman, *Success Kid’s Dad Needs Your Help Getting a New Kidney*, DAILYDOT (Mar. 8, 2015, 7:04 AM), <http://www.dailydot.com/news/success-kid-dad-kidney-transplant/> (noting that the meme in question had “been used on billboards and TV commercials”).

164. See Ed Payne, *‘Success Kid’ Appeals to Social Media to Get His Dad a Kidney Transplant*, CNN (Apr. 15, 2015, 4:30 AM), <http://www.cnn.com/2015/04/15/living/success-kid-dad-needs-help/> (quoting the mother of a child in a meme asserting that her photograph ended up on t-shirts).

165. In fact, commercialism is always a complicated inquiry. See, e.g., Eric Goldman, *Avvo’s Attorney Profile Pages Don’t Violate Publicity Rights—Vrdolyak v. Avvo*, TECH. & MKTG. L. BLOG (Sept. 14, 2016), <http://blog.ericgoldman.org/archives/2016/09/avvos-attorney-profile-pages-dont-violate-publicity-rights-vrdolyak-v-avvo.htm>.

166. See *N. Jersey Media Grp. Inc. v. Pirro*, 74 F. Supp. 3d 605, 618 (S.D.N.Y. 2015) (finding engagement of followers and promotion of interests for a Facebook page to be possibly sufficient commercial motivation); Clive Thompson, *Clive Thompson on the Age of Microcelebrity: Why Everyone’s a Little Brad Pitt*, WIRED (Nov. 27, 2007), <https://www.wired.com/2007/11/st-thompson/> (“Corporations are getting humanized, and humans are getting corporatized.”).

fact, everything on social media is advertising at some level—a level that has become increasingly difficult to determine.¹⁶⁷ Social media is a “gray zone,” where the terms and services of the social media sites themselves can operate to turn an obviously non-commercial family album into something that looks more commercial.¹⁶⁸ Some courts have even implied that any benefit at all could implicate commercialism,¹⁶⁹ and it is hard to think of any human activity that is done for zero benefit. Theoretically, pleasing one’s followers could be considered a benefit or merely just making a connection with others. Donald Trump, Jr., was not using the photograph of Skittles to engage in a commercial endeavor, but he was using it entirely to promote his own interests. Granted, his interests are political in nature, but the intertwining of money and politics makes this line blurrier and blurrier.¹⁷⁰ Difficult lines will have to be drawn: Should courts draw the line at corporations? For-profit corporations as opposed to non-profit corporations? What if one is a celebrity? Should he or she be considered a corporation for these purposes? And how does someone even rate what a “celebrity” is? Is it someone who has earned a little blue checkmark next to their name on Twitter? And how does one deal with the phenomenon of “micro-celebrities?”¹⁷¹ Are their actions treated commercially as well? At any rate, the enormous value of the social media companies whose businesses depend so heavily on meme communications would definitely seem to imply that all memes carry with them a very commercial consequence.¹⁷²

The important communicative value of mutating memes indicates why, as opposed to a more static meme, there may actually

167. See Ember & Abrams, *supra* note 84.

168. See Lau, *supra* note 2, at 243, 252; Remsen, *supra* note 1; Spillane et al., *supra* note 3.

169. See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (discussing commercial benefit in news reporting); Paramount Pictures Corp. v. Axanar Prods., Inc., No. 2:15-CV-09938-RGK-E, 2017 U.S. Dist. LEXIS 19670, at *23–24 (C.D. Cal. Jan. 3, 2017); Roy Export Co. v. Columbia Broad. Sys., Inc., 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980) (analyzing the benefit a network television channel gained from using movies during a special broadcast).

170. See The Nib (@thenib), TWITTER (July 25, 2016, 9:10 PM), <https://twitter.com/thenib/status/757790230350929921> (criticizing the GOP twitter account for using a popular internet meme without paying the artist).

171. See Thompson, *supra* note 166 (“Microcelebrity is the phenomenon of being extremely well known not to millions but to a small group—a thousand people, or maybe only a few dozen.”).

172. See Remsen, *supra* note 1 (explaining how social media sites, to function as businesses, rely on the ability to share and sell their users’ photos and information through terms of service and privacy policies).

be a lot of harm in interpreting commercial implications too broadly to stop the memes. If BuzzFeed's commercial posting of a meme is prohibited, then websites like BuzzFeed may be discouraged from posting such photographs, which, in turn, may deprive the internet of the value of a new meme. If the dissemination of a mutating meme is providing an important communicative function by allowing people to engage in a public commentary and debate what might otherwise be lost, that might raise concern. The commercial venture might be co-opting some value, but is it the value of the image or the value of the mutating meme's communicative power?

At the same time, there are companies whose entire business model is to wait for a photograph to go viral, buy the rights, and then assert ownership.¹⁷³ In that situation, the new copyright holder has bought a copyright to a visual image, but really wanted to buy the expressive power of the mutating meme. The complicated nature of the commercial intent in those circumstances should also be considered so that copyright holders cannot *en masse* seek to silence many uses that may be socially valuable and constitute fair use at the end of the day. Getty Images's cease and desist to the bloggers using the Socially Awkward Penguin meme is a good example of this.¹⁷⁴ Getty may be the copyright holder, but it should not be allowed to selectively silence internet speakers in this way.¹⁷⁵ In fact, it is unknown how many internet speakers are silenced each day by questionable copyright claims, considering Getty demanded that the bloggers in question not tell anyone that Getty had contacted them.¹⁷⁶

Because memes are so valuable as a communicative tool rather than as a piece of creativity, requiring a more traditional licensing scheme runs the risk of stifling a great deal of speech that might not be subsequently saved by a fair use defense. Take, for example, the "This is fine" meme that shows a dog, sitting in a café that is going up in flames all around him, calmly proclaiming, "This is

173. See Johnson, *supra* note 6, at 99 (discussing the rush to trademark words and catchphrases that go viral); Patel, *supra* note 5, at 237; see also Eric Francisco, *How the Dancing Pumpkin Man Kept His Dignity for 10 Years*, INVERSE (Oct. 21, 2016), <https://www.inverse.com/article/22492-dancing-pumpkin-man-halloween-ten-years-sell-out>.

174. See *supra* notes 69–75 and accompanying text.

175. See Haridy, *supra* note 69; see also Spillane et al., *supra* note 3 (explaining how people have found issue with copyright holders who treat people differently when they select who to sue).

176. See Haridy, *supra* note 69.

fine.”¹⁷⁷ This is one of those memes that is tricky to place on the spectrum. While it has become a shorthand form of communication divorced from its original source,¹⁷⁸ it has not necessarily evolved past the original message.¹⁷⁹ The meme’s copyright holder, KC Green, has expressed a fairly common attitude among copyright holders whose work has become communicative mutating memes, tweeting that “everyone is in their right to use this is fine on social media posts.”¹⁸⁰ However, Green also expressed dismay when the meme was used by the Republican National Committee’s (“RNC”) official Twitter.¹⁸¹ If memes were required to be licensed, Green might have denied such a license to the RNC. If memes were required to engage in a traditional fair use analysis, this meme may have been impermissible because it was not a comment on the meme itself, but rather on greater societal issues. Nevertheless, the RNC’s use of this meme communicated an important idea it would not have been able to communicate as effectively otherwise. The fact that a major political party found that it was necessary to use a meme to convey its message emphasizes how valuable memes’ communicative function actually is.

This can, however, be contrasted with the Donald Trump, Jr., tweet about the Skittles. In that case, the photograph of the Skittles had no communicative power on its own; the communicative power was in the explanatory text. For that reason, the use of the photograph was more clearly a static meme entitled to less protection. The Skittles photographer has stated that he would not have licensed the photograph to Donald Trump, Jr.¹⁸² That would not have prevented Donald Trump, Jr., from effectively communi-

177. See, e.g., *This Is Fine*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/this-is-fine> (last visited Nov. 15, 2017).

178. Know Your Meme explains the meme as being used to communicate “a sense of self-denial or acceptance in the face of a hopeless situation” and “an accurate and useful description of stressful situations.” See *id.*

179. See KC Green, *On Fire*, GUNSHOW, <http://gunshowcomic.com/648> (last visited Nov. 15, 2017).

180. KC Green (@kcgreen), TWITTER (July 25, 2016, 3:07 PM), <https://twitter.com/kcgreenn/status/757698876077928449>. The internet is not the only place where creators have sometimes seemed to speak as if some ownership has passed to their consumers. See, e.g., Tehrani, *Parchment, Pixels, & Personhood*, *supra* note 68, at 28.

181. KC Green (@kcgreen), TWITTER (July 25, 2016, 3:07 PM), <https://twitter.com/kcgreenn/status/757698876077928449> (“[M]an o man I personally would like @GOP to delete their stupid post.”).

182. See Evans, *supra* note 17.

cating his point, however. He did not need that particular photograph to make his point (or indeed any photograph at all).¹⁸³ The Skittles photographer's actions in this circumstance would not have stifled any speech in a way that should cause concern.

C. *Individual Harms*

Finally, courts should not lose sight of the fact that much of the harm in mutating meme usage falls not on the copyright holder but on those depicted in the visual image. It is certainly an individual harm that is sought to be vindicated in many cases, under the guise of copyright. For instance, Axl Rose sent many Digital Millennium Copyright Act ("DMCA") takedown notices rooted in copyright regarding a particular unflattering photograph of himself that had developed into a meme.¹⁸⁴ However, it was unclear whether he really owned the copyright in the photograph; what seemed clearer was that he sought to "cleanse the web" of the photograph because of the purpose for which the image was being used: to mock Axl Rose.¹⁸⁵

It is common to use intellectual property law as a backstop to privacy law failings.¹⁸⁶ In the case of *Moreno v. Hanford Sentinel, Inc.*, the court was largely unsympathetic to a plaintiff whose social media posting had been republished in the local newspaper.¹⁸⁷ The court found that, "once posted on MySpace.com, [the] article was available to anyone with internet access."¹⁸⁸ The fall-out from the posting's republication was harsh and immense, including death threats and a gunshot fired at the poster's family home.¹⁸⁹ However, the court found that the public posting on social media

183. See *id.* ("They could have just bought a cheap image from a micro stock library.")

184. See Andy, *supra* note 85.

185. See *id.*

186. This phenomenon is not necessarily a new one, see Tehranian, *supra* note 68, at 249, but the internet has magnified it. See Daxton R. "Chip" Stewart, *Can I Use This Photo I Found on Facebook? Applying Copyright Law and Fair Use Analysis to Photographs on Social Networking Sites Republished for News Reporting Purposes*, 10 J. TELECOMM. & HIGH TECH. L. 93, 94–95, 94 n.7 (2012); Tehranian, *The New Censorship*, *supra* note 85, at 263, 265. Indeed, Google has suggested that privacy is something that no longer exists, which would seem to increase the importance of intellectual property law as a protection. See Lau, *supra* note 2, at 269.

187. 91 Cal. Rptr. 3d 858, 861, 863–64 (Cal. Ct. App. 2009).

188. *Id.* at 861.

189. *Id.*

stripped the plaintiff of any reasonable expectation of privacy.¹⁹⁰ The court noted in a footnote, though, that it was not deciding the issue of whether the republication was copyright infringement.¹⁹¹ While not explicitly stating so, this opinion nevertheless suggests the possibility that copyright law can be used to push back against the elimination of privacy rights.¹⁹²

This, however, is an imprecise solution. There may be no right not to be mocked mercilessly,¹⁹³ but, to the extent that there should be protection, sometimes it is better to address that desire head-on than to try to slip it into copyright law, which has never been about “feelings.” Moreover, using copyright law to address the issue fails to acknowledge the First Amendment protections that are otherwise considered when evaluating a privacy law situation, which arguably could lead to *over*-protection.¹⁹⁴

While some fallout is predictable from the sharing of a photograph in public, such behavior should not be considered some sort of implied consent to everything that follows, no matter how extreme.¹⁹⁵ All privacy should not be treated as eliminated,¹⁹⁶ in much the same way that stepping outside does not entitle people to treat us however they wish. Society has begun to recognize the harm that can be caused by the widespread viral circulation of otherwise private—yet publicly posted—photographs.¹⁹⁷ The law

190. *Id.* at 862; see also Lau, *supra* note 2, at 264.

191. *Moreno*, 91 Cal. Rptr. 3d at 863 n.4.

192. See Stewart, *supra* note 186, at 114–15. Scholars have also suggested looking to the DMCA regime to provide guidance for dealing with privacy online. See Lau, *supra* note 2, at 273, 273 n.278 (discussing the applicability of the Online Copyright Infringement Liability Limitation Act, title II of the DCMA).

193. See Andy, *supra* note 85; Balasubramani, *supra* note 82; Maggie Parker, *Teenager Sues Media Outlets for Making Fun of His Mullet*, YAHOO BEAUTY (Oct. 26, 2016), <https://www.yahoo.com/beauty/teenager-sues-media-outlets-for-making-fun-of-his-mullet-193233328>.

194. See Tehranian, *The New Censorship*, *supra* note 85, at 251.

195. See, e.g., Lau, *supra* note 2, at 255, 273.

196. See, e.g., *id.* at 271 (arguing that fundamental notions of privacy and decency shall outweigh the public's interest in situations where internet content causes severe emotional distress).

197. See *id.* at 253; Joshua Barrie, *This Woman's Life Was Destroyed After She Posted One Dumb Photo on Facebook*, BUS. INSIDER (Mar. 9, 2015, 1:43 PM), <http://www.businessinsider.com/lindsey-stone--so-youve-been-publicly-shamed>; Pete D'Amato, *Non-profit Worker Who Provoked Fury with Disrespectful Arlington Photo Tells How She Lost Her Job, Can't Date and Now Lives in Fear*, DAILY MAIL (Feb. 23, 2015, 11:07 EST), <http://www.dailymail.co.uk/news/article-2964489/I-really-obsessed-reading-Woman-fired-photo-giving-middle-finger-Arlington-National-Cemetery-says-finally-Google-without-fear.html>; *Disabled Man, 23, Sues Shaq for Mocking Him on Instagram*, DAILY MAIL (July 31, 2014, 14:44 EST), <http://www.dailymail.co.uk/news/article-2712101/Disabled-man-23-sues-Shaq-mocking-Instagram>.

should also be cognizant that this sort of unjustifiable harm can be caused by memes, both static and mutating.¹⁹⁸ For instance, a recent case out of the Middle District of Tennessee involving a photograph of an overweight child with Down Syndrome permitted a privacy right claim to move forward.¹⁹⁹

There may be an argument that users agreed to this use in the terms and conditions of the website itself.²⁰⁰ Such consent might be considered in granting a license, either express or implied, for the waiver of publicity rights,²⁰¹ but privacy right issues in the form of severe emotional distress should still be protected and not waived by form contracts. At any rate, such waiver in the terms and conditions of a site would not be effective against the individual users of that site.²⁰²

A mutating meme functions more like a communicative symbol than like a piece of creativity. Therefore, it should be treated like a piece of language. One might have the intellectual property right to say a certain sentence, but that right might be taken away by a conflicting privacy or publicity right.²⁰³ Much as the use of the expressive tools of language are limited in what one can use that language to do to others, memes should be limited as well.

This does not necessarily mean that all private individuals can block all memes in which they are featured, nor does this view necessarily argue in favor of a right to be forgotten.²⁰⁴ After all, if the individual has indeed posted the photograph in question to a public place, there is some expected attendant loss of privacy in usual internet usage.²⁰⁵ Furthermore, not all consequences of becoming the subject of a meme are automatically bad. The little boy who was

html; Donnelly, *supra* note 82; Tim Kenneally, *Shaquille O'Neal, Rapper Waka Flocka Flame Sued for Making Fun of Disabled Man on Social Media*, WRAP (July 31, 2014, 12:17 PM), <http://www.thewrap.com/shaquille-oneal-rapper-waka-flocka-flame-sued-for-making-fun-of-disabled-man-on-social-media/>.

198. See Lau, *supra* note 2, at 263.

199. See *S.E. v. Chmerkovskiy*, 221 F. Supp. 3d 980, 981–82, 987 (M.D. Tenn. 2016).

200. See Lau, *supra* note 2, at 252; Spillane et al., *supra* note 3.

201. See Ember & Abrams, *supra* note 84.

202. See *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 303 (S.D.N.Y. 2011); see also Lau, *supra* note 2, at 270.

203. See Lau, *supra* note 2, at 271–72 (stating that copyright owners may be required to remove their copyrighted materials from the internet if they collide with the “fundamental notions of privacy and decency”); see also Goldman, *supra* note 165.

204. See Goldman, *supra* note 165.

205. See Lau, *supra* note 2, at 275; Ember & Abrams, *supra* note 84.

turned into “Success Kid” turned to the internet years later for assistance in finding a kidney donor for his father, raising more than \$100,000 to help fund the care needed for his father’s recovery.²⁰⁶ The child’s mother stated, “There’s not a single thing we regret about ‘Success Kid.’”²⁰⁷ She tweeted after the successful appeal, “Dear internet: I love you so damn much.”²⁰⁸ The Success Kid is not alone in his positive meme experience, either.²⁰⁹ Other objects of memes have used their sudden and unexpected internet fame to bring attention to charities,²¹⁰ or to sell their own merchandise.²¹¹ But where the consequences are sufficiently outrageous, closer attention should be paid.

There may be practical issues in trying to sue the entire internet, of course. In that case, providing recourse against a website like BuzzFeed that chooses to publicize a meme causing emotional distress creates much less concern than when the site gives a spotlight to an otherwise acceptable mutating meme.

CONCLUSION

As the internet moves forward, it will surely come up with more ways of advancing communications, as anyone who has tried to untangle an emoji-laden message can attest. These new methods of communication should not be automatically dismissed as if they fit neatly into recognized methods of legal classification. Nor should they be allowed to exist merely on the kindness of the copyright holders, which provides little comfort to those who want to engage

206. See Gillian Mohney, *Dad of ‘Success Kid’ Undergoes Successful Kidney Transplant*, ABC NEWS (Aug. 18, 2015, 4:57 PM ET), <http://abcnews.go.com/Health/dad-success-kid-undergoes-successful-kidney-transplant/story?id=33159971>; Payne, *supra* note 164.

207. Mohney, *supra* note 206.

208. Mary Bowerman, *‘Success Kid’ Boy Raises \$90K For Dad’s Kidney*, USA TODAY (Apr. 16, 2015, 8:50 AM ET) (quoting Laney Griner (@laneymg), TWITTER (Apr. 15, 2015, 9:27 AM), <https://twitter.com/laneymg/status/588378192886378496>), <http://www.usatoday.com/story/news/nation-now/2015/04/16/success-kid-meme-boy-gofundme-account-dads-kidney-transplant/25866103/>.

209. See, e.g., Michael Blackmon, *A Teen Became a Meme After Someone Took a Photo of His Reaction to Seeing Rihanna*, BUZZFEED (Aug. 30, 2016, 1:04 PM), https://www.buzzfeed.com/michaelblackmon/lemme-call-you-back-i-just-saw-rihanna?utm_term=.ipp0o5bRW#fqa8A2aMk.

210. See, e.g., *Disabled Man, 23, Sues Shaq for Mocking Him on Instagram*, *supra* note 197; *‘Success Kid’ Raises Cash for Dad’s Kidney Transplant*, BBC NEWS (Apr. 16, 2015), <http://www.bbc.com/news/technology-32333474>.

211. See, e.g., Furie, *supra* note 29; *The #CashMeOusside Child May Be Sued for Trademark Infringement*, SHONTAVIA (Feb. 13, 2017), <https://www.shontavia.com/fullblog/2017/the-cashmeousside-child-may-be-sued-for-trademark-infringement>.

with the forms of communication.²¹² Rather, we should continue as a society to think critically of the policies we wish to advance and thoroughly examine these new methods of communication.

Copyright law exists to incentivize creativity. In protecting copyright, we should not ignore the realities of the fact that there are other, newer forms of creativity also deserving of our appreciation and support. This article proposes a recognition that the term “meme” means a wide variety of new and interesting modes of communication, ranging along a spectrum of behavior, some of which are so unique and valuable that they should be carefully protected by thoughtful legal analysis. This article identifies the characteristics that make mutating memes so unique and suggests guidance for how recognition of mutating memes’ uniqueness can inform their legal status. The challenges posed by these memes are tricky and complex, but no more so than any of the many challenges that intellectual property laws have already faced. The questions may have no easy answers, but that is perhaps all the more reason why we should debate them.

212. See Schlinsog, *supra* note 104, at 187 (suggesting that copyright law needs to catch up to the evolving technologies); *KYM Office of Cease & Desist Records*, *supra* note 4 (showing how many cease and desist letters Know Your Meme has gotten, which could deter people from using memes if they do not want to face similar legal action); Spillane et al., *supra* note 3 (discussing how people may face times in countries where freedom to share images of building and art is restricted).