
MEME CULTURE AND COPYRIGHT INFRINGEMENT: A DILEMMA ON DERIVATIVE USAGE

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ABSTRACT

Memes, in the last few years, have become an integral part of our online existence. They effortlessly blend satire, humour, and social critique in a succinct and compelling way, to have emerged as a substantial tool of digital expression. Even though memes are apparently humorous, they tend to possess serious legal concerns, particularly involving copyright infringement. Memes, often, transform copyrighted content, including text, images, and videos, into new and satirical content. Such transformations may, in turn, potentially infringe the copyright of the original authors, thereby raising copyright concerns.

In Indian context, the Copyright Act, 1957, is the legislation that safeguards copyright, protecting original works of authorship such as literary, dramatic, musical, and artistic work. This study employs a qualitative descriptive analysis approach to probe and comprehend the complex interplay between meme culture and the legal jurisprudence on copyright in India. It also delves into the necessity of granting legal protection to memes under the Copyright Act, 1957. Further, the study undertakes a comparative analysis between Indian and the U.S. copyright regime with an objective to critically evaluate the efficacy of the Indian legal system to address copyright infringement actions in connection with internet memes.

Keywords: Meme, Derivative work, Copyright, Copyright Infringement, Intellectual Property.

Introduction

The term "meme" was originally used by Richard Dawkins in his 1976 book *The Selfish Gene*. He derived it from the Greek term "mimema," or "something imitated," to refer to how cultural information is disseminated and modified, just as genes spread biological traits (Dawkins, 2016). On the internet, the word "meme" has come to mean images, videos, phrases, or chunks of content that are shared extensively online, usually with a humorous or satirical purpose. Internet memes are a means of digital expression where users can comment on social issues, trends, and daily life in a short and relatable manner, usually going viral on platforms such as Twitter, Instagram, and Facebook (Shifman, 2013).

Modern digital communication is greatly influenced by internet memes, which serve as vehicles for disseminating ideas, comedy, and social insights. Often reflecting popular opinion, they provide a fast, relevant means to interact with cultural trends or present events. Beyond simple entertainment, memes may start debates and shape public opinion. Their viral character lets ideas spread fast across many different internet communities. A major force in modern digital communication, internet memes are vehicles for social commentary, humour, and cultural expression.

The primary function of copyright is to protect the original works of authors by granting them exclusive rights over their creations for a specific period. These laws encourage creativity and innovation by ensuring that creators can benefit economically from their work while also balancing public interest through imposing various limitations and exceptions. Modern digital media, especially social media, provides a perfect platform for content creators to exchange information, ideas, and creativity, and inopportunely, this is where the real problem lies. The concern arises regarding protection of intellectual property rights, as well as the rights of authors and creators. (WIPO, 2021; U.S. Copyright Office, 2022).

Objective

1. To explore the lacunae in the Indian copyright regime in contrast with the U.S copyright law.
2. To explore the conflicting interests between original authors and creators of derivative works in the context of intellectual property and creative expression.

3. To explore balanced solutions that safeguard the copyright of original creators while allowing for responsible and transformative derivative use.

Research Questions

1. Should copyright protection be extended to internet memes?
2. What lacunae in the Indian copyright regime encourages the derivative content creators to violate copyright of original authors?
3. To what extent do the copyright regimes in the U.S and India resemble each other and to what extent they differ with special reference to derivative works?
4. How can copyright laws be adapted to protect original creators while accommodating the transformative and creative nature of derivative works?

Copyright in memes

Copyright is granted to all original works. Though the term originality has not been explicitly defined under any Act in India, it is commonly understood in the sense that originality of expression is crucial and not that of idea. An original expression may derive from a pre-existing, copyrightable idea; nevertheless, it must not be founded upon pre-existing works. Copyright only protects the expression and not the idea. If an individual reproduces the expression from the original work, they are liable for copyright infringement.

Memes, as forms of creative expressions, often involve the use of pre-existing copyrighted material such as images, videos, or text altered to generate hilarious or satirical content. Copyright assumptions are, however, significantly undermined in the case of memes. Meme creators generally desire extensive replication of their work and often seek transformation by others (Adler & Fromer, 2022, 453). This replication tends to enhance, rather than diminish, the inherent worth of the original works upon which they are founded. Additionally, memes are contrary to copyright laws in the sense that memes are typically indirectly profitable, while copyright presumes that creative works are directly profitable (Sun, 2024, 418). Furthermore, copyright law's clear demarcations between non-protectable ideas and protectable expression are undermined by the domain of memes, which reveal that expression in one context may become an idea in another. Memes are characterized by an exponential rate of replication,

which simultaneously accelerates the obsolescence of existing works and the generation of new ones. Ultimately, while copyright law prioritizes the author, meme culture elevates the work itself, often rendering the originator unidentifiable (Amy Adler, 2022).

In India, the Copyright Act, 1957¹ delineates "literary work," to include translations, adaptations, and compilations. However, the applicability of the definition as given under the Act remains a contentious issue and is subject to interpretation and context. While memes could be considered adaptations or modifications of the original copyrighted content, their legal status is contingent upon several criteria, including the originality of the meme and its qualification for fair dealing. Fair dealing doctrine allows the usage of copyrighted content without authorization for purposes like criticism, parody, and commentary, which often underlie the creation of memes (Smith & Lantagne, 2021, 143).

Having said that, if a meme uses copyrighted content without authorization and does not qualify for fair use, it may result in copyright infringement (NLIU Cell for Studies in Intellectual Property Rights, 2022). The distinction between fair dealing and infringement can be ambiguous and often relies on the specifics of the case, such as the nature of the meme, its purpose and intent & the degree and extent of the use of the original work. Therefore it can be said that memes uphold a multifaceted position and occupy a complex space within copyright law, intertwining creativity, humor, and existing works in ways that can either contest, complement or enhance the legal framework.

A meme can be deemed original only when it demonstrates creativity and skill, the mere addition of a text to the pre-existing image does not qualify as originality. A meme asserting copyright must meet the standards of originality (K., 2022), and the courts, in order to determine substantiality of the copyrighted work used, have developed both, quantitative and qualitative assessment, based on the purpose, character and the transformative use of the work². Memes often reproduce quantitatively insubstantial portions yet they capture the core and spirit of the work. They often enhance the marketability of prior applications rather than detract from it. It is not a substitute for the original copyrighted work. Copyright owners often judge not to

¹ 'Literary work' has been defined under Section 2(o) of the Copyright Act, 1957. The section reads as "'literary work" includes computer programmes, tables and compilations including computer databases".

² In the case of TV Today Network Ltd. vs Newslandry Media Pvt. Ltd. [CS(COMM) 551/2021], TV Today filed a copyright infringement suit against Newslandry over a parody video. The Delhi High Court while deciding the matter stated that "Substantiality" is subjective. A small portion can be infringing if it captures the original's essence, while a longer portion might be justifiable if essential for transformative critique and not a market substitute.

take any actions against such memes as the use of such memes provides for a symbiotic benefit of promoting their works. This imitation typically yields beneficial outcomes for their prospective markets. However, the commercial use of a meme might be a factor considered against the creators as it uses another work to generate revenues. Prohibiting memes can serve as a mean of censorship and restriction on social discourse.

Case Study of 'The Distracted Boyfriend Meme'

The very famous Distracted Boyfriend meme, that went viral in 2017, features a man staring at a woman's posterior as she passes by, with another woman, possibly his romantic partner - looking on with disapproval (Herrera, 2017). According to Know Your Meme³, the source image, taken by photographer Antonio Guillem, was for the first time posted on the stock photo database iStock⁴ on November 1st, 2015. Soon the photo gained popularity and people discovered similar stock photos in the series with the same actors in various scenarios⁵. Even while conceding the popularity of the image, the original photographer of the image asserted that whoever is modifying or using the image without his authorization is breaking the law and that he is entitled to pursue legal action against anyone he deems to be using the pictures in ways that can injure him, no suit has been filed yet (Guadamuz, 2018).

According to the conventional format of the meme involves superimposing text on the three individuals in the shot, contrasting the obsolescence of one entity (the former girlfriend) with the enticing appeal of another (the woman walking by on the street). The meme instantly spread around the internet, as is the case with memes. The meme's intensely collaborative nature has facilitated the existence of versions of it for nearly every communicative topic that can be imagined (Lantagne, 2018).

Findings & Analysis

This is a thoughtful case study involving copyright law, internet culture, and ethical doctrines. After studying the case study, the author makes an attempt to answer the research questions

³ Know your Meme (KYM) is an Internet-based meme database, an online repository for meme information and history.

⁴ Disloyal man with his girlfriend looking at another girl stock photo, iStock by Getty Images, <https://www.istockphoto.com/photo/disloyal-man-with-his-girlfriend-looking-at-another-girl-gm493656728-77018851>. iStock is an online royalty free international photography provider.

⁵ Distracted Boyfriend, Know Your Meme, <https://knowyourmeme.com/memes/distracted-boyfriend>.

using two legal concepts as interpretive lenses. Below are detailed responses to the questions, on the basis of two doctrines:

- (a) Fair Use Doctrine, &
- (b) Doctrine of Double Effect (DDE)

I. Fair Use Doctrine

- A.** The Fair Use Doctrine permits limited use of copyrighted material without permission for purposes including criticism, commentary, parody, news reporting, education, and research. Memes often tend to fall under commentary or parody. The Doctrine endeavours to strike a balance: although the original photo is protected, transformative works such as memes tend to qualify as fair use if they:

- Provide new meaning or message
- Are non-commercial
- Don't substitute for the original market

Primarily, there are two participants in the creation of a meme: the originator, who has taken the original image, and the derivative author. Derivative authors modify either the text or image from the original slightly to develop a new meme or trend. Because they are derivative⁶, memes can pose copyright problems. Since memes make use of pre-existing images, meme creators can be sued for copyright. For instance, someone can reattribute various characters to the Distracted Boyfriend template and various memes can be created.

Therefore, to answer first research question that whether copyright protection be extended to internet memes, it can be stated that giving memes complete copyright protection might inhibit creativity and freedom of expression. Thus, copyright protection need not extend blindly to memes in such a manner that fair use is inhibited. Rather, a more subtle approach,

⁶ The Copyright Act 1976, 17 U.S.C. § 101, defines derivative work as "a work based upon one or more preexisting works" and cites as examples, "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."

informed by transformation and purpose should be adopted which is closer to the ideals of Fair Use.

B. In order to answer the second research question regarding lacunae in the Indian copyright regime that encourage derivative content creators to violate copyright of original authors, it is firstly important to understand the legislative framework of both the countries so that a better comparison be made between the two.

The U.S. copyright law shields original works of authorship that are fixed in a tangible medium and confers exclusive rights to reproduce, distribute, and make derivative works⁷. Section 103 of the Copyright Act stipulates that in derivative works, copyright does not protect any element of the work, however small, that illegally exploits the original work; rather, only exists in the parts that reflect the author's own contributions⁸. Section 107 enacts the doctrine of fair use which constitutes a complete defense against copyright infringement⁹ (Jr., 1988).

There are some considerations taken into account in deciding on the application of fair use doctrine, which are: (1) the reason for using the copyrighted work, whether commercial or not, (2) the nature of the copyrighted work, (3) the extent of the part that was borrowed from the copyrighted work and its proportion to the new work, and (4) the impact that the work that was infringed has on the value of the original. (Silverman, 2018)

Contrary to that, in India, protection to derivative work has not been extended explicitly under the Copyright Act. Any such work is covered under artistic works. (K., 2022) Alongside that, one section that is used for providing protection to transformative works is Section 52 of the Indian Copyright Act, 1957, which entails fair dealing exemptions, and is narrower than those under the Fair Use Doctrine in the United States'. The following are included within the scope of fair dealing:

- Personal or private use, such as research

⁷ 17 U.S.C. § 102 outlines the subject matter of copyright in the United States. It defines which works are eligible for copyright protection and what aspects of those works are protected. Specifically, it covers original works of authorship, including those fixed in a tangible medium of expression, but it does not extend to ideas, procedures, processes, or systems, regardless of how they are described or embodied.

⁸ 17 U.S.C. § 103.

⁹ 17 U.S.C. § 107.

- Reviewing or criticism
- Reporting current affairs¹⁰

When contrasting Indian copyright law to the U.S., clearly, following are the inadequacies in Indian Copyright regime:

- There is no explicit recognition of parody, satire, or meme culture
- The meaning of "transformative use" is vague, and courts' interpretations of derivative works are conflicting.

The major concern brought on by this hazy boundary is the unpredictability and inconsistency in legal determinations. Due to the absence of precise definitions about the requisite degree or nature of transformation for a work to be classified as fair use rather than a derivative work, much ambiguity exists for authors and rights holders. The minimal standard for originality implies that several works qualify for copyright protection, raising concerns that financially or socially significant alterations may be unfairly prohibited or classified as infringing, thereby stifling creativity and free expression. Therefore, it is quite clear that the absence of a definitive threshold for transformativeness leads to conflicting legal rulings and hinders the establishment of safe harbors for user-generated content platforms, obstructing innovation and cultural engagement (Nikhil Viswam Menon, 2023).

C. Having analyzed both the U.S. and Indian regime on copyright, it can be clearly stated that both the regimes have accorded almost similar legislative protection to original works including literary, dramatic, artistic and musical works. Along with this, talking about similarities, both countries grant exclusive rights to reproduce, distribute, and create derivative works, and, both have fair use/fair dealing exceptions.

¹⁰ Section 52 of the Copyright Act, 1957 is an elaborative section which outlines acts that do not constitute copyright infringement. This section essentially defines what is considered "fair dealing" and allows for certain uses of copyrighted material without the copyright owner's permission.

The section reads as "Certain acts not to be infringement of copyright.— (1) The following acts shall not constitute an infringement of copyright, namely,—

(a) a fair dealing with any work, not being a computer programme, for the purposes of—

(i) private or personal use, including research;

(ii) criticism or review, whether of that work or of any other work;

(iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public."

However, both countries are very different when it comes to derivative works. On one hand, in the U.S., a meme may be included under derivative works under the fair use doctrine, the scope of which is wide enough to include transformative works of parody, satire and memes¹¹¹². Not just sufficient laws but there are also robust enforcement mechanism to categorically provide protection to derivative works.

Contrasting it with India, certainly the scope of fair dealing doctrine is narrower and lacks specific inclusion of memes or parody. This leaves more space for ambiguities and promotes inadvertent or intentional violation. The Indian jurisprudence with respect to derivative works is in its nascent stage and it has not been evolved much. Clearly, in India, it is still a grey area and such matters are rarely litigated (SAW, 2023).

II. Doctrine of Double Effect

The doctrine of double effect is often invoked to support the morality of a course of action that causes substantial harm as a by-product of attaining a favourable outcome. The principle states that it is occasionally acceptable to inflict harm as an unanticipated and only anticipated result of attaining a positive goal, even if such harm would not be permissible if it were a means to the same good end. It is an ethical principle for establishing the morality of actions with both positive and negative consequences (R.G.Frey, 2020).

Basically, the Double Effect Doctrine provides that an action with a good and a bad outcome is morally permissible if:

1. The act itself is not inherently bad,
2. The bad effect is not a means of the good effect,
3. The intention is the good effect,
4. There is a proportionately grave reason for allowing the bad effect.

¹¹ Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023). In this case, the Supreme Court of the United States discussed about “transformative use” under the fair use doctrine.

¹² Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). In this case, the U.S. Supreme Court held that commercial parody as derivative work under the fair use doctrine.

Thus, in the case of memes, as evident from the Distracted Boyfriend meme where the original photograph is altered with text overlays to comment on or satirize various societal, cultural, or even personal ideas, the following inferences can be drawn:

- The act (creating and sharing a meme) is not inherently immoral.
- The positive effect is humour, commentary, or social critique.
- The negative effect (potential copyright infringement) is unintended.
- The intent is expression, not harm or economic sabotage.

Therefore, to answer the first research question, the author finds that from a DDE viewpoint, memes are ethically permissible, even if technically infringing, because the harm (unauthorized use) is unintended and the social benefits are significant.

By now, it is evident that the jurisprudence in India on derivative works has not evolved much. India lacks robust laws governing derivative works, which creates a room for ambiguity among creators of derivative works. Having observed the Distracted Boyfriend meme meticulously from the DDE lens, the authors realise that meme creators often do not intend to harm the original authors; their intention is creative or expressive. They intend to create satirical or humorous content.

In fact, memes sometimes enhance the marketability of prior applications due to its mass consumption on account of its nature and content. It is because of this reason that copyright owners often decide not to take any actions against any infringement by memes as these memes provide for a symbiotic benefit in subtly promoting their works. This naturally yields beneficial outcomes for their prospective markets.

Nonetheless, the negative effect (infringement of the rights of original copyright holder) is the consequence arising out of legal ambiguity or cultural disconnects rather than malicious intent of the meme creators. The principal causes behind this, in the opinion of the authors, are two-fold; the first being that the Indian regime does not account for intent vs. outcome clearly and the second are due to an absence of robust framework for licensed parody or satire. Therefore, DDE suggests that without clear avenues for legal transformative use, derivative content creators

easily get away even after infringing copyright of original owners and justify their actions based on good intent, thus operating in moral ambiguity.

Suggestions & Recommendations

“The Distracted Boyfriend” meme sits at the crossroads of copyright, creativity, and ethics. On one side, where Fair Use helps in understanding its legal leeway; on the other side, Doctrine of Double Effect helps in accepting the moral justification. Upon examining the meme comprehensively, the authors find that Indian jurisprudence on derivative works, unlike U.S.A., is far less-established and significantly lacking. It is in its nascent stage.

Also, it is pertinent to highlight here that memes involve the use of pre-existing copyrighted material; often leading to infringement of rights of original owner. In the light of the above observations, the authors believe that it is imperative to encourage balance and proportionality between the contrasting interests of derivative content creators and original creators while still preventing unjust enrichment. Under Indian copyright law, protecting derivative works while respecting the rights of original authors requires a nuanced legal and strategic approach.

Therefore, the legal reforms should aim at clarifying as to what constitutes permissible derivative works, protect creators on both ends as well as embrace digital-age expression without compromising artistic rights. On this basis, below are some suggestions by the authors:

1. **Explicit recognition of derivative works-** Expansion of the spectrum of Fair dealing doctrine under Section-52 of the Copyright Act, 1957 and categorical inclusion of derivative works under its the ambit to safeguard memes and parodies.
2. **Development of licensing platforms-** Encourage licensing platforms for derivative works, particularly meme or parody creators, with simple royalty or credit-based systems.
3. **Fast-track dispute resolution-** Establish fast-track dispute resolution mechanisms to settle derivative work conflicts efficiently.
4. **Register the Derivative Work separately-** Development of mechanism for mandatory separate registration of derivative works with the Copyright office. Once a derivative

work is created, the creator should register it with the Copyright Office. It will strengthen enforcement by serving as prima facie evidence of authorship and originality.

5. **Liberal approach of judiciary-** From a moral point of view, judiciary should adopt a relatively liberal approach. It must ensure that original creators are not exploited, but also not overly empowered to suppress creative expression. While deciding matters related to memes or other derivative works, it should account for intent vs. harm more clearly and offer safe harbours for creators whose primary intent is commentary, critique, or humour rather than profit.

Conclusion

The interaction between meme culture and copyright law constitutes a challenging scenario in the age of the internet, specifically under the Indian legal framework. Memes as derivative works, blend humour, satire and social commentary generally using copyrighted work that raises serious issues of copyright infringement. The Indian Copyright Act of 1957, in defending original work, does not have clear provisions for derivative work such as memes, resulting in uncertainty and varying legal interpretations as opposed to the U.S. fair use doctrine. This lacuna encourages inadvertent breaches by meme artists, who are more concerned with creative freedom than adherence to law, as seen from the case of the Distracted Boyfriend meme. The Doctrine of Double Effect also emphasizes that such transgressions usually fall short of intent, motivated by social welfare instead of harm. For this purpose, the reforms needed are many-fold, ranging from enhancing the Fair Dealing Doctrine in section 52 to launching licensing platforms and framing expedited means for the resolution of disputes. A liberal judicial approach with a balancing act between original authors' rights and derivative authors' rights is vital to ensure creativity while avoiding unjust enrichment. By embracing these changes, India is better poised to ride out the changing landscape of digital expression, allowing memes to flourish as tools of culture without compromising Intellectual Property Rights.

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