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## Copyright Fair Use and the Digital Carnavalesque: Towards A New Lexicon of Transformative Internet Memes

David Tan

National University of Singapore, david.tan@nus.edu.sg

Angus J. Wilson

National University of Singapore, lawajw@nus.edu.sg

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### Cover Page Footnote

\* Professor and Vice Dean (Academic Affairs), Faculty of Law, National University of Singapore; Head (Intellectual Property), E.W. Barker Centre for Law & Business; Deputy Director, Centre for Technology, Robotics, Artificial Intelligence & the Law, National University of Singapore. \*\* Adjunct Research Fellow, E.W. Barker Centre for Law & Business, Faculty of Law, National University of Singapore.

# Copyright Fair Use and the Digital Carnavalesque: Towards A New Lexicon of Transformative Internet Memes

David Tan\* and Angus Wilson\*\*

*The influence of social media in the 21<sup>st</sup> century has led to new social norms of behavior with individuals presenting themselves to others, whether physically or virtually, on various social media platforms. As a result, these new trends have led recent society to be characterized as a “presentational cultural regime” and a “specular economy.” In a Bakhtinian digital carnivalesque, internet memes present a feast of challenges to exceptions and limitations in copyright law. Memes encompass a wide range of expression about the human experience, while also existing as a playful mode of culturally permissible expression in online social communications rather than as self-contained and specific categories such as parody or satire. This Article analyzes how, and to what extent, internet memes should be protected by the fair use doctrine. It concludes that as the digital intercommunicative persona construction becomes pandemic in the contemporary moment, more and more images will inevitably become the raw materials in the online making and re-making of the public self in an anti-hierarchical networked community. Copyright law is slowly and belatedly learning a new cultural vocabulary that it needs to translate into a legal lexicon relevant to judges and lawmakers.*

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\*\* Adjunct Research Fellow, E.W. Barker Centre for Law & Business, Faculty of Law, National University of Singapore.

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## INTRODUCTION

Internet memes provide a cogent example of how cultural expression shapes and is shaped by digital technology, which demonstrates the constant challenge of reconciling social norms of online communication with the fair use doctrine in copyright law. Recent society has been described with terms such as “presentational cultural regime” and “specular economy.”<sup>1</sup> These characterizations reflect how the influence of social media in the 21<sup>st</sup> Century has led to new social norms of behavior where individuals present themselves to others, whether physically or virtually, on various social media platforms and impels innovative economic models. The digital

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<sup>1</sup> P. DAVID MARSHALL, THE CELEBRITY PERSONA PANDEMIC 5, 37 (2016) [hereinafter “THE CELEBRITY PERSONA PANDEMIC”]; P. David Marshall, *The Specular Economy: Celebrity, Two-Way Mirrors, and the Personalization of Renown*, 47(6) SOC’Y 498 (2010) [hereinafter “*The Specular Economy*”].

culture has led to a pronounced focus on the production of the self or an online persona—whether through Facebook, Instagram, LinkedIn, Twitter, or Pinterest, billions of individuals worldwide are constantly making and remaking public versions of themselves for myriad purposes and monitoring these profiles daily. David Marshall observes that:

[T]he new technologies of the social—such as Facebook, Instagram, and Twitter—position the individual differently in the chain of communication, in the organization of engagement, and in the play of connection . . . we are on a spectrum of presentation of the self . . . producing our personas for publics.<sup>2</sup>

Social media inherently encourages the production of the online public persona that resembles the serialization of fictional characters in a television or movie series.<sup>3</sup> Individuals are using a combination of images, videos, text, handles and hashtags on social media to construct their online identities. Indeed “[t]hrough the circulation of viral images, texts, and videos . . . [and] memes, we replicate and seriate content that at some level seriates personas in terms of humor, connection, and value.”<sup>4</sup>

As the COVID-19 pandemic ravaged the world and governments enforced draconian lockdown measures, individuals have stormed social media to express their frustration, anger, and despair.<sup>5</sup> The proliferation of memes and parody videos on YouTube provide humorous outlets to convey our emotions and criticisms of political leaders and government agencies in their handling of the pandemic.<sup>6</sup> Images and videos are widely shared and reposted, often

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<sup>2</sup> THE CELEBRITY PERSONA PANDEMIC, *supra* note 1, at 39.

<sup>3</sup> For a discussion, see *id.* at 48–63.

<sup>4</sup> *Id.* at 63.

<sup>5</sup> E.g., Casey Schwartz, *Is Everybody Doing...OK? Let's Ask Social Media*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/10/12/style/self-care/social-media.html> [<https://perma.cc/S365-DPTN>]; Koustuv Saha, John Torous, Eric D. Caine, & Munmun De Choudhury, *Psychosocial Effects of the COVID-19 Pandemic: Large-Scale Quasi-Experimental Study on Social Media*, 22(11) J. MED. INTERNET RES. (2020), <https://pubmed.ncbi.nlm.nih.gov/33156805/> [<https://perma.cc/8267-VV2H>].

<sup>6</sup> See, e.g., Olivia Blair, *230 Coronavirus Memes To Get You Through Self-Isolation and Social Distancing*, ELLE (Feb. 24, 2021), <https://www.elle.com/uk/life-and->

at breakneck speed. Mikhail Bakhtin's concept of "carnival laughter" provides an apropos lens through which we can view these behavior on social media "as a spectacular feast of inversion and parody of high culture."<sup>7</sup> The cult theory of carnival culture first espoused by Bakhtin in his book *Problems of Dostoevsky's Poetics* is a familiar one to many scholars of literature, culture and political science.<sup>8</sup> There is a tendency on social media for a different set of rules to operate, one "in which anti-hierarchism, relativity of values, questioning of authority, openness, joyous anarchy, and the ridiculing of all dogmas hold sway."<sup>9</sup> Other scholars have already invoked Bakhtin's analytical paradigm of the carnivalesque to explain the presidential campaign of Donald Trump,<sup>10</sup> and have suggested that fair use can represent carnivalesque resistance to the hierarchies inherent in copyright law.<sup>11</sup> This Article, however, goes further to postulate that the notion of the carnivalesque as applied to social media platforms does not require the creative practices to be modes of expression that present a resistance to authority, but merely one that embodies performance as "a spectacle seen by the people [where] they live in it, and [where] everyone participates because its very idea embraces all the people."<sup>12</sup>

Images posted or circulated on social media have arguably the same purpose as the "social photograph" in the manner

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culture/g31803505/coronavirus-social-distancing-memes/ [https://perma.cc/A693-QP72]; Abram Brown, *Laugh Away the Apocalypse with These 15 Coronavirus Memes*, FORBES (Mar. 21, 2020), <https://www.forbes.com/sites/abrambrown/2020/03/21/laugh-away-the-apocalypse-with-these-15-coronavirus-memes/?sh=505a831723fc> [https://perma.cc/SXE8-CF6E]; CDC *Coronavirus Guidelines (Parody)*, YOUTUBE (Mar. 24, 2020), <https://www.youtube.com/watch?v=x503AEbk-TU> [https://perma.cc/J649-ARHT].

<sup>7</sup> Renate Lachmann, *Bakhtin and Carnival: Culture as Counter-Culture*, 11 CULTURAL CRITIQUE 115, 118 (Raoul Eshelman & Marc Davis, trans., 1988-89).

<sup>8</sup> MIKHAIL BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS (Caryl Emerson, ed. & trans., 1984).

<sup>9</sup> Lachmann, *supra* note 7, at 118.

<sup>10</sup> See, e.g., Elizaveta Gaufman, *The Trump Carnival: Popular Appeal in the Age of Misinformation*, 32(4) INT'L RELS. 410 (2018); Shaheed Nick Mohammed & Robert C. Trumpbour, *The Carnivalesque in the 2016 U.S. Presidential Campaign*, PRESIDENTIAL STUD. Q. (2020) (forthcoming), available at (<https://doi.org/10.1111/psq.12658>) [https://perma.cc/FK2C-WAP8].

<sup>11</sup> Elizabeth L. Rosenblatt, *Fair Use as Resistance*, 9 U.C. IRVINE L. REV. 377 (2019).

<sup>12</sup> MIKHAIL BAKHTIN, RABELAIS AND HIS WORLD 6, 7 (Helen Iswolsky, trans., 1984).

contemplated by Nathan Jurgenson; the image object itself is less its own end but a means of communicating an experience.<sup>13</sup> The posting of selfies, social photographs, and memes all form “part of an ongoing communication of who you are, what you are experiencing, the simple fact that you exist and are live doing things.”<sup>14</sup> One of the authors of this Article previously argued that a well-known literary or artistic work does much more than simply educate, inform or entertain; it also functions as a *signifier* of a set of *signified* meanings which are relevant to triggering the protection of the First Amendment when used in particular *expressive* ways.<sup>15</sup> Here, as part of a stream of continual postings—or in Marshall’s parlance, a serialization of an online public persona—photographs and memes form a nuanced visual literacy that plays with the distinction between the world of real objects and their symbolic meaning as a “means to express feelings, ideas, and experiences in the moment, a means sometimes more important than the specific ends of a particular image.”<sup>16</sup> These images transcend their original purpose in social media postings as they are utilized as raw materials and repurposed for their semiotic values in the serialized construction of the online public persona.

As the digital intercommunicative persona construction becomes “pandemic in the contemporary moment”,<sup>17</sup> more and more images, videos, and text will inevitably become the raw materials in the online making and remaking of the public self. Copyright law is slowly and belatedly learning a new cultural vocabulary that it needs to translate into a legal lexicon relevant to judges and lawmakers. But it is never too late to learn a new language.

This Article analyzes how internet memes are protected by the fair use doctrine, and to what extent they should be, under U.S. copyright law. Internet memes present a nebulous challenge to

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<sup>13</sup> NATHAN JURGENSON, *THE SOCIAL PHOTO: ON PHOTOGRAPHY AND SOCIAL MEDIA* 16–17 (2019).

<sup>14</sup> *Id.* at 16.

<sup>15</sup> David Tan, *The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the “Transformative Use” Doctrine Twenty-Five Years On*, 26 FORDHAM INT. PROP. MEDIA & ENT. L.J. 311, 316 (2016).

<sup>16</sup> JURGENSON, *supra* note 13, at 18.

<sup>17</sup> THE CELEBRITY PERSONA PANDEMIC, *supra* note 1, at 1. *See also id.* at 71–77.

exceptions and limitations in copyright law, as they encompass a wide range of expression about the human experience—they exist as a mode of culturally permissible expression in online social communications rather than as self-contained and specific categories such as parody or satire. Memes are a pervasive form of expression online and may incorporate image or video elements. They are shared across a variety of internet platforms such as blogs, Facebook, and Instagram as commentary or to further discourse. They rely on the viewer’s prior knowledge of a creative work or digital subculture to make the necessary semiotic connections, often drawing from copyrighted works of popular culture such as films, television series, paintings, or photographs. Ultimately, internet memes may be conceived as remixed, iterated discursive units of digital culture typified by rapid diffusion that inhere some form of commentary, admittedly to widely varying degrees.<sup>18</sup>

Part I considers the fair use doctrine in the U.S. and interrogates specifically how it is able to accommodate the notion of the carnivalesque within the rubric of the First Amendment in its protection of expressive and symbolic speech. Part II explores the role of memes as a mode of expression in what may broadly be referred to as “digital culture” to demonstrate a lack of alignment between online cultural norms of use and the prevailing traditional understanding of copyright law. Part III applies fair use doctrine to different categories of internet memes to determine the extent to which this genre of digital expression qualifies as fair use. The Article concludes on a cautionary note, urging the US judiciary to embrace a culturally sensitive interpretation of the first factor of fair use especially when considering novel and overwhelmingly non-commercial secondary uses that do not visually transform the underlying work.

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<sup>18</sup> BRADLEY E. WIGGINS, *THE DISCURSIVE POWER OF MEMES IN DIGITAL CULTURE: IDEOLOGY, SEMIOTICS, AND INTERTEXTUALITY* 11 (2019).



## I. FAIR USE

### A. *Contextualizing Fair Use within a Carnavalesque Cultural Milieu*

Copyright law is intended to promote creativity and innovation by providing fair compensation to copyright holders. However, the exclusive rights of the copyright holder give way to a user's right allowing limited, unauthorized use of protected works to prevent these rights from stifling creativity and innovation. Open-ended fair use in the U.S. and categorical fair dealing provisions in other countries like the United Kingdom, Canada and Australia both operate to temper the exclusive rights of copyright owners with the public interest to foster further creative expression by permitting secondary uses of copyrighted works,<sup>19</sup> which provides the primary mechanism to balance copyright protection with the broader public interest of fostering creative expression.<sup>20</sup> In the U.S., the Second Circuit Court of Appeals has led the charge in regarding the "public interest" as a guiding consideration in conducting the overall fair use analysis: "transformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public knowledge."<sup>21</sup> In a comprehensive analysis of policy clusters, Pamela Samuelson has similarly concluded that the primary purpose of copyright is "to promote the public good, or as the U.S. Constitution puts it, 'promote the [p]rogress of Science and useful Arts.'"<sup>22</sup>

The Copyright Act, enacted by Congress under the authority of the U.S. Constitution's Copyright Clause, grants individuals monopoly-like power to preclude others from using copyrighted material in their expression.<sup>23</sup> It is this "paradox" that creates the

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<sup>19</sup> Emily Hudson, *Implementing Fair Use in Copyright Law: Lessons from Australia*, 25 INTELL. PROP. J. 201 (2013).

<sup>20</sup> See e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>21</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015). See also Haochen Sun, *Copyright Law as an Engine of Public Interest Protection*, 16 NW. J. TECH. & INTELL. PROP. 123, 137–139 (2019).

<sup>22</sup> Pamela Samuelson, *Unbundling Fair Use*, 77 FORDHAM L. REV. 2537, 2617 (2009).

<sup>23</sup> 17 U.S.C. § 106.

tension—copyright laws grant a copyright owner the right to suppress or abridge another person’s freedom of speech when that person seeks to express copyrighted material.<sup>24</sup> However, on a number of occasions, the Supreme Court has rejected any further independent consideration of the impact of the First Amendment on copyright law, pronouncing that “copyright law contains built-in First Amendment accommodations.”<sup>25</sup> As a “traditional contour” of copyright law, the Court held that the “fair use defense affords considerable latitude for scholarship and comment . . . even for parody.”<sup>26</sup> Justice Ginsburg delivering the opinion of the Court in *Golan v. Holder* emphasized the “speech-protective purposes and safeguards embraced by copyright law”<sup>27</sup> and assured that the public may freely use the author’s expression “in certain circumstances.”<sup>28</sup> Indeed the Supreme Court’s ruling in *Golan* makes it clear that the fair use defense has “constitutional import” and “reaffirms that copyright law poses a First Amendment paradox that cannot be ignored.”<sup>29</sup>

One may regard *Golan v. Holder* as recognizing copyright law as implicitly establishing a hierarchy that values certain kinds of works and authors/users/speakers over others by assigning different levels of protection and value to each of them. In the shadows of the First Amendment, original speakers (authors), derivative speakers (fair users and infringers) and the audience (general public and consumers) are engaged in a communicative discourse.<sup>30</sup> In his analysis of the potential of audience reconstruction with dominant symbols of a culture, John Fiske coined the term “semiotic democracy” to describe a world where empowered audiences freely and widely engage in the use of cultural symbols to express meanings that are

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<sup>24</sup> See, e.g., NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 3 (2010) (“Yet copyright also burdens speech. We often copy or build upon another’s words, images, or music to convey our own ideas effectively. We cannot do that if a copyright holder withholds permission or insists upon a license fee that is beyond our means.”).

<sup>25</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). See also *Golan v. Holder*, 565 U.S. 302, 328 (2012); *Harper & Row, Publishers, Inc. v. Nation Ents.*, 471 U.S. 539, 560 (1985).

<sup>26</sup> *Eldred*, 537 U.S. at 219–220.

<sup>27</sup> *Golan*, 565 U.S. at 328 (internal citations omitted).

<sup>28</sup> *Id.* (citing *Eldred*, 537 U.S. at 219).

<sup>29</sup> Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082, 1128 (2013).

<sup>30</sup> Rosenblatt, *supra* note 11, at 381.

different from the ones intended by their creators.<sup>31</sup> As forms of relational discourse, semiotics and the theory of intertextuality are intimately intertwined. Bakhtin viewed the products of authorship as reliant on, and inevitably inflected with, both the author's voice and the voices of others—ultimately a dialogic practice.<sup>32</sup> Bakhtin has emphasized that the “utterance” is always the site of ideological contestation and that there will always be a constant struggle over the sign.<sup>33</sup> Bakhtin argued that in our social interactions we would start from the accumulated language material, which is inevitably ideologically loaded—we then proceed with our dialogue in certain social circumstances, using speech genres and specific utterances.<sup>34</sup> His observations certainly resonate in the digital world of social media where individuals communicate through posting and reposting of words, images, and videos each chosen with its semiotic freight and particular connotations understood within that community. Annemarie Bridy notes that:

For Bakhtin, intertextuality is an intrinsic property of language because the words a writer chooses “are already populated with the social intentions of others.” The writer “compels them to serve his own new intentions, to serve a second master.”<sup>35</sup>

Stuart Hall has defined the taking of an existing meaning and reappropriating it for new meanings as “trans-coding”<sup>36</sup> and

<sup>31</sup> JOHN FISKE, *TELEVISION CULTURE* 239 (1st ed. 1987). Fiske examines the construction of meanings by the audience, which plays with parodies and actively subverts the dominant encoding of the sign. See also Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 489–90 (2006).

<sup>32</sup> See generally MIKHAIL M. BAKHTIN, *SPEECH GENRES AND OTHER LATE ESSAYS* (Vern W. McGee, trans., Caryl Emerson & Michael Holquist eds., 1994); MICHAEL E. GARDINER, *THE DIALOGICS OF CRITIQUE: M.M. BAKHTIN AND THE THEORY OF IDEOLOGY* (1992).

<sup>33</sup> BAKHTIN, *supra* note 32, at 76–77; GARDINER, *supra* note 32, at 7.

<sup>34</sup> LESZEK KOCZANOWICZ, *POLITICS OF DIALOGUE: NON-CONSENSUAL DEMOCRACY AND CRITICAL COMMUNITY* 77 (2015).

<sup>35</sup> Annemarie Bridy, *Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality*, 9 U.C. IRVINE L. REV. 293, 302 (2019) (internal citations omitted).

<sup>36</sup> Stuart Hall, *The Spectacle of the “Other”*, in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 223, 270 (Stuart Hall ed., 1997). The term “transfunctionalize” has also been used to describe how subcultures assign new and often contradictory meanings to signs as understood by mainstream society. PAUL NATHANSON, *OVER THE RAINBOW: THE WIZARD OF OZ AS A SECULAR MYTH OF AMERICA* 343 (1991).

explained that repressed groups may use trans-coding strategies to reverse stereotypes, substitute negative portrayals with positive ones, or contest subordinate representations from within.<sup>37</sup> Such a description possibly falls within Hal Foster's description of the countercultural movement which seeks to counter the myth; such "‘myth-robbery’ seeks to restore the original sign for its social context *or* to break apart the abstracted mythical sign and to reinscribe *it* in a countermythical system."<sup>38</sup> However, Foster views the "sub-cultural" practice to be different from the countercultural in that it "recodes signs rather than poses a revolutionary practice of its own."<sup>39</sup> Despite the differences, both countercultural and subcultural recordings are arguably applicable to the transformative use doctrine in copyright law.

In his study of digital fandom, Paul Booth advances his thesis of a "philosophy of playfulness" which he observes to be prevalent in the individual's use of today's digital technology.<sup>40</sup> Drawing on Bakhtin's writings, Booth postulates that on the internet, individuals entering into a "carnavalesque atmosphere subsume their identities, join a collectivity, and participate in a textual freedom."<sup>41</sup> Bakhtin's earlier interest in a purely textual form of dialogism (such as in his 1929 study of Fyodor Dostoevsky) soon evolved into a preoccupation with the transgressive potential of a constellation of cultural practices, rituals, and symbols designated as the "carnavalesque" that is concerned with "images of symbolic degradation and the 'bringing down to earth' of hegemonic values, ideas, and sentiments via the evocation of utopian community."<sup>42</sup> He initially developed the concept of carnival while analyzing François Rabelais's writings and their connection to the popular laughing culture of the Renaissance. Bakhtin was exiled from the center of official Soviet culture due to his involvement in an unofficial circle of philosophers, and he was interested in writing about "the multiplicity of split-offs from

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<sup>37</sup> Hall, *supra* note 36, at 270–75.

<sup>38</sup> HAL FOSTER, RECORDINGS: ART, SPECTACLE, CULTURAL POLITICS 169 (1985).

<sup>39</sup> *Id.* at 170.

<sup>40</sup> PAUL BOOTH, DIGITAL FANDOM: NEW MEDIA STUDIES 2 (1st prtg. 2010).

<sup>41</sup> *Id.* at 60. *See also* PAUL BOOTH, PLAYING FANS: NEGOTIATING FANDOM AND MEDIA IN THE DIGITAL AGE 136–149 (2015).

<sup>42</sup> Michael Gardiner, *Bakhtin's Carnival: Utopia as Critique*, 3 UTOPIAN STUD., no. 2, 21, 28 (1992).

the core” and “the conflict between the two forces, the centrifugal and the centripetal” within the Soviet cultural system.<sup>43</sup> According to Bakhtin, the lively carnival ethos represented by folklore and folk laughter stood in opposition to the official and serious church-sanctioned and feudal culture.<sup>44</sup> This resulted in the carnival’s appearance as a direct response to medieval political theology.<sup>45</sup> Bakhtin’s notion of the carnival has been applied to studies of the hegemony of the Roman Catholic Church, the Holy Roman Empire of the Renaissance, and Stalinism.<sup>46</sup> Today, a parallel may be drawn with the carnivalesque atmosphere on social media in contradistinction to the more serious real world where intellectual property rights are more rigorously and rigidly enforced. Renate Lachmann explains that the ensemble of rites and symbols is subjugated to:

[t]he principle of laughter that organizes the carnival is transtemporal and universal. Laughter rises above and transcends the objects at which it is temporarily aimed: official institutions and the sacral.<sup>47</sup>

It had been noted similarly that the carnival culture’s idea of “transgression of cultural norms and values by subaltern groups, [is] the ideal critical tool for approaching all kinds of social and material interactions.”<sup>48</sup> In her reading of Bakhtin, Elizabeth Rosenblatt has observed that the medieval carnival has brought together a *mélange* of clerics, schoolmen, and ordinary people “to engage in renewal and recreation, providing temporary release from a rigid ideological system”, thus creating “a temporary space for fantasy, radicalism, and criticism of the upper strata.”<sup>49</sup> Indeed, Bakhtin’s conceptualization of the carnival is very much focused on how a temporary upending of hierarchy is tolerated within a prescribed time and space that is still very much governed by rules. In the carnival, strict social and class roles are reversed or inverted through ritual spectacles and

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<sup>43</sup> Lachmann, *supra* note 7, at 116.

<sup>44</sup> *Id.* at 118.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 123.

<sup>48</sup> Chris Humphrey, *Bakhtin and the Study of Popular Culture: Re-thinking Carnival as a Historical and Analytical Concept*, in *MATERIALIZING BAKHTIN* 164, 165 (Craig Brandist & Galin Tihanov eds., 2000).

<sup>49</sup> Rosenblatt, *supra* note 11, at 386.

discourse that include profanities, parodies, pastiche, and mockery.<sup>50</sup> The transgressive activities cloaked in a festive spirit allowed the ordinary folk to talk back to the dominant culture and the power czars, but it did not undermine or distort the broader framework of class and political structure.<sup>51</sup> Framing copyright law through this lens, Rosenblatt argues:

[L]ike the carnivalesque, fair uses employ the communicative tools of the establishment to convey a new, possibly contradictory meaning—a secular use of sacred symbols, so to speak. The carnivalesque engages in dialogue by assigning a folk meaning to (religious or other authoritarian) signs, resisting a power structure that would assign a monologic meaning to those same signs.<sup>52</sup>

More specifically, David Tan, co-author of this Article, has previously mooted a more nuanced approach to the new media paradigm that posits cultural practices of fans as a form of “transformative play” within an interactive social and cultural space which offers exciting collaborative possibilities to authors and fans,<sup>53</sup> approaching fair use through the viewpoint of the carnivalesque.<sup>54</sup> It has also been suggested that the law be more accepting of the antics of the “prankster” in culture jamming where resistance is effected “less through negating and opposing dominant rhetorics than by playfully and provocatively folding existing cultural forms in on themselves.”<sup>55</sup> The authors agree with Rosenblatt that framing fair use through a carnivalesque lens acknowledges “intertextual and relational nature of expression, but at the same time, the framework of

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<sup>50</sup> Mohammed & Trumbour, *supra* note 10, at 3.

<sup>51</sup> Rosenblatt, *supra* note 11, at 386.

<sup>52</sup> *Id.* at 388.

<sup>53</sup> David Tan, *Fair Use and Transformative Play in the Digital Age*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT 102, 130 (Megan Richardson ed., 2017).

<sup>54</sup> David Tan, *De(Re)Constructing Narratives in Intellectual Property Law: Transformative Play, Culture Jamming, and Poststructural Disruptions*, 32 L. & LITERATURE 75, 87 (2020).

<sup>55</sup> Christine Harold, *Pranking Rhetoric: “Culture Jamming” as Media Activism*, 21 CRITICAL STUD. IN MEDIA COMMUN. 189, 191 (2004).

fair use is not a free-for-all.”<sup>56</sup> However, Rosenblatt does not elucidate how conduct functioning as carnivalesque can be protected by current fair use doctrine. Indeed, the four factors of fair use have to carefully be weighed taking into account the public benefit of excusing/permitting the transgressive (infringing) behavior. The authors propose to build on Rosenblatt’s conception of the carnivalesque by considering how the creation and maintenance of the online public persona in a social media environment can benefit from the notion of a “digital carnivalesque.”

Three key characteristics of the carnivalesque are pertinent here. First, the *laughing culture* of the carnival where official authority is subverted by laughter and all carnival participants are friendly with each other regardless of their social standing.<sup>57</sup> Jesters are permitted to speak their minds and real names are replaced by nicknames. Second, the *material culture* of pleasure and gluttony predominates in the carnival as the participants obsess with sex, body parts, material objects, and food.<sup>58</sup> Third, the *game culture* presents a giddy psychedelia of repeated activities and rituals with rewards and prizes, including the election of the mock king.<sup>59</sup> One can immediately see how a social media platform like Instagram embodies all three attributes. Individuals create an online persona using nicknames and engage in familiar and intimate interactions with one another. The most popular postings revolve around obsessions with celebrity, sex, material objects, and food. Influencers are financially rewarded for specific activities, as well as other participants for taking part in contests.<sup>60</sup> In the Bakhtinian program of an ideal social life, the

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<sup>56</sup> Rosenblatt, *supra* note 11, at 390.

<sup>57</sup> Gauffman, *supra* note 10, at 413 (internal citations omitted).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 414.

<sup>60</sup> See, e.g., Gil Appel, Lauren Grewal, Rhonda Hadi, & Andrew T. Stephen, *The Future of Social Media in Marketing*, 48 J. ACAD. MKTG. SCI. 79 (2020); Paul Jankowski, *Gaming Is The Best Social Media Platform For Brands To Reach Gen-Z*, FORBES (June 1, 2020), <https://www.forbes.com/sites/pauljankowski/2020/06/01/gaming-is-the-best-social-media-platform-for-brands-to-reach-gen-z/> [https://perma.cc/3P8S-D3ER]; Paul Suci, *Social Media Influencers—Still Worth the Money*, FORBES (May 29, 2020), <https://www.forbes.com/sites/petersuci/2020/05/29/social-media-influencers—still-worth-the-money/> [https://perma.cc/7Y7J-ZVPL]; Audrey Conklin, *How Much Money Do Social Media Influencers Make?*, FOX BUSINESS (Mar. 11, 2020),

perpetual fluctuation of the traditional carnival discourse from pathos to grotesque, or from laughter to seriousness, precludes the appropriation of the empty space of the carnival feast by any permanent symbol.<sup>61</sup> Importantly, the digital carnivalesque cannot be an embodied utopia as intellectual property rules will continue to operate in this online milieu, but we can regard this carnival with its ongoing utterances and dialogue as a universal phenomenon reflecting human nature with immense potential for freedom of expression that ought to be safeguarded.

The US Supreme Court in both *Golan v Holder* and *Eldred v Ashcroft* held that “the ‘traditional contours’ of copyright protection, *i.e.*, the ‘idea/expression dichotomy’ and the ‘fair use’ defense . . . are recognized in our jurisprudence as ‘built-in First Amendment accommodations.’”<sup>62</sup> In particular, the fair use defense as codified in 17 USC §107 “allows the public to use not only facts and ideas contained in a copyrighted work, but also [the author’s] expression itself in certain circumstances.”<sup>63</sup> It is unsurprising that in the context of a robust free speech culture emboldened by the First Amendment, U.S. courts have interpreted the notion of transformative use liberally—and consequentially the fair use defense—when the freedom of speech would be unduly constrained by the enforcement of the rights of copyright owners. One of the most significant contributions that semiotics can bring to copyright law is in the analysis of fair use. In copyright fair use, the pertinent inquiry is whether the secondary work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>64</sup>

As Tan has pointed out,<sup>65</sup> Brian Holland finds that certain aspects of the critical theories aligned with the law and literature movement are useful to a more expansive model of transformative

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<https://www.foxbusiness.com/lifestyle/social-media-influencer-pay>  
[<https://perma.cc/ZX59-DFTJ>].

<sup>61</sup> KOCZANOWICZ, *supra* note 34, at 84–85.

<sup>62</sup> *Golan v. Holder*, 565 U.S. 302, 328 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

<sup>63</sup> *Eldred*, 537 U.S. at 219.

<sup>64</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>65</sup> Tan, *supra* note 54.



fair use that addresses both monopoly incentive and accommodation concerns. He explains:

First, these critical theories shift the focus away from works of authorship and toward audience engagement with the text. This mitigates the tendency to overvalue, through a monopoly interest, those who most closely fit the image of the romantic author and to undervalue both prior works and the audience. Second, these critical theories acknowledge that an author does not control the meaning of a work. Instead, meaning is determined, at least in part, through intertextual processes. This opens the door to a reconsideration of meaning-making and the role of audiences in that process, with significant implications for copyright doctrine.<sup>66</sup>

Holland postulates that “the prevailing conception of transformativeness [in copyright fair use] is one of romantic authorship, evidenced by a defendant’s authorial purpose or activity” and proposes an approach “grounded in social semiotic theory [that] attempts to account for the multiple and divergent meanings created as various interpretive communities engage a particular work.”<sup>67</sup> However, contrary to Holland’s observations that the U.S. courts currently focus on the degree to which a defendant has engaged in authorial activity in the fair use analysis,<sup>68</sup> the current approach of the Second and Ninth Circuit Courts of Appeals appears to be able to accommodate the shifting of the transformativeness inquiry from locating an authorial presence or authorial activity, to one of reader interpretation, i.e. whether one might reasonably perceive the creation of “new information, new aesthetics, new insights and understandings.”<sup>69</sup> As Laura Heymann points out, ultimately, the question is whether the resulting work “is transformative in its meaning—that

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<sup>66</sup> H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 HARV. J. LAW & TECH. 335, 358 (2011).

<sup>67</sup> *Id.* at 348.

<sup>68</sup> *Id.* at 354–56.

<sup>69</sup> *See, e.g.,* Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); Dr. Seuss Enters., L.P. v. ComicMix, LLC, 983 F.3d 443 (9th Cir. 2020); Seltzer v. Green Day, 729 F.3d 1170 (9th Cir. 2013).

is, whether the reader perceives the second copy as signifying something different from the first.”<sup>70</sup> When one analyzes a work of copyright, one can potentially read it semiotically as embodying a unity of modern cultural meanings capable of being opposed or resisted (through “countercultural” means such as parody), or one can regard it as possessing polysemous qualities which may be contested or disrupted (through “subcultural” practice such as bricolage or pastiche). Uses that comment on or present a different way of viewing familiar iconography, societal archetypes, public obsessions, and majoritarian beliefs—typical carnivalesque conduct—all fall within the First Amendment categories of protected speech, such as political speech, art, entertainment, and matters of public interest.<sup>71</sup> Parody may be viewed as contributing valuable commentary and criticism to the marketplace of ideas, or advancing democratic debate on matters of public interest through the use of irreverent humor.<sup>72</sup> Various forms of appropriation art, which can include memes on social media and altered image posts on Instagram, can be viewed as ideological critiques that take or hijack dominant words and images to create insubordinate, counter messages.<sup>73</sup> Furthermore, the participatory theory of the First Amendment supports the protection of the making of “representations about self, identity, community, solidarity, and difference” or the articulation of political and social aspirations using these copyright signs within a “dialogic democracy.”<sup>74</sup> Within this carnivalesque, it may be argued that fair use clearly advances the marketplace of ideas and the democratic rationale

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<sup>70</sup> Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J. LAW & THE ARTS 445, 455 (2008). However, this observation is not unproblematic. Holland notes that:

Courts have come to assume, however, that those messages and meanings reside in the mind and intentions of the “author,” that those messages and meanings are transmitted from the author to the audience, and that certain segments of the audience either “get it” or do not. But this paradigm misconceives the process by which “meaning” is realized. Meaning is not controlled, transmitted, or even consistent. It is, instead, negotiated and actualized in engagement with the audience, or, more appropriately, audiences.

Holland, *supra* note 66, at 361. See also Laura A. Heymann, *Reasonable Appropriation and Reader Response*, 9 U.C. IRVINE L. REV. 343 (2019).

<sup>71</sup> Tan, *supra* note 15, at 344.

<sup>72</sup> *Id.* at 345.

<sup>73</sup> *Id.* at 348.

<sup>74</sup> *Id.* at 378–79.

through the creation of “new information” and “new insights and understandings,” as well as the self-fulfillment function through the creation of “new aesthetics.”<sup>75</sup>

### B. Fair Use in the 21<sup>st</sup> Century

Justice Story’s test in *Folsom v. Marsh* is widely considered to be the origin of fair use in the U.S..<sup>76</sup> Section 107 of the *Copyright Act 1976* permits use of copyrighted works “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research,” with consideration of a non-exhaustive list of four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted works.<sup>77</sup>

These factors will be examined in turn below.

#### 1. Purpose and Character of the Use

Pierre Leval, then a Judge of the United States District Court for the Southern District of New York, published an influential article in 1990 that considered “whether imprecision—the absence of a clear standard—in the fair use doctrine [was] a strength or a weakness.”<sup>78</sup> Leval noted that “throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values”<sup>79</sup> but he was concerned that fair use “should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright.”<sup>80</sup> Leval advocated instilling a coherent and useful set of principles in the fair

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<sup>75</sup> *Id.* at 358.

<sup>76</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841).

<sup>77</sup> 17 U.S.C. § 107.

<sup>78</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

<sup>79</sup> *Id.* at 1105.

<sup>80</sup> *Id.* at 1107.

use doctrine, such that “the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.”<sup>81</sup> In his analysis of the four statutory fair use factors, Leval was of the view that factor one—the “purpose and character of the use”—is the “soul of fair use.”<sup>82</sup> Explaining that this consideration raises the question of whether the secondary use “fulfil[s] the objective of copyright law to stimulate creativity for public illumination,”<sup>83</sup> he emphasized that the answer turns primarily on whether, and to what extent, the challenged use is transformative. Leval frames the inquiry as follows:

The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original . . . [If] the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.<sup>84</sup>

Leval also provided some examples of transformative use which included criticizing the quoted work, exposing the character of the original author, summarizing an idea argued in the original in order to defend or rebut it, parody, symbolism, and aesthetic declarations.<sup>85</sup>

The phrase “transformative use” has catapulted into prominence in fair use jurisprudence ever since the Supreme Court in 1994 embraced transformiveness as the heart of fair use in *Campbell v. Acuff-Rose Music Inc.*<sup>86</sup> The decision is important in its emphasis on

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<sup>81</sup> *Id.* at 1110.

<sup>82</sup> *Id.* at 1116.

<sup>83</sup> *Id.* at 1111.

<sup>84</sup> *Id.* (internal citations omitted).

<sup>85</sup> *Id.*

<sup>86</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The controversial rap group 2 Live Crew sampled the distinctive bassline from Roy Orbison’s original hit song *Pretty Woman*, used the same title in their parody song, and the romantic lyrics were replaced with lyrics about a big hairy woman and her exploits.

how a highly transformative use of an original work may qualify the secondary infringing work for fair use protection even if the latter was commercial in nature, rebutting earlier presumptions in cases like *Harper & Row Publishers v Nation Enterprises*<sup>87</sup> and *Sony Corp of America v Universal City Studios*.<sup>88</sup> While all four statutory fair use factors are supposed to be weighed together to determine whether a use is fair, the first factor has largely dominated the analysis in the last three decades since the Supreme Court in *Campbell* endorsed transformative use doctrine (a concept which to which section 107 does not even explicitly refer).<sup>89</sup> In his empirical study of U.S. copyright decisions up to January 1, 2017, Jiarui Liu concluded:

A finding of transformative use overrides findings of commercial purpose and bad faith under factor one, makes irrelevant the issue of whether the original work is creative or unpublished under factor two, stretches the extent of copying permitted under factor three towards 100% verbatim reproduction, and precludes the evidence on damage to the primary or derivative market under factor four even though there exists a well-functioning market for the use.<sup>90</sup>

The Supreme Court in *Campbell* held that a work will be transformative to the extent the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>91</sup> The extent to which a use is transformative can reduce the weight given to other factors such as commerciality,<sup>92</sup> because highly transformative secondary uses do not

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<sup>87</sup> *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985).

<sup>88</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>89</sup> See generally Barton Beebe, *An Empirical Study of US Copyright Fair Use Opinions, 1978–2005*, 156 U. PENN. L. REV. 549 (2008); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L. J. 47 (2012); Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163 (2019).

<sup>90</sup> Liu, *supra* note 89, at 240.

<sup>91</sup> *Campbell*, 510 U.S. at 579.

<sup>92</sup> *Campbell*, 510 U.S. at 580. However, Judge Leval noted recently in *Capitol Records, LLC v ReDigi Inc.*, 910 F.3d 649, 661 (2d Cir. 2018):

provide a market substitute for the original work. The decision appeared to have deemphasized the importance of the fourth factor in the evaluation of fair use, and most of the lower courts' decisions in the aftermath of *Campbell* seemed to proceed on the basis that "if transformative, then fair use."<sup>93</sup> In almost thirty years since Leval urged courts to adopt transformation as a guiding principle of fair use and following its endorsement in *Campbell*, the transformative use doctrine has undergone a remarkable judicial expansion to include virtually any "creation of new information, new aesthetics, new insights and understandings."<sup>94</sup>

While parody appeared to occupy an exalted position in the annals of fair use after *Campbell*, it becomes clearer from the mid-2000s onwards in a series of Circuit Court decisions that courts should not be fixated with unnaturally distinguishing parody from satire, or locating a critical commentary on the original work, when assessing the first factor of fair use.<sup>95</sup> The complexity of defining parody has been highlighted in many scholarly writings.<sup>96</sup> In her masterful analysis of the history of the parody genre, Sabine Jacques observes that "parody is often used interchangeably with terms such as pastiche, caricature, satire, irony, imitation, plagiarism, and burlesque."<sup>97</sup> In particular, parodies and satires are not hermetically

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[W]hile the mere fact of a commercial motivation rarely pushes the first factor determination against fair use (as so many canonical fair uses, such as book reviews; quotation of prominent figures in news reports, news commentary, and history books; the performance of parodic plays, are all commercial), in some circumstances a commercial motive will weigh against a finding of fair use under Factor One.

(Citation omitted).

<sup>93</sup> Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, SING. J. LEGAL STUD. 265, 277 (2020). Ginsburg questions whether the pendulum of transformative use has begun to return to a more balanced fair use analysis but cautions that renewed emphasis on the fourth factor risks simply inverting the test ("The formula 'if transformative work/purpose, then no market harm' meets its corollary: 'If commercial and not transformative, then market harm.' Thus, fair use continues to reduce to a one-factor test, but one that cuts both ways."). *Id.* at 287.

<sup>94</sup> See *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.* 150 F.3d 132, 143 (2d Cir. 1998) (quoting Leval, *supra* note 78, at 1111).

<sup>95</sup> See, e.g., Amy Lai, *Copyright Law and Its Parody Defense: Multiple Legal Perspectives*, 4 NYU J. INTELL. PROP. & ENT. L. 311 (2015).

<sup>96</sup> See, e.g., SABINE JACQUES, *THE PARODY EXCEPTION IN COPYRIGHT LAW* 1–36 (2019).

<sup>97</sup> *Id.* at 7.

separated from one another, and they can blend in a single work called a “satiric parody.” Referring to *Mattel v. MCA Records*,<sup>98</sup> Jacques points out that the song *Barbie Girl* by the Danish band Aqua “parodies the famous fashion doll manufactured by Mattel, but at the same time, it is a satiric commentary on the ‘blond bimbo’ image of women in today’s society.”<sup>99</sup> Simon Dentith contends that it is impossible to encapsulate parody in a single definition, and suggests that it broadly “includes any cultural practice which provides a relatively polemical allusive imitation of another cultural production or practice.”<sup>100</sup>

In 2006, the Second Circuit Court of Appeals in *Blanch v. Koons* held that appropriation artist Jeff Koons’ use of Andrea Blanch’s fashion photograph was fair use even though he did not comment on the original work, rather using it “as fodder for his commentary on the social and aesthetic consequences of mass media.”<sup>101</sup> The Second Circuit expressly disagreed that comment or criticism of the original work is required to show transformative use, and instead inquired whether the original work was used in the “creation of new information, new aesthetics, new insights and understandings.”<sup>102</sup> In 2013, the Second Circuit reiterated in *Cariou v. Prince* that a work need not comment on the original to be transformative, and went even further to state that transformativeness will be judged on how the work may “reasonably be perceived” by the audience, rather than relying on an artist’s stated intent.<sup>103</sup> Whether a secondary use is parody or satire is of greater importance in jurisdictions with closed-ended fair dealing provisions such as those in the United Kingdom, Canada, and Australia than under present U.S. fair use doctrine. Since 2006, the Second and Ninth Circuit Courts of

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<sup>98</sup> *Mattel, Inc. v. MCA Records*, 296 F.3d 894 (9th Cir. 2002).

<sup>99</sup> JACQUES, *supra* note 96, at 8.

<sup>100</sup> SIMON DENTITH, *PARODY* 9 (2000).

<sup>101</sup> *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

<sup>102</sup> *Id.* at 253. *See also* *Castle Rock Ent., Inc. v. Carol Publ’g Grp, Inc.* 150 F.3d 132, 141 (2d Cir. 1998) (“If ‘the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.’” (citation omitted)).

<sup>103</sup> *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013).

Appeals in a consistent lineage of decisions such as *Blanch v. Koons*,<sup>104</sup> *Cariou v. Prince*,<sup>105</sup> *Seltzer v. Green Day*,<sup>106</sup> *TCA Television Corp. v. McCollum*,<sup>107</sup> and *Dr. Seuss Enterprises v. ComicMix*<sup>108</sup> have avoided discussing specifically whether an infringing use was parody or satire, instead applying the “creation of new information, new aesthetics, new insights and understandings” test for transformativeness. Even so, a parodic or satirical purpose may permit greater copying under the third factor analysis,<sup>109</sup> and reduce the relevant market harm under the fourth factor.<sup>110</sup> Largely in line with Pamela Samuelson’s policy clusters,<sup>111</sup> Tan has conducted a review of US fair use cases post-*Campbell*, identifying five broad and sometimes overlapping categories of transformative uses identified as demonstrating a change in the “purpose” or “character” under 17 U.S.C § 107:

- (1) Directly commenting on or criticizing the original work, or targeting the original work for ridicule or parody;
- (2) Using the original work to comment on something else or in a satire, but the secondary work nonetheless contains some underlying critical relevance to the original work;
- (3) Recontextualizing the original work without significant modification but changing the meaning of the original work (e.g., Andy Warhol’s appropriation art);

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<sup>104</sup> 467 F.3d 244 (2d Cir. 2006).

<sup>105</sup> 714 F.3d 694 (2d Cir. 2013).

<sup>106</sup> *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013).

<sup>107</sup> *TCA Television Corp. v. McCollum*, 839 F.3d 168 (2d Cir 2016).

<sup>108</sup> *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020). The infringing work *Oh, the Places You’ll Boldly Go!* which was a mash-up of characters from *Star Trek* and Seussian landscapes, was separately considered by the court on whether it was a parody and in the alternative, whether it had the “benchmarks of transformative use.” *Id.* at 451–61.

<sup>109</sup> See e.g., *TCA*, 839 F.3d 168 (ruling that a non-parodic and non-satirical verbatim use of a famous comedy routine *Who’s on First?* in a play was not fair use since it had the same purpose as the original).

<sup>110</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (“[T]here is no protectable derivative market for criticism.”).

<sup>111</sup> See generally Pamela Samuelson, *supra* note 22.



- (4) Changing the purpose of the original work within an expressive context (e.g., from entertainment to education or research); and
- (5) Changing the purpose of the original work within a technological context and with significant social benefit.<sup>112</sup>

More recently, in a spate of fair use decisions involving technology as opposed to the visual and performing arts contexts, the Circuit Courts have focused more closely on the statutory text of whether there was a change in “purpose” or “character” when determining fair use.<sup>113</sup> The Second Circuit Court of Appeals in *TCA Television Corp. v. McCollum* has commented that the generous view of what might constitute transformative use (and therefore fair use) might have hit its “high-water mark” in *Cariou*.<sup>114</sup> Judge Pierre Leval, now sitting on the Second Circuit Court of Appeals, also retreated noticeably from endorsing the transformative use talisman in *Capitol Records, LLC v. ReDigi, Inc.*, commenting that the fourth factor is “undoubtedly the single most important element of fair use.”<sup>115</sup> Ginsburg notes that during this period of the first factor primacy, while courts have followed a nearly formulaic “if

<sup>112</sup> Tan, *supra* note 15, at 332–34. See also Liu, *supra* note 89, at 204–10.

<sup>113</sup> See, e.g., *Authors Guild Inc., et al. v. Google, Inc.* 804 F.3d 202 (2d Cir. 2015) (allowing researchers access to snippets in Google Books program, which scanned entire contents of books but allowed only minimal access to the text of those books, was fair use); *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018) [hereinafter “*TVEyes*”] (allowing subscribers to search and view substantial portions of copyrighted news broadcasts is not fair use); *Capitol Records, LLC v. ReDigi, Inc.*, 910 F.3d 649 (2d Cir. 2018) (ruling that resale of digital music files is not fair use); *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018) (finding the purpose of the API packages in Android is the same as the purpose of the packages in the Java platform and that Google made no alteration to the expressive content or message of the copyrighted material); *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255 (4th Cir. 2019) (finding that posting a cropped photograph, without a change in purpose, is not fair use); *VHT, Inc. v. Zillow Grp., Inc.*, 918 F. 3d 723 (9th Cir. 2019) (finding that searchable full-sized real estate images displayed for the same purpose as the original photographs is not fair use).

<sup>114</sup> *TCA TV Corp. v. McCollum*, 839 F.3d at 181. Judge Easterbrook of the Seventh Circuit Court of Appeals was also highly critical of the *Cariou* decision: *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“We’re skeptical of *Cariou*’s approach, because asking exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works.”).

<sup>115</sup> 910 F.3d at 662 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

transformative, then fair use,”<sup>116</sup> one should be cautious against flipping this single-factor analysis to “[i]f commercial and not transformative, then market harm.”<sup>117</sup> The resurgence of the primacy of the fourth factor in last few years will be discussed below.

Rosenblatt’s excellent analysis will not be repeated here. The authors agree that the “carnival of fair use is extraordinarily diverse and can include, for example, criticism, parody, satire, data-mining, fanworks, collage, and scholarship.”<sup>118</sup> Viewing cases like *Campbell* and *Suntrust Bank v. Houghton Mifflin Co.*<sup>119</sup> through a Bakhtinian lens, Bridy locates the presence of a “confrontational dialogism” and finds that the theme of “intertextual inversion” runs through these cases.<sup>120</sup> The commonality in cases like *Campbell*, *Blanch*, *Cariou*, and *Authors Guild* is that they involve defendants using the works of the owners with a purpose or character different from what the owners intended.

## 2. Nature of the Work

This factor is virtually never dispositive in a fair use analysis but copying from factual/compilation works is more likely to be found fair use—whereas taking from creative, artistic, and fictional works will be less so.<sup>121</sup> This is in line with copyright’s protection of

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<sup>116</sup> Ginsburg, *supra* note 93, at 277.

<sup>117</sup> *Id.* at 287.

<sup>118</sup> Rosenblatt, *supra* note 11, at 389.

<sup>119</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

<sup>120</sup> Bridy, *supra* note 35, at 319–20. Bridy also comments: “By specifically identifying criticism and commentary as examples of protected second-degree uses, the Copyright Act discourages the use of copyright to enforce authorial monologism in cases involving unfaithful continuations and other disputatious hypertexts.” *Id.* at 321.

<sup>121</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1993) (“This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”); *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 267 (4th Cir. 2019) (“As a basic matter, photographs are ‘generally viewed as creative, aesthetic expressions of a scene or image’ and have long received thick copyright protection. This is so even though photographs capture images of reality. ‘Simply because a photo documents an event does not turn a pictorial representation into a factual recitation . . . Photos that we now regard as iconic often document an event—whether the flight of the Wright Brothers’ airplane, the sailor’s kiss in Times Square on V-J Day, the first landing on the moon, or the fall of the Berlin Wall.’”) (internal citations omitted) (quoting *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012)).

expression, rather than facts or ideas. The Supreme Court in *Campbell* held that the second factor “calls for recognition that some works are closer to the core of intended copyright protection than others,”<sup>122</sup> noting that parodies “almost invariably copy publicly known, expressive works.”<sup>123</sup> Additionally, use of unpublished works narrows the scope of fair use.<sup>124</sup> Memes often make use of widely known photographs and audiovisual works, which belong to the “core” of copyright protection, but this factor is unlikely to be significant in the fair use analysis.

### 3. Amount and Substantiality Taken

The amount and substantiality taken from the original work is an important consideration in the fair use analysis. This third factor was prominently considered in cases such as *Harper & Row, Publishers, Inc. v. Nation Enterprise* and more recently in *TCA v. McCollum*. In *Harper & Row*, the Supreme Court held the defendant’s taking of some 300 words from President Ford’s memoir was not fair use.<sup>125</sup> Though representing a small number of words in relation to the whole, the Supreme Court held that those amounted to “the heart of the book,” which militated against finding fair use.<sup>126</sup> The Supreme Court held in *Campbell* that substantial taking from the original may “reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth.”<sup>127</sup>

Secondary use of the entire or significant portions of copyrighted works as the “raw material” for social commentary without direct bearing on or criticism of the original will have to overcome or counterbalance this factor, which would generally weigh against a finding of fair use. This discomfort that courts may have in allowing too much leeway to non-parodic works was evident in how the Second Circuit could not decide as a matter of law that five of

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<sup>122</sup> *Campbell*, 510 U.S. at 586.

<sup>123</sup> *Id.*

<sup>124</sup> *See, e.g.,* *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (internal citation omitted); *Cariou v. Prince*, 714 F.3d 694, 709–10 (2d Cir. 2013) (citation omitted).

<sup>125</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542 (1985).

<sup>126</sup> *Id.* at 564–65.

<sup>127</sup> *Campbell*, 510 U.S. at 587.

Richard Prince's works, which reproduced the entire photographs by Patrick Cariou with minimal alterations, were fair use as it was unclear whether the alterations amounted to a sufficient transformation of the original work of art such that the new work was transformative.<sup>128</sup> Courts will also consider the broader public good provided by the new use and some uses that necessitate taking of the whole work may nonetheless qualify as fair use as there was clearly a new purpose.<sup>129</sup> Under this factor, a parodic purpose or one which directly criticizes or comments on the original work may justify reproductions of entire or significant portions of copyrighted works.<sup>130</sup>

#### 4. Effect on Market and Potential Market for the Work

The Supreme Court held in *Sony Corp. v. Universal City Studios* that the fourth factor is “perhaps the most important” of the fair use analysis.<sup>131</sup> Courts today consider the extent to which new work supersedes the original, the effects on the licensing market, and the impairment on the copyright owner's exclusive right to authorize derivative works.<sup>132</sup> Fromer points out that before *Campbell*, the Supreme Court's treatment of market effects tended to be “tentative

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<sup>128</sup> *Cariou*, 714 F.3d at 710–11.

<sup>129</sup> See e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216–17 (2d Cir. 2015). See also *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605, 610–12 (2d Cir. 2006) (finding a “transformative purpose” in the complete reproduction of seven copyrighted images).

<sup>130</sup> *Campbell*, 510 U.S. at 580 (“For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.”). However, the Supreme Court also said,

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners' suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair.

*Id.* at 581.

<sup>131</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 476 (1984).

<sup>132</sup> See, e.g., *Cariou*, 714 F.3d at 708–09; *Authors Guild*, 804 F.3d at 223–25; *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 181; *Capitol Records, LLC v. ReDigi, Inc.*, 910 F.3d 649, 662–63; *Dr. Seuss Enters., L.P. v. ComicMix, LLC*, 983 F.3d 443, 458–61 (9th Cir. 2020).

and embryonic.”<sup>133</sup> In the span of a year, the Supreme Court decided *Sony* and *Harper & Row*. In *Sony*, the court considered the potential market for pre-recorded videotapes too speculative and the non-commercial nature of time-shifting enabled by home videotape recording.<sup>134</sup> The court in *Harper & Row* considered the direct evidence of market harm resulting from the “scooping” of key excerpts of President Ford’s memoir by *The Nation* newspaper in its finding against fair use.<sup>135</sup>

Citing *Sony*, *Harper & Row*, and *Folsom v. Marsh*, the Supreme Court in *Campbell* held that the fourth factor “requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”<sup>136</sup> However, Justice Souter’s emphatic pronouncement in *Campbell* has had the (perhaps unintended) effect of amplifying the ascendancy of the first over the fourth factor: “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>137</sup>

Fromer notes that transformative works including parodies are “unlikely to cause relevant market harm to a copyright owner, even if they can harm the market for the copyrighted work in unrelated ways.”<sup>138</sup> Moreover, since works that transform existing material are directly connected to those works, they “can draw attention to, enhance, or affirm the work’s role in the marketplace.”<sup>139</sup> Ginsburg rightly observes that decisions following *Campbell* often concluded that “if the use was ‘transformative’, then the market within which it operated was also ‘transformative’, and, accordingly, non-

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<sup>133</sup> Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 625 (2015).

<sup>134</sup> *Sony*, 464 U.S. at 454, 484–85.

<sup>135</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 602–03.

<sup>136</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (internal citations omitted).

<sup>137</sup> *Id.* at 579.

<sup>138</sup> Fromer, *supra* note 134, at 629.

<sup>139</sup> *Id.* at 630.

competing.”<sup>140</sup> However, recent decisions from the Second and Ninth Circuit Courts seem to mark a renaissance of the fourth factor.<sup>141</sup> Ginsburg argues that this renewed emphasis on the fourth factor could risk simply reversing the formula that transformative works do not impact the market of the original.<sup>142</sup>

Judge Pierre Leval, who authored the iconic article that resulted in the Supreme Court articulating the transformative use doctrine, was sitting as a judge for the Second Circuit in *Capitol Records, LLC v. ReDigi Inc.* when he reiterated the Supreme Court’s description of the fourth factor in *Harper & Row Publishers, Inc. v. Nation Enterprises* as “undoubtedly the single most important element of fair use.”<sup>143</sup> Citing *Fox News Network, LLC v. TVEyes, LLC* and *Authors Guild v. Google, Inc.*, he correctly observed that the fourth factor is a consideration of whether the secondary use brings a competing substitute to the marketplace, and “the more the objective of the secondary use differs from the original, the less likely it will be to supplant the commercial market for the original.”<sup>144</sup> Judge Leval held that ReDigi’s minimally transformative purpose fell short of *TVEyes*’ failed assertion of fair use, and competed in an identical market as the original works.<sup>145</sup> These recent decisions suggest that the influential Second Circuit has begun to reemphasize the fourth factor over the hitherto dominance of the first factor in a fair use analysis. The Seventh Circuit has already eschewed the application of the transformative use doctrine and has asserted the importance of the fourth factor.<sup>146</sup>

In 2019, the Ninth Circuit in *VHT v. Zillow* held that Zillow’s reproduction of VHT’s high-definition photographs was a non-

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<sup>140</sup> Ginsburg, *supra* note 93, at 268.

<sup>141</sup> *Capitol Records, LLC v. ReDigi, Inc.*, 910 F.3d 649, 662–63 (2d Cir. 2018); *Dr. Seuss Enters., L.P. v. ComicMix, LLP*, 983 F.3d 443, 458–61 (9th Cir. 2020).

<sup>142</sup> Ginsburg, *supra* note 93, at 287 (“In other words, ‘transformativeness’ may remain decisive, but the equation has flipped. The formula ‘if transformative work/purpose, then no market harm’ meets its corollary: ‘if commercial and not transformative, then market harm.’ Thus, fair use continues to reduce to a one-factor test, but one that cuts both ways.”)

<sup>143</sup> *Capitol Records*, 910 F.3d at 662 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

<sup>144</sup> *Id.* 910 F.3d at 662 (internal citations omitted).

<sup>145</sup> *Id.* at 663.

<sup>146</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

transformative use that usurped the original market for the photographs, noting that “the label ‘search engine’ is not a talismanic term that serves as an on-off switch as to fair use.”<sup>147</sup> In the same year, the Fourth Circuit also held in *Brammer v. Violent Hues Prods* that the commercial and non-transformative reproduction of Brammer’s photo impacted its licensing market and was therefore not fair use.<sup>148</sup> In 2020, the Ninth Circuit found that ComicMix created, without seeking permission or a license, a non-transformative commercial mash-up work that targets and usurps the potential market for Dr. Seuss’s classic book, *Oh, the Places You’ll Go!*<sup>149</sup> It was pertinent that Seuss often “collaborates with other creators, including in projects that mix different stories and characters . . . [and that] Seuss routinely receives requests for collaborations and licenses, and has entered into various collaborations that apply Seuss’s works to new creative contexts.”<sup>150</sup> Ginsburg argues that rather than a simple rebalancing in favor of the fourth factor which risks introducing other distortions to the analysis, courts should examine “the amount of the copying (factor 3) in light of how the allegedly transformative work treats the copied material (factor 1) [which] should help determine the substitution effect (factor 4) of the portion taken.”<sup>151</sup> If the trend towards a renewed emphasis on the fourth factor continues, one might expect courts to place greater weight on the substitution effects or effects on potential derivative and licensing markets that a secondary use impinges on. Transformative use will continue to be an important consideration that alters the effects of a secondary use on the potential market for a work, but uses that copy to “avoid the drudgery in working up something fresh” or “merely . . . to get attention”<sup>152</sup> are unlikely to succeed in their claim, especially when what the new use delivers is substantially similar to the original expression. Moving forward, transformative use as a juridical concept is also unlikely to have the trump effect which it has enjoyed for over the last three decades.

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<sup>147</sup> *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 742 (9th Cir. 2019).

<sup>148</sup> *Brammer v. Violent Hues Prods., LLC.*, 922 F.3d 255, 268–69 (4th Cir. 2019).

<sup>149</sup> *Dr. Seuss Enters., L.P. v. ComicMix, LLC*, 983 F.3d 443, 461 (9th Cir. 2020).

<sup>150</sup> *Id.* at 460.

<sup>151</sup> Ginsburg, *supra* note 93, at 293.

<sup>152</sup> *Campbell v. Rose-Acuff Music, Inc.*, 510 U.S. 569, 580 (1994).

## II. INTERNET MEMES AND DIGITAL CULTURE

Memes usually alter the meaning of the underlying works through semiotic recontextualization, recoding, or visual editing, but they often do so in a way that does not mesh well with copyright law that is developed for dissemination of works through traditional intermediaries. For this reason, they provide an excellent example of how courts and legislators have struggled to adapt to changing user behavior in an intercommunicative digital world where the line blurs between creator and consumer.<sup>153</sup> Memes have become a fundamental mode of expression in digital culture, embodying the transformative qualities that fair use is intended to protect. This Part seeks to establish an operational definition and understanding of memes as they relate to fair use, and to situate them within digital culture.

### A. Defining Memes

The term “meme” was first introduced by biologist Richard Dawkins in his book *The Selfish Gene* in 1976.<sup>154</sup> The word meme derives from the Greek *mimema*, meaning something which is imitated, which Dawkins shortened to rhyme with gene. Dawkins defined memes as a small cultural units of transmission, analogous to genes, which are spread from person to person by copying or imitation that include specific signifiers such as melodies, catchphrases and clothing fashions.<sup>155</sup> According to Limor Shifman, like genes, memes are replicators that are constantly subject to variation, competition, selection, and retention.<sup>156</sup> As different memes compete with one another for attention, only those that are suited to their sociocultural environment are propagated quickly and successfully, i.e. going viral. Michele Knobel and Colin Lankshear contend that the word *meme* is employed by Internet users mainly to describe the rapid uptake and spread of a “particular idea presented as a written

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<sup>153</sup> Paul Booth argues that fans’ treatment of copyrighted works “transgress the line between production and consumption, and more importantly, alter our interpretation of that boundary.” BOOTH, *supra* note 40, at 180.

<sup>154</sup> RICHARD DAWKINS, *THE SELFISH GENE* 171 (1976).

<sup>155</sup> Limor Shifman, *Memes in a Digital World: Reconciling with a Conceptual Troublemaker*, 18 J. COMPUT.-MEDIATED COMM. 362, 363 (2013).

<sup>156</sup> *Id.*



text, image, language ‘move’, or some other unit of cultural ‘stuff’.’<sup>157</sup>

Internet memes defy rigid categorization, but establishing a definition is necessary to analyze them through the lens of copyright law.<sup>158</sup> Bradley Wiggins defines internet memes as:

[a] remixed, iterated message that can be rapidly diffused by members of participatory digital culture for the purpose of satire, parody, critique, or other discursive activity. An internet meme is a more specific term for the various iterations it represents, such as image macro memes, GIFs, hashtags, video memes, and more. Its function is to posit an argument, visually, in order to commence, extend, counter, or influence a discourse.<sup>159</sup>

Shifman, in analyzing the “Leave Britney Alone” meme example, found that hardly any of the ideas conveyed by the original video were further circulated by its imitators, and that the imitations stress a different communicative role.<sup>160</sup> In the propagation of internet memes, overt reproduction of the original image is accompanied by new elements which may be images or text which introduces a different take on the original event.<sup>161</sup>

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<sup>157</sup> MICHELE KNOBEL & COLIN LANKSHEAR, *A NEW LITERACIES SAMPLER 202* (2nd ed. 2007).

<sup>158</sup> Bradley Wiggins notes that the modern conception of *meme* originated with evolutionary biologist Richard Dawkins, who created the neologism as a noun to convey cultural transmission that fully captures the connection between culture and memory. Wiggins distinguishes *internet memes* from Dawkins’ formulation based on the conception of imitation: the essence of internet memes is marked not by imitation, “but by the capacity to propose or counter a discursive argument through visual and often also verbal interplay” and their power to inhere a critical component of political and social interaction. Internet memes can vary widely in their discursiveness, but considered with the medium’s semiotic potential, may serve *inter alia* as commentary on the absurdity of the human condition or as an “in-joke” within a particular internet subculture. See WIGGINS, *supra* note 18, at 1. Shifman also provides a comprehensive analysis of internet memes, isolating three dimensions of cultural items that people can potentially imitate: content, form, and stance. Shifman, *supra* note 156, at 367.

<sup>159</sup> WIGGINS, *supra* note 18, at 11.

<sup>160</sup> Shifman, *supra* note 156, at 370–71.

<sup>161</sup> *Id.* at 371.

For the purposes of this Article, “internet meme” and “meme” refer interchangeably to the same phenomenon. An important aspect of the *meme* format is that it leaves certain premises of an argument unstated, allowing the audience to implant their own knowledge and lived experience into the expression of the meme. As such, it supports further expression and semiotic richness rather than being a mere imitation of an earlier idea. This reliance on unstated premises also has the effect of making memes of obscure subcultures arcane to non-members. This definition is not all-encompassing of what might be popularly considered a “meme.” Other phenomena exist within digital culture adjacent to the internet meme or have memetic qualities. This Article focuses solely on audiovisual memes as those memetic behaviors that fall outside the above definition are generally self-referential of internet culture, and will generally not be subject to claims of infringement in the same manner as those that draw on external referents.<sup>162</sup>

Memes are fundamentally communicative. For the purpose of fair use analysis, memes may be grouped into four broad categories, three of which engage significant copyright concerns:

- (1) Image Macros, which caption direct reproductions of existing visual and audiovisual works for commentative effect and vary to the extent they alter

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<sup>162</sup> For example, one internet phenomena that is not considered is “copy/pasta” (for copy/paste). The format consists almost exclusively of text and is commonly seen on imageboards such as 4chan and Reddit. A user will post a script almost instantly recognizable to insiders with one or more slight alterations. See e.g., *To Be Fair, You Have to Have a Very High IQ to Understand Rick and Morty*, KNOW YOUR MEME (July 17, 2017), <https://knowyourmeme.com/memes/to-be-fair-you-have-to-have-a-very-high-iq-to-understand-rick-and-morty> [<https://perma.cc/RE5E-BQME>]. Arguably, another category that may possess memetic status includes indignant responses to ignorant or bombastic claims on social media. For example, “OK Boomer” (to signify that the person making the claim too old and detached to understand the problems of young people), “Sir this is a Wendy’s” (to signify that the person making the claim is doing so in the wrong forum or in an unnecessarily dramatic manner), or calling the person making the claim “Karen” (signifying the archetypal soccer mom, demanding to speak to the manager of a waged employee out of a sense of entitlement) or “Kyle” (signifying a person who is quick to anger, and embodying traits of toxic masculinity). While these phenomena are no doubt worthy of further academic research, these kinds of memes find no nexus with fair use or fair dealing and have been intentionally omitted from the analysis.

the underlying meaning or message of the original work;

(2) Exploitables, which rely on direct reproductions of works as a single frame or series of frames in which users can add dialog or label objects within the frame to explicate a relationship between objects and subjects;<sup>163</sup>

(3) Edits, which visually transform original works by adding elements into existing scenes or relocating subjects into unfamiliar or ironic surroundings; and

(4) Self-referential or Standalone memes, which often utilize and remix crudely drawn characters, referencing digital culture which generally do not engage significant copyright concerns and will not be discussed in this Article.<sup>164</sup>

The first two categories either directly reproduce or allow easy modification to the underlying image requiring few technical skills that the average private user could easily grasp,<sup>165</sup> while the third can be executed with widely available software such as Photoshop.<sup>166</sup>

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<sup>163</sup> *Exploitables*, KNOW YOUR MEME (Apr. 10, 2009) <https://knowyourmeme.com/memes/exploitables> [<https://perma.cc/K4X2-LC2W>]. Exploitables differ from Image Macros in that they often explicate the relationship between objects or subjects in the frame, whereas image macros may contain a single central theme such as a specific reaction or attitude.

<sup>164</sup> This category includes some “old memes” such as the Advice Animals series, which depicted an animal on a bi-color radial background. See, for example, Trollface, Rage Comics, Wojak, and also “old memes” such as Bad Luck Brian, Courage Wolf, and Socially Awkward Penguin. This final category will not be analyzed as copyright issues are not triggered by these generally authorless, collaborative memes that do not rely on mediated images or videos, but they are instructive as they represent the purest expression of “free play” with images that effectively form the public domain for meme generation. These are often drawn by the individuals that author the work and are presumed to have given consent for widespread sharing on social media.

<sup>165</sup> See e.g., *Well Yes, But Actually No*, MEME GENERATOR, <https://imgflip.com/memegenerator> [<https://perma.cc/U52X-BRS9>]; MEME GENERATOR, <https://memegenerator.com> [<https://perma.cc/KL6G-9S2Y>]; MAKE A MEME.ORG, <https://makea-meme.org> [<https://perma.cc/S3GD-DPFE>].

<sup>166</sup> The definition of internet memes employed in this Article is inclusive of video, image, and GIF variants. One example of a video meme that would be considered under the “edits”

## (1) Image Macros

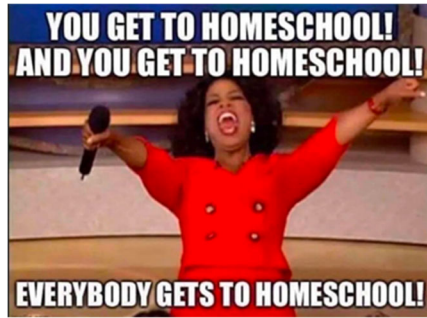


Figure 1

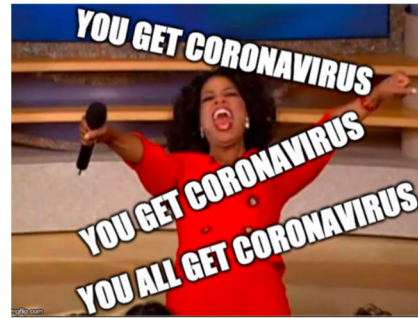


Figure 2

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category is the *Shooting Star* video meme, which edits a video of someone jumping or falling, only for their surroundings to change to outer space, underwater, or any other background for dramatic effect. The potentially infringing nature of this meme comes not from use of the video content, which is generally user-generated and unlikely to qualify for copyright alone, but the distinctive use of a short clip from a sound recording. The 2008 song “Shooting Stars” by the Australian electronic duo Bag Raiders is reproduced at the moment the subject on screen falls or jumps. Common subjects include runway models or performing artists that mistakenly find the edge of the stage. This meme is best categorized as an edit. See e.g., *Shooting Stars*, KNOW YOUR MEME (June 21, 2020), <https://knowyourmeme.com/memes/shooting-stars> [<https://perma.cc/BMC8-SY97>]. When asked for comment, Bag Raiders said they were “chuffed” that the meme had exposed their song to such a large audience. This may be an important consideration for the fourth factor analysis, as appearance in a meme may promote the original work—though this raises issues of properly attributing unaltered portions of the work. Know Your Meme notes that the song has more than 13 million views on YouTube and appears in Katy Perry’s music video “Swish Swish” at 2:10. Katy Perry, *Swish Swish (Official) ft. Nicki Minaj*, YOUTUBE (Aug. 24, 2017), <https://youtu.be/iGk5fR-t5AU?t=130> [<https://perma.cc/C5VP-DU9F>]. GIFs will more often than not fall within the “direct reproduction” category. While the format does not lend itself well to visual edits, it has significant utility recontextualized as a discursive medium. They may be juxtaposed with other works either within the GIF or as visually distinct part of an insular whole or used as a means of direct commentary in the comments section of GIF-enabled platforms such as Twitter and Facebook.



**Figure 3**

Oprah Winfrey's *You Get A Car* Memes.<sup>167</sup>



**Figure 4**

Image Macros—perhaps the most common type of meme—encompass a spectrum of captioned direct reproductions of copyrighted works ranging from those that transform the message or meaning of the original work with some degree of social commentary, to “reaction images” which are instead used to augment the user’s own expression.<sup>168</sup> There are a number of enduring Image Macro memes, but many draw upon current events and recent works of popular culture, sometimes captioning an image only through an online platform’s user interface. While utilizing a still image from an audiovisual work or photograph for purposes of self-expression rather than to entertain or to inform arguably does alter the *purpose* of the use from the original, those that use the format to create new information, insights, and understandings (in the lingo of the US Second and Ninth Circuits) will have a greater claim to transformativeness than reaction images. In this case, the Oprah memes in Figures 1-3 alter the meaning or message to a greater extent than Figure

<sup>167</sup> Oprah’s ‘You Get A Car’, KNOW YOUR MEME (Apr. 5, 2013), <https://knowyourmeme.com/memes/oprahs-you-get-a-car> [<https://perma.cc/6VVX-AEGN>]. On September 13th, 2004, Oprah Winfrey gave away new Pontiac G6 cars to her audience, spawning a surprisingly durable image macros meme and a number of video parodies on TV programs such as *Conan* and *Robot Chicken*. This Image Macro has extended recently to themes such as COVID-19 quarantine orders and the legalization of gay marriage in countries that criminalize homosexuality. While originally focused on Oprah’s gifting of cars to her audience, the format is frequently extended to any experience, idea, or debate that occupies a prominent position in a country’s collective psyche or identity.

<sup>168</sup> This category includes “Old Memes” such as the “Advice Animal” format Image Macros.

4, which is a “reaction image” type of meme, using Oprah Winfrey’s expression to amplify the user’s own expression.

(2) Exploitables



**Figure 5**  
*Distracted Boyfriend Meme*, posted by Leader of the Brexit Party Nigel Farage to Facebook.<sup>169</sup> Photographer: Antonio Guillem (Stock Image).

Exploitable memes reproduce a single frame or multiple frames from a photo or audiovisual work as a template, differing from Image Macros in that they label subjects or objects in the frame to explicate a relationship between elements in the frame, or to create a dialogue between two characters. The visual relationship between objects or subjects in the frame allow meme creators to discuss other concepts, *often wholly unrelated* to the original scene. By labelling subjects in the frame, meme creators leverage one’s understanding of the visual relationship between characters to suggest an analogous relationship in another form.<sup>170</sup>

<sup>169</sup> *Distracted Boyfriend*, KNOW YOUR MEME (Jan. 3, 2021), <https://knowyourmeme.com/memes/distracted-boyfriend> [https://perma.cc/45VB-RAWL]. See also WIGGINS, *supra* note 18, at 47.

<sup>170</sup> This category also includes exploitable “comic”-style memes that add dialog to a series of images, relying on the expressions and actions of characters to display countering sides of a debate. See e.g., *American Chopper Argument*, KNOW YOUR MEME (Mar. 28, 2018), <https://knowyourmeme.com/memes/american-chopper-argument> [https://perma.cc/W5RS-P53Z].

## (3) Edits



Figure 6



Figure 7

Figure 8  
Rhianna's *Met Gala Dress* Edits<sup>171</sup>

Figure 9

Edits are a highly creative and varied category of memes in which users add elements to existing scenes or remove characters from their original context. Often drawing from audiovisual works and photographs taken of notable people, they represent a more labor-intensive form of memes which *creates new aesthetics* and *visually alters* works in ways that are more immediately cognizable under transformative use doctrine. They are also generally the category that comes closest to parody, as a prominent element—the

<sup>171</sup> Know Your Meme, “Rhianna’s Met Gala Dress,” May 5th, 2015. <https://knowyourmeme.com/memes/rihannas-met-gala-dress> [<https://perma.cc/G52H-AX99>]; The Internet Speaks/Rihanna Met Gala 2015, SPITGAN MAGAZINE (May 6, 2015), <https://blog.spitgan.com/the-internet-says-rihanna-met-gala-2015/> [<https://perma.cc/MD5B-MB23>]

“heart”—of the original image necessarily becomes the object of ridicule or derision. This category also best represents the carnivalesque “transformative play” that consumers engage in with well-known works and marks in meme generation.<sup>172</sup> In line with what Marshall<sup>173</sup> and Jurgenson<sup>174</sup> have observed, these memes can contribute to an integral portion of the serialization of our online public persona where we communicate our feelings, thoughts, emotions, and political ideologies. In this Figure 6 displays the original paparazzo photograph of Rhianna on the red carpet at the Met Gala, while figures 7-9 display Edits depicting the train of the dress as the Yellow Brick Road in *The Wizard of Oz*, a pizza, or an emergency slide of an airplane.

The proposed typology usefully groups memes based on the use they make of the underlying work, offering enough precision to apply the fair use factors to each category. While Edits bear analogy to cases involving appropriation artists such as Richard Prince and Jeff Koons, Image Macros and Exploitable memes rely on a form of semiotic play that could be understood as the “creation of new information, new aesthetics, new insights and understandings” that may “reasonably be perceived” by the online community,<sup>175</sup> but requires a comparison between the author’s intent and the supposed alteration to that intent by the secondary user. Much like appropriation or pop art (e.g., Andy Warhol’s *Marilyn* that is based on a single publicity photograph) that recontextualizes existing works,<sup>176</sup>

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<sup>172</sup> Tan, *supra* note 65, at 87, 98.

<sup>173</sup> See generally *supra* note 1.

<sup>174</sup> JURGENSON, *supra* note 13.

<sup>175</sup> See e.g., *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006); *Castle Rock Ent., Inc. v. Carol Publ’g. Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998); *Seltzer v. Green Day*, 725 F.3d 1177 (9th Cir. 2013).

<sup>176</sup> See also *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (finding that each of the Prince Series works may reasonably be perceived to be transformative of the Goldsmith Prince Photograph). More specifically, the court found:

The Prince Series works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure. The humanity Prince embodies in Goldsmith’s photograph is gone. Moreover, each Prince Series work is immediately recognizable as a “Warhol” rather than as a photograph of Prince—in the same way that Warhol’s famous



memes that are visually transformative require less emphasis on recoding and reinterpreting the subtext of an original work to be considered fair use. Memes that recode and recontextualize the original work without visual alteration are harder to situate within existing fair use doctrines than those that visibly transform an underlying work. An internet meme can only exist if it refers to something in addition to the original subject matter it contains,<sup>177</sup> existing as an inherently intertextual medium that draws upon the semiotic aura of the original work. Most works are indirectly intertextual by adherence to a genre, or directly by way of citation, allusions, parody, pastiche, etc., but memes often directly appropriate earlier expressions to draw upon their cultural symbolic relevance,<sup>178</sup> relying on the audience's widespread familiarity and relatability with underlying content to emphasize their message.<sup>179</sup> Though internet platforms and social media act as the creative engine for meme content, they may be further disseminated throughout the physical world.<sup>180</sup>

### B. Memes, Semiotics, and Digital Culture

The last time the US Supreme Court ruled on the fair use doctrine was in *Campbell* in 1994 before the advent of the internet. Since then, the internet has evolved from a repository of facts, data, and documents to a global social community of users engaging with

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representations of Marilyn Monroe and Mao are recognizable as “Warhols,” not as realistic photographs of those persons.

*Id.* at 326.

<sup>177</sup> WIGGINS, *supra* note 18, at 33.

<sup>178</sup> *Id.* at 35.

<sup>179</sup> Kara Podraza, *When Is a Little Too Much: The De Minimis Doctrine and Its Implications for Online Communication Tools*, 25 GEO. MASON L. REV. 550 (2018).

<sup>180</sup> One of the most enduring memes is Pepe the Frog, having made his debut in Matt Furie's *Boys' Club* cartoon in 2005. The character saw consistent use as a meme on social media platforms and imageboards such as 4chan for a number of years as a symbol of loneliness and alienation, before becoming a symbol of the alt-right during the 2016 United States Presidential Election. More recently, Pepe has become a symbol for pro-democracy protestors in Hong Kong protesting China's extradition bill and featured in the 2020 documentary *Feels Good Man*, which documents Furie's attempt to save his character from the alt right. *Pepe the Frog*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/pepe-the-frog> [<https://perma.cc/G9RH-6N2D>].

each other.<sup>181</sup> As the world became more networked and as new technologies have forever changed the way consumers interact with protected works,<sup>182</sup> the copyright law that governs the fair use of those works has not kept pace.<sup>183</sup>

Broadly speaking, digital culture is the interaction of people through computers and mobile devices. While commonly understood to be related primarily to social media, the concept extends to immediate access to the full breadth of humanity's digitized knowledge and the ability to stream video and contribute content on various platforms.<sup>184</sup> The term "digital culture" distinguishes from earlier forms of media and reflects new ways in which users interact with copyrighted works, including user-generated content ("UGC"), algorithmically curated newsfeeds, and the role of social media "influencers."<sup>185</sup> Furthermore, this digital network means so much

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<sup>181</sup> Jeff Bercovici, *Who Coined 'Social Media'? Web Pioneers Compete for Credit*, FORBES (Dec. 9, 2010), <http://www.forbes.com/sites/jeffbercovici/2010/12/09/who-coined-social-media-web-pioneers-compete-for-credit/> [<https://perma.cc/6AT9-22BS>], cited in Tim Kingsbury, *Copyright Paste: The Unfairness of Sticking to Transformative Use in the Digital Age*, 2018 U. ILL. L. REV. 1471, 1473 (2018).

<sup>182</sup> Holland, *supra* note 66, at 337. Here, Holland observes:

New technologies that not only enable increased audience engagement with cultural works, but also facilitate the use of these "raw materials" to produce new works have made fair use more controversial. At another level, these technologies have made visible an audience, not of passive content consumers, but of active participants in the discourse around and about those works.

<sup>183</sup> Christopher Sprigman and Kal Raustiala call this development the second digital disruption. The first was defined by the development of novel distribution methods, whereas the second is characterized by two-way data flows between producer and consumer. See Kal Raustiala & Christopher Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1558 (2019).

<sup>184</sup> WIGGINS, *supra* note 18, at 21. Wikipedia is an excellent example of the internet's collaborative potential: the online free encyclopedia is available in 309 languages, written and edited entirely by volunteers. People now carry powerful computers and high-resolution cameras everywhere they go in their cell phones. This facilitates the opportunity to infringe copyright in situations such as making video and audio recordings of performances and their subsequent reposting, screenshotting copyrighted works, and sharing works. This development was certainly not in the contemplation of legislative drafters when they tabled copyright acts, which explains in part the continued legislative debate surrounding fair use, fair dealing and other exceptions across the world.

<sup>185</sup> *Id.* at 22. Wiggins elaborates upon the idea of *participatory culture*, asserting that this earlier conception of human interaction with social media reflects an optimistic and perhaps naïve conception of a "utopian plateau", rather than one where not all users have

more than technological interconnectedness—it has been argued to resemble the “folk” relations of Mikhail Bakhtin’s carnival.<sup>186</sup> Social media platforms like Facebook and Instagram can function like a carnival which “subverts the very hierarchies that impose the kind of distinction seen in the classes of ‘official culture’ and ‘unofficial culture’, ‘aristocracy’, and ‘peasants’, implied in the modern intellectual property system.”<sup>187</sup> As Bakhtin explains, during the duration of the carnival, “there is a temporary suspension of all hierarchic distinctions and barriers among men and of certain norms and prohibitions of usual life.”<sup>188</sup> Insofar as the laws of copyright are concerned, the carnivalesque atmosphere of social media gives life to a network that simultaneously confounds conventional understandings of copyright law and reinvigorates a polyphonous public sphere.

Ultimately, the digital realm is a readily available carnivalesque arena for individuals to express themselves and to make—and constantly remake—an online public persona; and it is increasingly becoming a communicative space that is more readily governed by culturally permissible norms of behavior than by clearly articulated legal rules. By posting, sharing, and creatively altering what they find online, social media users use readily available images—especially well-known images imbued with cultural meanings—to construct their public selves.<sup>189</sup> Social media also allows people to connect to other people and businesses, facilitating debate of socioeconomic and political issues, among other things. Wiggins asserts that culture, whether at a societal level or varied levels such as pop culture, counterculture, etc., necessitates a shared understanding and a level of reliable and systematic sustainability.<sup>190</sup> Embedded within

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equal access, entry, and impact. This also reflects that while traditional methods of broadcasting were typically a one-way street, modern dissemination also receives information from the consumer in the form of viewership and other metadata. *See also* Raustiala & Sprigman, *supra* note 183.

<sup>186</sup> *See, e.g.*, JOHANNA GIBSON, CREATING SELVES: INTELLECTUAL PROPERTY AND THE NARRATION OF CULTURE 28–29 (2006) (*referring to* MIKHAIL BAKHTIN, RABELAIS AND HIS WORLD (Helene Iswolsky trans., 1984).

<sup>187</sup> *Id.* at 28 (internal citations omitted).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> WIGGINS, *supra* note 18, at 7 (emphasis in original).

that shared understanding is an “in-progress and evolving systems of interacting, producing, co-creating meaning.”<sup>191</sup> Internet memes remix and recode images and videos with meanings often substantially different from the original expression, evident in the captioning of Oprah memes (Figures 1-4) and the edits of Rhianna’s *Dress* (Figures 7-9).<sup>192</sup>

Memes that are focused on the creation of shared meanings by commenting on relatable and broadly applicable socio-political themes largely external to the self (such as a global pandemic or Brexit), and “reaction image”-style memes (e.g. Figure 4) are simply different aspects of individual expression that enables users to construct and promote their idealized digital persona through identification with the semiotic coding of the original work.<sup>193</sup> By utilizing well-known characters or works to portray their emotions or reactions rather than a selfie or photo of themselves, individuals leverage the near-universal semiotic coding and instantly-recognizable features of the original<sup>194</sup>—at the same time reinforcing that individual’s role as a participant in a mediated digital culture. The carnivalesque atmosphere of social media has effectively broken down the formalities of hierarchy and the differences between social classes, ages, and nationalities, “replacing established traditions and canons with a ‘free and familiar’ mode of social interaction based on principles of mutual cooperation, solidarity and equality.”<sup>195</sup> Nathaniel Noda also argues that copyright law ought to “keep pace with changing times and practices by recognizing that an author implicitly cedes certain interpretive rights to the general public when he or she introduces a work into the stream of public discourse.”<sup>196</sup> Fair use is intended to balance a broader societal interest against the

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<sup>191</sup> *Id.*

<sup>192</sup> Wiggins proposes a different understanding of “remix” culture in the context of internet memes: “Remixing occurs as a necessary step in the realization of an internet meme’s process of generating and sustaining meaning which is co-constructed between the (unimportant or unknowable) author of a given internet meme and the audience consuming the message.” *Id.* at 13.

<sup>193</sup> Tan, *supra* note 15, at 360–61.

<sup>194</sup> *Id.*

<sup>195</sup> Gardiner, *supra* note 42, at 30.

<sup>196</sup> Nathaniel T. Noda, *Copyright Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities*, 57 J. COPYRIGHT SOC’Y USA 987, 991 (2010).

exclusive rights of the copyright owner.<sup>197</sup> Even before the advent of the internet, Rosemary Coombe had already highlighted the potential of intellectual property laws to stifle dialogic uses of some of the most “powerful, prevalent, and accessible cultural forms.”<sup>198</sup> Denying meme creators—especially if they were private non-commercial individuals—protection under fair use risks further impoverishing the cultural public domain and subjecting social media users to copyright infringement liability or harassment by rights owners.

### C. *Emerging Norms and Online Incentives*

Cultural norms of fair use in the digital realm vary greatly from the legal framework imposed by copyright law in 17 U.S.C. § 107. The divergence of these norms is reinforced by a virtual absence of copyright enforcement against the private users that create internet memes. Insofar as the use of copyrighted works is concerned, private non-commercial individual internet users perceive that a “free culture” permeates the internet.<sup>199</sup> If something is published online, such users often see no harm in reposting those works on different websites or social media platforms.<sup>200</sup> This perceived “free” culture online naturally conflicts with copyright holders’ exclusive rights to control reproduction and distribution of their works.<sup>201</sup> Ultimately,

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<sup>197</sup> As Jeanne Fromer and Mark Lemley note: “IP owners’ efforts to take control over the use of their works in completely different markets create the biggest problems for the IP system.” Allowing IP owners to stifle meme creation through enforcement of copyright would not further the goals of copyright law. See Jeanne C. Fromer and Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1291–92 (2014).

<sup>198</sup> Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Law and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1855 (1991). See also Holland, *supra* note 66, at 338 (“Social semiotics offers an alternate conception of transformativeness in which social value is manifest in the process of meaning-making that occurs as individuals and interpretive communities engage the work. Copyright’s commitment to the enrichment of society can be best evaluated in the context of this process of semiosis as a distinct question apart from the creation of new authorial rights.”).

<sup>199</sup> Mary W. S. Wong, *Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use*, 11 VAND. J. ENT. & TECH. L. 1075, 1081 (2009). See also Lauren Levinson, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. REV. 1038 (2017).

<sup>200</sup> Brittany Curtis, *Copyright vs. Social Media: Who Will Win*, 20 I.P. L. BULL. 81 (2016).

<sup>201</sup> Levinson, *supra* note 199.

the seemingly permissionless nature of the internet (and more particularly of social media platforms like Instagram and Facebook), combined with the breakneck speed in which users can download, alter, and reshare content, have combined to create a semi-anarchic system where emergent norms constrain user behavior to a greater extent than do legal and regulatory structures such as copyright law.

The rules and design of specific platforms also constrain and influence user behavior. Moran Yemini notes that social media operates in a symbiotic relationship with its users—they depend on UGC while at the same time providing the architecture and setting the rules for how that content can be shared and interacted with.<sup>202</sup> This creates an environment in which users are nudged to share new content that they did not create themselves, sending mixed signals that unfairly expose sharers to allegations of copyright infringement.<sup>203</sup> Social media platforms designed to impel user sharing and community interaction while simultaneously facilitating the effortless dissemination of content, whether copyrighted or not, reinforce the user’s impression of a free and permissionless sharing culture on the internet. Norms of attribution among the denizens of digital culture exist in what Kal Raustiala and Christopher Sprigman call a “low-IP equilibrium,”<sup>204</sup> paralleling extra-legal norms of attribution and

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<sup>202</sup> Moran Yemini, *The New Irony of Free Speech*, 20 COLUM. SCI. & TECH. L. REV. 119, 162 (2018).

<sup>203</sup> WIGGINS, *supra* note 18, at 87. He observes: “Digital culture often operates on an assumption that is unique to its essence but dissonant with respect to real-world law and practice. This assumption posits that what is available or searchable is equally useable, remixable, etc. In other words, if I can access it, I can use it, drag it off the website, download the video, remix it, etc. in order to offer my own version of whatever it happens to be. By and large, this approach largely defines much of digital culture in terms of common practice. Yet, laws remain in place despite the grab-and-share, copy/paste, etc. aspects of digital culture.” *Id.*

<sup>204</sup> Memes seem to be an example of Raustiala and Sprigman’s “low-IP equilibrium situation,” in which a lack of IP protection spurs on greater innovation and creativity and leads creators within the equilibrium to develop extra-legal norms that parallel copyright. Raustiala and Sprigman examine the role of copying in the fashion industry, finding that the pervasiveness of copying by fast-fashion brands accelerates the fashion cycle. As trends become available to the masses, fashion cognoscenti seek out emerging trends. Memes share a similar cycle of emergence, popularity, and trend death, but these cycles are often driven by the media they draw from. Memes will often draw from recent films, series, or news events, often finding widespread popularity before fading as new developments in

enforcement in high-end cuisine and stand-up comedy.<sup>205</sup> In digital culture, norms of attribution manifest among artists, meme-aggregating accounts, and private individuals alike as a means of gaining a substantial social media following and the benefits that accrue from being “Instafamous.”<sup>206</sup>

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the social world spur on further meme creation. While not all memes become widely known, a small number endure well beyond the popular discussion of their underlying work. Analogously, memes thrive upon the low-IP equilibrium created by a legislative void and lack of enforcement. *See generally* KAL RAUSTIALA AND CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2015).

<sup>205</sup> See Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 *CARDOZO ARTS & ENT. L.J.* 1121, 1152 (2007). *See also* Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 *V.A. L. REV.* 1787, 1791 (2008). Sprigman explains how a system of intellectual property norms has developed independent of any legal framework in stand-up comedy, a field that has not traditionally been protected by copyright law. He notes that comedians’ IP norms “generally parallel those ordered by copyright law, namely authorship, ownership, transfer of rights, fair use and other exceptions to ownership.” The informal sanctions imposed on joke-stealing comics can be analogized to accounts that “steal” memes from other accounts, which reached its most prominent example in 2019 when meme content creators and aggregators sanctioned a popular Instagram meme account “@fuckjerry” with public shaming for taking content without permission or attribution under the hashtag “#fuckfuckjerry.” However, while joke-stealing can result in hampered career prospects for comics, social media accounts may just lose a small portion of their following. The tendency of bigger accounts appropriating from smaller ones carries a similar “clout” problem to Sprigman’s analysis of joke-theft by popular comics. *Id.* at 1824. In the case of @fuckjerry, his following went from 14.3 million to 14 million followers, and he released a public statement promising to get advanced permission to repost memes. *See also* Alexis Madrigal, “*The Limits of Extremely Online Organizing*,” *THE ATLANTIC* (Feb. 13, 2019), <https://www.theatlantic.com/technology/archive/2019/02/fuckfuckjerry-the-limits-of-extremely-online-organizing/582556/> [<https://perma.cc/X6SS-FHBQ>].

<sup>206</sup> Norms of attribution have developed in part from creators wanting to be recognized for their creativity, but also due to the market principles at work on social media that reward accounts with large followings with potential endorsement and advertising revenues, free product testing, and a range of social benefits that accrue through being “instafamous.” Some meme accounts will watermark their original content, such as Instagram user @sonny5ideup’s use of translucent fried eggs to prevent meme stealing. In this way, watermarking content operates as a trademark, while also providing attribution to the creators in a digital culture in which memes are shared, reposted, and published on other platforms. While influencers and other celebrities on social media have a significant number of revenue opportunities such as sponsorships and endorsements as a result of their marketable personality, meme accounts are more limited to acting as advertisers or creating meme-related merchandise. *See* Taylor Lorenz, “*Memes Are Becoming Harder to Monetize*,” *THE ATLANTIC* (MAY 31, 2018),

### III. ARE MEMES FAIR USE?

#### A. Purpose and Character of the Use

The first factor analyzes two elements: (1) the extent to which the secondary work is different in purpose or character from the original work,<sup>207</sup> or whether it transforms the original with “new expression, meaning, or message”,<sup>208</sup> or where the original has been used in the “creation of new information, new aesthetics, new insights and understandings” that may “reasonably be perceived”;<sup>209</sup> and (2) the commerciality of the use. A commercial use may still be fair, but it must be sufficiently or highly transformative in order to counterbalance its commerciality for the first factor to weigh in favor of fair use. The commerciality of the online personas of celebrities, influencers, and meme-aggregating accounts may impart a commercial character to their expression, particularly when that same online account is used to promote products or services.<sup>210</sup> However, this commerciality tends to be subservient to a particular meme’s significant transformation of the underlying work.

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<https://www.theatlantic.com/technology/archive/2018/05/memes-are-becoming-harder-to-monetize/561578/> [<https://perma.cc/QD2J-T2NT>]. For a discussion on the changing nature of contemporary fame, see DAVID TAN, *THE COMMERCIAL APPROPRIATION OF FAME: A CULTURAL ANALYSIS OF THE RIGHT OF PUBLICITY AND PASSING OFF* 22–26 (2017).

<sup>207</sup> 17 U.S.C. §107. See also *TCA TV Corp. v. McCollum*, 839 F.3d 168, 182 (2d Cir. 2016) (“The only purpose served by the extent of defendants’ taking is identically comedic to that of the original authors, that is, to have two performers expand on a singular joke in order to generate increasing audience laughter.”); *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 742 (9th Cir. 2019) (“That Digs makes these images searchable does not fundamentally change their original purpose when produced by VHT: to artfully depict rooms and properties.”).

<sup>208</sup> *Campbell v. Rose-Acuff Music, Inc.*, 510 U.S. 596, 579 (1994).

<sup>209</sup> *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006); *Castle Rock Ent., Inc. v. Carol Publ’g Grp. Inc.*, 150 F.3d 138, 142 (2d Cir. 1998); *Seltzer v. Green Day*, 725 F.3d 1170, 1177 (9th Cir. 2013).

<sup>210</sup> The Supreme Court ruled in *Harper & Row* that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985). A court may find that in posting copyrighted meme content, commercial users derive benefits through increased consumer engagement with the brand whether there is a marketing message or not; and quasi-commercial users such as celebrities, influencers and meme-aggregating accounts similarly seek to profit through posting or reposting these memes whether directly through paid endorsements or indirectly through free merchandise.



As pointed out above, individuals invariably engage in differing degrees of “transformative play” on social media in the digital era<sup>211</sup>—and memes are an important part of this social communication. Meme creators utilize well-known works or characters to draw upon their symbolic value as raw materials for their own expression, or as a means of recoding, subverting or criticizing the dominant or conventional interpretations of those works.<sup>212</sup> Internet memes result from a process of audience interaction and participation with some of the most prevalent and salient cultural forms available to the public, in a way that “triggers unexpected social responses, cultivating new and expansive cultural meanings, messages, and insights.”<sup>213</sup> They are an example of precisely the kind of socially valuable expressive activities that should be permitted within the First Amendment’s guarantee of “breathing space” for secondary uses.<sup>214</sup> According to Rosenblatt, “the carnivalesque engages in dialogue by assigning a folk meaning to (religious or other authoritarian) signs, resisting a power structure that would assign a monologic meaning to those same signs.”<sup>215</sup> In fair use-speak, this would require that the “creation of new information, new aesthetics, new insights and understandings” may “reasonably be perceived” in the repurposing of the original signs.<sup>216</sup> Image Macro memes, as exemplified by the

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<sup>211</sup> See e.g., Tan, *supra* note 54. See also Tan, *supra* note 53.

<sup>212</sup> Holland, *supra* note 66, at 338 (discussing transformative use as a social semiotic process and First Amendment concerns); Tan, *supra* note 15, at 361 (“Like famous trademarks, the copyrighted character signifier/signified relationship would have become universally codified for the audience; the audience will automatically and consistently think of the coded meanings and values (the signified) when they are exposed to the character signifiers.”).

<sup>213</sup> Holland, *supra* note 66, at 361 (“Can audience engagement with a work matter? What if audience interaction with and about the work triggers unexpected social responses, cultivating new and expansive cultural meanings, messages, and insights? Does accommodating this work, as a necessary constituent of the social value of new expression? If fair use is taken seriously as a doctrine of accommodation, distinct from monopoly incentives, then the answer is yes.”).

<sup>214</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>215</sup> Rosenblatt, *supra* note 11, at 388. Rosenblatt also comments that “fair uses dismember works and bring them closer so that they can be examined, experimented with, critiqued, laughed at. Each of these genres ‘profanes’ sacralized (here, copyrighted) symbols by playing with them.” *Id.* at 389.

<sup>216</sup> *Cariou v. Prince*, 714 F.3d 694, 706–07 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006); *Castle Rock Ent., Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 141 (2d Cir. 1998); *Seltzer v. Green Day*, 725 F.3d 1170, 1177 (9th Cir. 2013).

Oprah memes above, as well as Exploitable memes such as Nigel Farage’s pro-Brexit *Distracted Boyfriend* memes represent non-visually transformative uses that nonetheless use the underlying work as “raw material” for political, social, and cultural expressions—which all also enjoy First Amendment protection.

Holland compellingly argues that the search for authorial intent in the secondary uses that demand fair use protection is misguided, noting that copyright’s monopoly-incentive is often wrongly imported into fair use’s guarantee of breathing space within the confines of copyright law.<sup>217</sup> This is bolstered by the Second Circuit’s current jurisprudence when assessing visual works in focusing on what may “reasonably be perceived” by the audience regardless of authorial intent.<sup>218</sup> Transformative use doctrine as applied by the Second and Ninth Circuits suggests that courts may be willing consider evidence of semiotic transformation, whether visual or not. Tan suggests that current approach in these Circuits “appears to be able to accommodate the shifting of the transformativeness inquiry from locating an authorial presence or authorial activity, to one of reader interpretation, i.e. whether one might reasonably perceive the creation of ‘new information, new aesthetics, new insights and understandings.’”<sup>219</sup> He emphasizes that “even a visually non-transformative work may be contextually transformative because it has introduced new ideas fundamentally different from the original.”<sup>220</sup> By recognizing the role of audience interpretation (and reinterpretation) in fair use, the Second and Ninth Circuits’ approaches may accommodate both visually and non-visually transformative memes.

Considering Figures 1-3, a still image taken from an iconic Oprah television episode is used to comment on issues such as gay marriage and the COVID-19 pandemic, including its social effects such as homeschooling as a result of nationwide lockdowns and

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<sup>217</sup> Holland, *supra* note 66, at 381 (“Valuable new expression—new meanings and new messages—created by social interaction with the work can occur entirely apart from the author.”).

<sup>218</sup> *Cariou*, 714 F.3d at 707. See also ROBERT HODGE & GUNTHER KRESS, *SOCIAL SEMIOTICS* 12 (1988) (“Meaning is always negotiated in the semiotic process, never simply imposed inexorably from above by an omnipotent author through an absolute code.”).

<sup>219</sup> Tan, *supra* note 54, at 84.

<sup>220</sup> *Id.* at 85.

school closures.<sup>221</sup> No visual alteration has occurred save for the addition of a caption, and yet, the audience's reasonable perception of a transformative change in purpose or character is likely. While the original work depicted Oprah's gift of new automobiles, her statement "You get a car!" has been playfully recoded to deal with current issues, providing a valuable meme template for the creation of "new information, new aesthetics, new insights and understandings." Figure 4 depicts a Reaction Image-style Image Macro meme and varies from the earlier examples based on the use it makes of the underlying work.<sup>222</sup> While earlier examples recoded Oprah's famous quote, Figure 4 removes the original context entirely, using her image to augment the user's own expression of the same emotion. In doing so, the meme is arguably "contextually transformative" by taking a small portion of a TV entertainment work and using it as a digital self-expression.<sup>223</sup> Figure 4 can be distinguished from *TCA v. McCollum* which held that the use of Abbott and Costello's famous "Who's on First" skit was copied for the same dramatic purpose as it was originally written. Figure 4 manifests a substantially different purpose than the original: from entertaining the audience on television to communicating one's emotions in an ironic manner during a pandemic lockdown. As noted above, users repurpose well-known characters and works to amplify their digital self-expression and to affirm their participation within digital culture.

Figure 5 depicts former UKIP and current Brexit Party leader Nigel Farage's Facebook post discussing an overtly political message.<sup>224</sup> While Farage's use of the image in a meme may not be permissible under the UK's categorical fair dealing provision, it would almost certainly qualify as a transformative use in the US, despite the minimal visual alteration. The original stock image was ostensibly intended for licensed use in online blogs or news forums for its

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<sup>221</sup> *Oprah's 'You Get A Car'*, *supra* note 168.

<sup>222</sup> *Id.*

<sup>223</sup> Tan, *supra* note 54, at 85. The change in context alone may not be dispositive of a fair use inquiry, but it often facilitates a change in purpose. While arguably less transformative and further from the shelter of constitutionally-protected speech, the radical change in context and use suggest a moderate-to-high degree of transformation that can neutralize or displace any marginally-commercial character that may vary depending on the user (i.e., private users vs. influencers vs. business accounts).

<sup>224</sup> *Distracted Boyfriend*, *supra* note 170.

ability to present a romantic betrayal simplistically and plainly, a message that it has successfully and exhaustively captured. Subsequent meme usage of the image as an Exploitable meme labels the three characters to explicate a relationship between three related concepts, in this case Italy's desirous gaze at a Brexit-style option. The "creation of . . . new insights and understandings" by making use of an image limited in its potential meanings for political ends is a clear transformation of purpose and character of the original work. *Brammer v. Violent Hues*, which concerned the unlicensed use of a photograph online can be distinguished from the transformations in Figures 1-3 and 5 in that the secondary use utilized the photograph *for the content itself*, while the memes have drawn upon the earlier works to communicate new information, insights, and understandings of political, social, and cultural issues.<sup>225</sup> Figures 7-9 display Edits of the original red carpet photograph of Rhianna's dress from the 2015 Met Gala, depicted as the Yellow Brick Road from *The Wizard of Oz*, a pepperoni pizza, and an aircraft emergency slide.<sup>226</sup> The original image (Figure 6) depicts Rihanna in a resplendent haute couture dress designed by Guo Pei, while the edited images visually criticize and ridicule the opulent over-the-top look in humorous ways, which calls to mind the smirking face of Leslie Nielsen superimposed on Demi Moore's naked pregnant body as photographed by Annie Leibovitz which was found to be fair use.<sup>227</sup> Current transformative use jurisprudence applies most unproblematically to Edits, in which visual transformation alters or recontextualizes key elements in the frame to suit the secondary user's discursive intent.<sup>228</sup>

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<sup>225</sup> *Brammer v. Violet Hues Prods.*, 922 F.3d 255, 261 (4th Cir. 2019). Figure 4 can likewise be distinguished from *Brammer* in that its use of the earlier work demonstrates a marked shift in purpose, from mass media to mediated self-expression.

<sup>226</sup> *Rihanna's Met Gala Dress*, KNOW YOUR MEME (May 5, 2015), <https://knowyourmeme.com/memes/rihannas-met-gala-dress> [<https://perma.cc/L8K7-ADKU>]. The dress was also mocked as resembling a poured omelet and a yellow condom.

<sup>227</sup> *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115 (2d Cir. 1998).

<sup>228</sup> Justice Kennedy's concurring opinion in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 598 (1994) warned "that courts should not accord fair use protection to profiteers who do no more than add a few silly words to someone else's song or place the characters from a familiar work in novel or eccentric poses." *Campbell*, 510 U.S. at 598. However, *TCA* can be distinguished on the basis that its reproduction of Abbott and Costello's "Who's on

Holland suggests that “an infringement defendant claiming this [social semiotics-informed] form of transformativeness would therefore need to produce evidence of audience engagement and the negotiation of new and distinct meanings around the text.”<sup>229</sup> As a format, memes are an iterative form of digital expression that results from audience engagement with existing works that takes the form of either renegotiating or actively subverting the original meanings of those works, and so appear to be highly transformative uses under the first factor.<sup>230</sup> The current transformative use analysis by the courts appears to be able to accommodate the protection of non-visual transformations present in Image Macro and Exploitable memes. While there is an apparent reinvigoration of the fourth factor in the Second Circuit, neither this factor nor any arguably commercial character of the user would seem capable of outweighing the transformativeness of these categories of memes.<sup>231</sup>

### B. Nature of the Work

The second factor examines the nature of the original work, considering that “some works are closer to the core of intended copyright protection than others.”<sup>232</sup> Creative works such as audiovisual works and photographs receive thick copyright protection whether they depict fictional works or factual settings, but this factor “may be of limited usefulness where the creative work of art is being used

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First” introduced no new purpose, while Edits memes often parody original images in a way consistent with recent fair use rulings on the works of pop artists such as Andy Warhol, Jeff Koons and Richard Prince. In this case, there is a clear parodic usage that differentiates these Edits memes from the infringing use of “Who’s on First” in the play.

<sup>229</sup> Holland, *supra* note 66, at 391–92.

<sup>230</sup> *Id.* at 361 (“Meaning is not controlled, transmitted, or even consistent. It is, instead, negotiated and actualized in engagement with the audience, or, more appropriately, audiences.”). *See also* Tan, *supra* note 54, at 86: “Parodies, fan fiction and appropriation art are the best examples of trans-coding practices where an irreverent portrayal of an iconic literary, dramatic, musical or artistic work has recoded its semiotic meanings to express a different or counterviewpoint that creates new insights and understandings, thus rendering the secondary use ‘transformative’ in nature.”

<sup>231</sup> Holland, *supra* note 66, at 357 (“The fair use doctrine is not, after all, concerned with incentivizing the creation of new works through the grant of monopoly. Rather, the heart of the fair use doctrine is its ‘guarantee of *breathing space* within the confines of copyright.”).

<sup>232</sup> *Campbell*, 510 U.S. at 587.

for a transformative purpose.”<sup>233</sup> As demonstrated above, the Second and Ninth Circuits’ transformative use approach appears to accommodate both visual and non-visual transformations as employed in memes.

Holland’s semiotic analysis of the iconic “Hope” poster featuring Barack Obama found the original photograph’s typically thick copyright protection nevertheless yielded to a highly transformative secondary use.<sup>234</sup> He argues that the original photograph could be described “as an attempt to capture unremarkable semiotic resources with powerful encoded meanings, to combine those resources and present the text in an unremarkable way, and to do so for the purposes of conveying conventional meanings.”<sup>235</sup> Likewise, the original image of Oprah depicts an unremarkable (if perhaps instantly-recognizable) talk show set, shot from a camera whose location was dictated by custom and necessity rather than a creative decision. The red-carpet photos of Rhianna utilized in the Edits (figures 6-9) demonstrate limited creativity or originality on the part of the photographer, whose positioning and framing of the star was most probably happenstance, after being jostled by hundreds of other photographers jockeying for a near-identical shot. Though photographs generally exist at the core of copyright protection, these photographs do not exhibit significant creativity in terms of its lighting, styling, subject arrangement and aesthetic choices and seem more deserving of thin rather than thick protection. In comparison, the stock photograph used in Farage’s Facebook meme post (Figure 5) required slightly more creative effort than the Oprah image, including the wardrobe and styling of the models. Nonetheless, this factor is rarely dispositive in fair use, and is neutral or at best tilts very slightly against fair use.

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<sup>233</sup> *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006) (citing *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006)). The Second Circuit held “the second fair-use factor has limited weight in our analysis because Koons used Blanch’s work in a transformative manner to comment on her image’s social and aesthetic meaning rather than to exploit its creative virtues.” *Id.*

<sup>234</sup> Holland, *supra* note 66, at 385.

<sup>235</sup> *Id.*

### C. Amount and Substantiality of Use

The third factor analysis considers whether “‘the amount and substantiality of the portion used in relation to the copyrighted work as a whole’ are reasonable in relation to the purpose of the copying.”<sup>236</sup> The Supreme Court held in *Campbell* that while the nature of parody requires some taking from the “heart” of the work, excessive copying of its expressive elements may weigh against a finding of fair use, especially where the secondary use is not sufficiently transformative under the first factor or provides a market substitute for the original under the fourth.<sup>237</sup> The extent to which non-parodic and non-satirical uses may borrow from the original is less certain. Given that memes often borrow from the “heart” of a work, there needs to be sufficient justification for the copying—without which the third factor seems *initially* to favor copyright owners.

Figures 1-3 and 7-9 (Oprah’s *You Get a Car!* and Rhianna’s Met Gala Dress) display clear parodic intent in their repurposing of, and reference to, elements of the original work, which provides justification to copy from the “heart” of the work.<sup>238</sup> That considered, the amount and substantiality taken from Oprah’s daytime talk show is minimal—one frame out of a single episode. However, the Edits of Rhianna utilize all or a significant portion of the original photograph but would likely be justified in their copying as a parodic fair use of the original.<sup>239</sup> Internet meme creators are rarely identified, but their use of current or well-known pop-culture works and other user-found images finds its justification in the process of audience interpretation and meaning-making within digital culture. Figures 4 and 5’s use can be justified on these grounds, despite their lack of comment on or reference to the original work. Highly transformative use diminishes the weight of other factors such as the amount and

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<sup>236</sup> *Campbell*, 510 U.S. at 586 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985)).

<sup>237</sup> *Id.*

<sup>238</sup> *Campbell*, 510 U.S. at 579.

<sup>239</sup> The Second Circuit cautioned that “[a] secondary work may modify the original without being transformative,” but “‘works that add something new’ and [present] images with a fundamentally different aesthetic will be considered transformative.” *See Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998). The recontextualization of a single object in frame in Figure 9 is reminiscent of Jeff Koons’ copying of one element of Andrea Blanch’s fashion photograph in *Koons II*.

substantiality taken, but there are also important policy arguments concerning free speech and democratic participation with prominent cultural symbols that should be considered by courts adjudicating widespread digital repurposing of mediated works.

#### *D. Effect on Market and Potential Market for the Work*

Despite the dominance of transformative use doctrine that underpinned the first factor over almost three decades, the fourth factor has enjoyed a resurgence, and is considered “the most important” fair use factor.<sup>240</sup> The interaction between the first and the fourth factors does implicitly suggest the doctrinal primacy of the fourth factor as the focus is ultimately on the economic impact on the demand for the original work and its derivatives.<sup>241</sup> Ginsburg notes that the dominant role of transformative use doctrine under the first factor appears to be giving way to a more fulsome consideration of the statutory factors, and a renewed emphasis on the fourth factor in particular,<sup>242</sup> citing *TCA v. McCollum* as an example of the Second Circuit’s willingness to engage in textual analysis as a demonstration of this increasingly skeptical approach to purportedly transformative uses and their market effects.<sup>243</sup>

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<sup>240</sup> See *Capitol Records, LLC v. ReDigi, Inc.*, 910 F.3d 649, 662 (2d Cir. 2018) (citing *Harper & Row*, 471 U.S. at 566 (1985)).

<sup>241</sup> See e.g., *Campbell*, 510 U.S. at 590.

<sup>242</sup> Other academics have noted the risk of allowing transformativeness under the first factor to dominate the market harm analysis under the fourth. See e.g., Beebe, *supra* note 89, at 588–91 (discussing the “stampeding” of the four factors); Ginsburg, *supra* note 93, at 287 (“The formula ‘if transformative work/purpose, then no market harm’ meets its corollary: ‘If commercial and not transformative, then market harm.’ Thus, fair use continues to reduce to a one-factor test, but one that cuts both ways.”).

<sup>243</sup> Ginsburg, *supra* note 93, at 287. Ginsburg also emphasizes a renewed consideration of the “value” of the work separate from the market harm analysis, considering its effects on the monopoly-incentive structure established under copyright. Interestingly, meme usage of well-known works may actually benefit the underlying copyright. Perhaps counterintuitively, widespread usage in memes of a well-known work may enhance the value of the copyright. Fromer similarly comments that secondary uses that transform the original can have positive effects on the copyrighted work’s value that should be relevant under the fair use analysis, as these uses “can draw attention to, enhance, or affirm the work’s role in the marketplace.” Fromer, *supra* note 134, at 630.



Internet memes tend to be highly transformative under the first factor, thus reducing their relevant fourth factor market impacts.<sup>244</sup> Memes neither create a market substitute for the original nor infringe directly on the exclusive rights to authorize derivative works, as no real licensing market exists for memes. Applying his social semiotics framework to the market effects of potential licensing markets for originals under the fourth factor, Holland argues that “[w]hen the flow of discourse around the subsequent work moves significantly outside these dominant structures and constraints [present in the original work], these markets are less foreseeable.”<sup>245</sup> Even where licensing markets may exist, such as the underlying photographs in Figures 5-9, this means that the relevant derivative and licensing markets are constrained to secondary works and uses that make use of the original within the semiotic constraints of its original purpose and character; seemingly a restatement of transformative use doctrine, but one that actively reframes the analysis as one which explicitly recognizes the role of audience discourse and interaction with the work.

The Oprah memes in Figures 1-4 do not produce a market alternative for Oprah’s talk show, nor is there any evidence that the increased exposure of her car giveaway led to any relevant market harms for the copyright in Oprah Winfrey’s talk show. The stock image used in Figure 5 was ostensibly produced for uses on commercial websites, news sites, and other licensed digital uses, a well-established market. Likewise, the paparazzo photo depicted in Figure 6 would ostensibly be licensed for use in tabloids and celebrity news websites. In *Brammer*, the Fourth Circuit considered the direct reproduction of a photo used exclusively and expressly for its contents—the depiction of the Adams Morgan neighborhood.<sup>246</sup> Wisely rejecting the defendant’s argument that the “informational” use was transformative of the original purpose, the court cautioned that such

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<sup>244</sup> *Campbell*, 510 U.S. at 591 (“[W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly “supersede[s] the objects,” of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”).

<sup>245</sup> Holland, *supra* note 66, at 388–89.

<sup>246</sup> *Brammer v. Violent Hues Prods., LLC*, 922 F.3d. 255, 261 (4th Cir. 2019).

a broad application of transformative use doctrine would effectively remove copyright protection from photographs and that Violent Hues impermissibly intruded upon Brammer's licensing market.<sup>247</sup> Secondary uses of licensable photographs such as memes are easily distinguished from the commercial use in *Brammer*. Under a semi-otic analysis, the *Distracted Boyfriend* Exploitable meme and Rhianna's Dress Edits exist far outside the textual constraints of the original works, and audience engagement in recoding and recontextualizing these works for a discursive purpose has moved far beyond the foreseeable markets for those works.<sup>248</sup> While a renewed emphasis on the fourth factor jeopardizes marginally-transformative uses or those with discernable market impacts, this fact favors Image Macro, Edits and Exploitable memes, in part due to their transformativeness, and in part because they produce no competing substitute for the original work.

## CONCLUSION

Social media today invariably enable and encourage the creation of individuated online identities through repetition, reproduction, and remixing. Marshall astutely observes that we are collectively reconstituted as intercommunicated public personas online<sup>249</sup> and our online persona is "a projection of our self for particular and directed purposes . . . derived from the archive of material that circulates around our online activity."<sup>250</sup> Jurgenson similarly notes that social media has resulted in "calculated avatar performance"<sup>251</sup> and that the social media profile emerges as a kind of library to make our pasts accessible and (equally important) to give ourselves an

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<sup>247</sup> *Id.* at 264.

<sup>248</sup> It is not a relevant market harm that a transformative secondary use may eclipse the market for the original work, as appears to have happened to the stock image featured in *Distracted Boyfriend* as a result of audience association with the meme format. *See e.g., Campbell*, 510 U.S. at 591 ("The cognizable harm is market substitution, not any harm from criticism. As to parody pure and simple, it is unlikely that the work will act as a substitute for the original, since the two works usually serve different market functions.").

<sup>249</sup> THE CELEBRITY PERSONA PANDEMIC, *supra* note 1, at 71.

<sup>250</sup> *Id.* at 73–74.

<sup>251</sup> JURGENSON, *supra* note 13, at 72.

order.”<sup>252</sup> Put in a different way, we are all using a mélange of images, text, and videos—comprising self-generated and infringing works—for the purposes of constructing this intercommunicated public persona that participates in an online environment that is characterized by anti-ideology and anti-authority features.

It is worthwhile taking a parting look at a recent internet meme that has taken the world by storm. The photograph by Getty photographer Brendan Smialowski of Senator Bernie Sanders of Vermont, a former presidential candidate, sitting comfortably masked, cross-legged and bundled up in a bulky coat with garish oversized mittens, at President Joe Biden’s inauguration on January 20, 2021, has captured the imagination of netizens as the image is inserted into a panoply of famous scenarios and everyday situations that include being on the USS Enterprise in *Star Trek*, at *The Last Supper*, sitting with Forrest Gump on a bench, and having a conference with the superhero group The Avengers.<sup>253</sup> “Bernie Sanders Wearing Mittens Sitting in a Chair” has been expressed as Image Macro and Exploitable memes,<sup>254</sup> and Nick Swahney, an N.Y.U. student had created an app that allowed users to drop the Bernie Sanders image into any location in the world.<sup>255</sup> The original photograph depicts a down-to-earth dowdy Sanders who values comfort over style, and is confidently unperturbed by what people may think of his appearance (Figure 10). The different versions of the meme shown below play with the Sanders image showing how at home the nonplussed senator can be in all these ridiculous scenarios, thus repurposing the original work which Smialowski confessed did not have any particular meaning to it. “I saw Sen. Sanders out of my other eye kind of fiddling with his

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<sup>252</sup> *Id.* at 85.

<sup>253</sup> Mike Ives and Daniel Victor, *Bernie Sanders Is Once Again the Star of a Meme*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/us/politics/bernie-sanders-meme.html> [<https://perma.cc/8HBN-CT4X>].

<sup>254</sup> *Bernie Sanders Wearing Mittens Sitting in a Chair*, KNOW YOUR MEME (Jan. 21, 2021), <https://knowyourmeme.com/memes/bernie-sanders-wearing-mittens-sitting-in-a-chair#fn1> [<https://perma.cc/5T63-FXC6>].

<sup>255</sup> The app has been discontinued, but almost 10 million Bernie Sanders memes had been created. Nick Sawhney, *Put Bernie Anywhere!*, BERNIE-SITS.HEROKUPAPP.COM, <http://bernie-sits.herokuapp.com/> [<https://perma.cc/J8RE-7U99>]. See also Megan Graham, *How to Put Bernie Sanders Into Any Shot on Google Maps Street View or Snapchat*, CNBC (Jan. 21, 2021, 3:42 PM), <https://www.cnbc.com/2021/01/21/how-to-put-bernie-sanders-into-google-maps-street-view-or-snapchat.html> [<https://perma.cc/V88X-TVKG>].

gloves. It was just a nice moment when he crossed his legs and crossed his arms,” Smialowski said. “I threw the camera over to him.”<sup>256</sup> When asked why he thought the photograph of Sanders resulting in the meme becoming an internet sensation so quickly, Smialowski replied, “Sen. Sanders has a very well-defined brand and image. He is who he is and he’s comfortable in that and it’s very much part of his politics.”<sup>257</sup>

Sanders entered into a licensing agreement with Getty Images to sell merchandise bearing the Bernie Sanders meme, including T-shirts, sweatshirts and stickers, on his campaign website with the money going to charitable organizations.<sup>258</sup> Getty Images also confirmed that it will donate its proceeds from the licensing agreement to Meals on Wheels of America.<sup>259</sup> While the online sharing of the Bernie Sanders image as Image Macro and Exploitable memes is arguably transformative,<sup>260</sup> the reproduction of the memes on an assortment of merchandise<sup>261</sup>—in particular, only the image of Sanders sitting in a chair—may tilt the scales against a finding of fair use as there would be an adverse impact on the commercial licensing market currently exploited by Getty Images. By moving into the physical world of merchandising, one has exited the digital carnivalesque in which greater permissibility is accorded to

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<sup>256</sup> Hannah Miao, ‘It’s Just Bernie Being Bernie’—How a Photo of Sanders Wearing Mittens on Inauguration Day Went Viral, CNBC (Jan. 23, 2021, 2:36 PM), <https://www.cnbc.com/2021/01/23/bernie-sanders-inauguration-meme-heres-the-story-behind-the-photo.html> [<https://perma.cc/37ED-3NNK>].

<sup>257</sup> *Id.*

<sup>258</sup> *Chairman Sanders Crewneck*, BERNIE SANDERS CAMPAIGN STORE (Jan. 21, 2021), <https://store.berniesanders.com/products/chairman-sanders-crewneck?variant=32787050004551> [<https://perma.cc/3WUR-6YJZ>].

<sup>259</sup> Lisa Rathke, *Bernie Sanders’ Inauguration Mittens, Memes Help Raise \$1.8M for Charity*, ABC13 EYEWITNESS NEWS (Jan. 27, 2021), <https://abc13.com/bernie-sanders-mittens-meme-at-biden-inauguration-best-memes-buzzfeed-origin/10073344/> [<https://perma.cc/M5MY-LWEM>].

<sup>260</sup> See the discussion *supra* Section III.A.

<sup>261</sup> Kala Herh and Zoe Malin, *10 Funny Gifts Inspired by the Bernie Sanders Mittens Meme*, NBC NEWS (Jan. 28, 2021, 4:42PM), <https://www.nbcnews.com/shopping/gift-guides/bernie-mittens-meme-gifts-n1256020> [<https://perma.cc/3QZX-8X78>]; Nicole Goodkind, *As the Meme Turns: Bernie with Mittens Merch Has Dropped*, FORTUNE (Jan. 22, 2021, 7:17 PM), <https://fortune.com/2021/01/22/bernie-sanders-inauguration-mittens-meme-merch/> [<https://perma.cc/6YGN-6AGB>].

transformative play and entered the realm where the hegemony of copyright laws ought to apply.



**Figure 10**

Original photograph by Brendan Smialowski/Agence France-Presse  
—Getty Images<sup>262</sup>



**Figure 11**

Senator Bernie Sanders on USS Enterprise in *Star Trek*<sup>263</sup>

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<sup>262</sup> Bernie Sanders Wearing Mittens Sitting in a Chair, *supra* note 254.

<sup>263</sup> *Id.*



**Figure 12**  
Senator Bernie Sanders in the *Distracted Boyfriend Meme*<sup>264</sup>



**Figure 13**  
Senator Bernie Sanders with *The Avengers*<sup>265</sup>

Each meme on a Facebook or Twitter profile could function like our own user-generated content, and “place each moment in a narrative with a point of view and a purpose, more like a memoir with

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<sup>264</sup> @ashtroid22, TWITTER (Jan. 21, 2021) <https://twitter.com/ashtroid22/status/1352079682137583616/photo/2> [<https://perma.cc/K8Y5-NYBK>].

<sup>265</sup> @AshleyKSmalls, TWITTER (Jan. 21, 2021) <https://twitter.com/AshleyKSmalls/status/1352099922988961792/photo/1> [<https://perma.cc/DMT4-XYUH>].

a grand narrative.”<sup>266</sup> Unsurprisingly, memes, with their rich semiotic connotations, are popularly used for the purpose of creating, maintaining and remaking of a digital public persona, and should generally qualify as highly transformative secondary uses that repurpose copyrighted works in a digital medium. Each sign is assimilated into the carnival language with its meanings changed and exploited in a multitude of heterogeneous layers. In this carnivalesque environment, they may be employed for discursive activities—such as using an Oprah meme to humorously comment on the COVID-19 pandemic or gay marriage—or just simply employed to amplify one’s emotion at a particular moment in time much like writing a digital diary on social media. In the context of an interconnected networked community in the 21<sup>st</sup> century, there is significant public benefit or public interest in recognizing memes as part of our new international cultural vocabulary and multi-directional discourse that has engendered important “group-based and society-based public interests.”<sup>267</sup> In the words of Shifman, “[c]opies become, in this sense, more important than the ‘original’: They are the *raison d’être* of digital communication.”<sup>268</sup>

The authors acknowledge that it is always a risky venture to engage in a preliminary interdisciplinary exploration of linguistic, cultural, political, and legal concepts, and there is more work to be done in this regard. In Bakhtin’s utopia of bourgeois frivolity, the work of the imagination is the most important social asset as carnival and communication are inextricably intertwined in transgressive play which celebrates “the joyful relativity of all hierarchical, authoritarian structures.”<sup>269</sup> The phenomena of meme sharing and other social media activities indeed exist in a digital dialogized carnival characterized by the laughing, material and game cultures. Like in Bakhtin’s carnival where “[d]egrees of transgression were bound by perfectly applied choreographic rules”,<sup>270</sup> transgressive infringing uses of works protected by copyright are only permissible according to

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<sup>266</sup> JURGENSON, *supra* note 13, at 88.

<sup>267</sup> Sun, *supra* note 21, at 151. Sun also argues that one may treat fair use as a “collective user right.” *Id.* at 168–69.

<sup>268</sup> Shifman, *supra* note 156, at 373.

<sup>269</sup> Gardiner, *supra* note 42, at 30.

<sup>270</sup> Lachmann, *supra* note 7, at 118.

the legal rules of fair use. This Article does not contend that there should be a *per se* rule that all internet memes are fair use. Fair use ought to be found for most private individuals using memes, but the finding may not be as certain for influencers on social media who gain a commercial benefit from their social media account or for multinational corporations seeking to capitalize on popular iconic works for profit. In line with the decisions in cases such as *Blanch*, *Cariou*, and *Seltzer*, the transformative use analysis applied by the Second and Ninth Circuits appears to be able to protect a kaleidoscope of memes from copyright infringement liability so long as a recoding or repurposing of the original can “reasonably be perceived.” The flexibility of the fair use analysis enables U.S. courts to develop jurisprudence surrounding memes in a way that reflects their social value in this new digital age. By accommodating transformative digital uses such as memes under fair use, courts can better balance between copyright holders’ exclusive rights and breathing space within the confines of copyright law all within this playful digital carnivalesque.