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# First World Problems:<sup>1</sup> A Fair Use Analysis of Internet Memes

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*The phenomenon of Internet memes—pictures with juxtaposed text that are replicated by derivative authors to the point where the pictures transcend the importance of the original posting and its underlying work—has become a pervasive component of mass Internet culture. Yet, there is little legal scholarship on the subject. This Article seeks to fill that void—or at least, a small part of it—by exploring whether or not an Internet meme could survive an action for copyright infringement by asserting a fair use defense. To that end, this Article considers what Internet memes are and compares them to “actual” memes, as the term was originally conceived in Richard Dawkins’s *The Selfish Gene*. Positing that Internet memes share many characteristics with actual memes as described by Dawkins, the Article goes on to show how those memes serve the functions of the theoretical concepts that ground the fair use defense (namely, cultural interchange, market failure, and productive consumption). The Article ultimately argues that a meme user will likely prevail if he asserts the fair use defense.*

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<sup>1</sup> “First world problems” refers to a meme lampooning complaints by Western citizens about problems that only arise “in the first world” and thus appear radically (and humorously) insignificant relative to problems in the second- or third-worlds. *First World Problems*, KNOW YOUR MEME, July 2012, <http://knowyourmeme.com/memes/first-world-problems> (last visited Jan. 25, 2013).

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## I. INTRODUCTION

I will sue you if you photocopy this article. Okay, no, I might not, but I *could* sue you. Still, that does not mean I will necessarily be successful, because you may be able to assert the fair use defense.<sup>1</sup> The fair use defense negates an otherwise proper finding of copyright infringement on the grounds that the would-be infringer's use of the work is socially desirable and aligned with the basic aims of copyright law<sup>2</sup>—simply stated, it recognizes that some infringement is *fair*. For

<sup>1</sup> See 17 U.S.C. § 107 (2013) (codifying the fair use defense); see *infra* Part II for further discussion.

<sup>2</sup> Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1600 (1983) ("fair use" renders

example, the fair use doctrine generally protects parodies of copyrighted works, the underlying reasoning being that a parody is a natural tool in providing commentary on and analysis of a pre-existing work.<sup>3</sup>

Fair use is a hotly-debated topic and a widely-used affirmative defense.<sup>4</sup> Yet, one area of copyright law and the applicability of the fair use defense remains unexplored: the case of the Internet meme. An Internet meme, as the term is used in this paper,<sup>5</sup> refers to a picture with juxtaposed text, which develops over time through derivative authors who slightly (or largely) mutate the original meme, usually by retaining the image and general theme while altering the specific language.<sup>6</sup> The end goal of an Internet meme is usually to make a joke or comment,<sup>7</sup> and they are often created by anonymous persons on sites like Reddit, without anything marking the identity of the original creator, suggesting no profit is sought. Yet memes have recently shown the potential for economic value, with companies licensing them<sup>8</sup> or otherwise creating or appropriating them for advertising purposes.<sup>9</sup>

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noninfringing certain uses of copyrighted material that might technically violate the statute, but which do not violate the statute's basic purposes").

<sup>3</sup> *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (permitting infringement where infringing work was a parody); *see also* *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986).

<sup>4</sup> *E.g.*, *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991) (noting that a biographer successfully claimed fair use of quotes from letters and journal entries in a biography); *Monster Commc'ns, Inc. v. Turner Broad. Sys. Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996) (permitting infringement under the fair use doctrine where a movie used less than one minute of a boxing match); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (finding fair use where Google used thumbnail images from another site in its search engine); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005) (considering, and ultimately rejecting, defendant's claim that downloading songs from a peer-to-peer network in order to determine whether she wanted to buy them was fair use).

<sup>5</sup> Notably, there is widespread disagreement as to what constitutes a meme and what does not constitute a meme. I have selected this definition for the purposes of this paper because of the recent explosion of such memes on sites like Facebook, Reddit, and Tumblr.

<sup>6</sup> For an example of a succession of Internet memes, *see* *Socially Awkward Penguin*, KNOW YOUR MEME, Oct. 2012, <http://knowyourmeme.com/memes/socially-awkward-penguin> (last visited Jan. 29, 2013) (detailing the evolution of the "Socially Awkward Penguin" meme).

<sup>7</sup> For example, the meme known as "Overly Attached Girlfriend," which features a picture of a woman smiling broadly in a way that is unsettling to some, is used to lampoon common comments by girlfriends which appear as extreme or overbearing. *Overly Attached Girlfriend*, KNOW YOUR MEME, Dec. 2012, [knowyourmeme.com/memes/overly-attached-girlfriend](http://knowyourmeme.com/memes/overly-attached-girlfriend).

<sup>8</sup> *See* *Virgin Media Using 'Success Kid' Meme for Marketing*, NEW RISING MEDIA (Feb. 14, 2012), [newrisingmedia.com/all/2012/2/14/virgin-media-using-success-kid-meme-for-marketing.html](http://newrisingmedia.com/all/2012/2/14/virgin-media-using-success-kid-meme-for-marketing.html).

<sup>9</sup> Christian Bauchhage, *Insights Into Internet Memes*, INTERNATIONAL AAAI CONFERENCE ON WEBLOGS AND SOCIAL MEDIA (July 2011), *available at* <http://www.aaai.org/ocs/index.php/ICWSM/ICWSM11/paper/view/2757/3304>. There are also sites centered

One notable example of the commercial value of memes concerns the television show *Futurama*. Fans of *Futurama* created several memes online, using jokes from the show.<sup>10</sup> The meme quickly gained popularity.<sup>11</sup> In fact, the meme was so popular that *Futurama* used the memes as part of their fall 2012 television advertising campaign.<sup>12</sup>

The *Futurama* model is likely to dominate television shows' approaches to memes because it is a cheap way to create buzz about a show, and encourages fan interest and participation in the show. But what if the meme was not one that helped the show, but one that ridiculed it and turned viewers away? In that case, the television program might want to pursue a copyright infringement suit as a way to stop the spread of the meme or to recoup damages. Such a process would be daunting, but not impossible.<sup>13</sup> That subject, however, is beyond the scope of this Article. Instead, this Article focuses on the following question: assuming a meme creator was found to have prima facie infringed on a television show's copyright, would he be able to avail himself of the fair use defense?

In addressing this question, Part II provides an overview of the fair use defense, exploring both the normative theories that guide it and the factor analysis used to determine whether a particular work is infringing. Part III discusses the concept of memes generally and how those

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around memes and meme creation, which reap profits off advertising dollars, such as Know Your Meme and Cheezburger.

<sup>10</sup> *Futurama*, KNOW YOUR MEME, [knowyourmeme.com/memes/subcultures/futurama](http://knowyourmeme.com/memes/subcultures/futurama) (last visited Jul. 15, 2013).

<sup>11</sup> See *Futurama Fry/Not Sure If X*, KNOW YOUR MEME, <http://www.knowyourmeme.com/memes/futurama-fry-not-sure-if-x> (last visited Jan. 26, 2013).

<sup>12</sup> *Comedy Central Futurama Meme*, YOUTUBE (Apr. 25, 2012), <http://www.youtube.com/watch?v=PMdKUAIdic>.

<sup>13</sup> For instance, plaintiffs could use meme generators' websites to obtain a large list of IP addresses and bring a suit against those individuals, using the court's discovery powers to obtain the names of the IP address holders. See Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation*, 71 MD. L. REV. ENDNOTES 51, 53 (2012). The legal fees of such a case would be high, but the plaintiffs may be able to extract cheap settlements, as the cost of defending a suit would likewise be prohibitively high for an infringer. *Id.* In a sufficiently large volume, this could reap large payouts. Moreover, the threat of suit might dissuade others from propagating the meme; in all likelihood, however, such an abuse of the apparent anonymity of the Internet would likely cause those upset with the lawsuit to spread the meme further as a backlash against the company's tactics. Problems such as this have been called by some the "Steisand Effect," which refers to efforts by Barbara Streisand to suppress a picture of her home that ultimately only caused the picture to spread even faster, as online users took offense to her efforts to suppress freedom of speech and retaliated by posting and sharing the image. T.C., *What is the Streisand Effect?*, THE ECONOMIST, Apr. 15, 2013, [www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect](http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect).

concepts run parallel to Internet memes. Finally, Part IV will analyze Internet memes—using a *Futurama* meme as an example—under each factor of the fair use defense, an analysis which will be informed by the earlier discussion of the normative principles of fair use and the principles of memetics. Ultimately, this Article concludes that an Internet meme similar to the *Futurama* meme is likely to fall within the fair use defense.

## II. THE FAIR USE DEFENSE

The fair use defense is a statutory doctrine<sup>14</sup> that provides certain defenses to otherwise infringing activity.<sup>15</sup> The statute provides a preamble of representative cases and enunciates a four-factor test.<sup>16</sup> In this Section, the Article examines the test in detail. Prior to doing so, however, the Article begins by discussing some of the normative theories that ground the fair use defense and breathe life into the factors.

### A. Normative Theories for Fair Use

Several normative theories have been relied on to justify the fair use defense. This Part touches on several of these theories, including cultural interchange,<sup>17</sup> market failure, and productive consumption.

#### 1. Cultural Interchange

The Preamble of Section 107 of United States Code Title 17 states that where an otherwise infringing work is created “for purposes such as criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research, [such use] is not an infringement of copyright.”<sup>18</sup> The listed uses have received some of

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<sup>14</sup> While the doctrine is, today, a statutory one, it originated from the common law, which formed the defense as a judicial safety valve to ensure the copyright laws were not enforced in a way that ran counter to the underlying purposes of the statutes, as articulated by the Constitution—“To promote the Progress of . . . [the] useful Arts.” U.S. CONST. ART. I § 8 cl. 8; PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 80 (2011). While the 1976 Act codified the doctrine, the statute is very broad and contemplates broad judicial discretion in determining whether or not the doctrine is applicable.

<sup>15</sup> 17 U.S.C. § 107.

<sup>16</sup> 17 U.S.C. § 107.

<sup>17</sup> See COHEN ET. AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 534 (3d ed. 2010) (using the term “cultural interchange”).

<sup>18</sup> 17 U.S.C. § 107.

the strongest—although not absolute—fair use protection,<sup>19</sup> however, what is perhaps most noteworthy is the inclusion of the language “such as.” This word choice is important because it indicates that the list given is not exhaustive. To understand what “such as” includes, Section 107 provides four (non-exhaustive) factors: the character and purpose of the use, the nature of the copyrighted work, the amount and substantiality of the copyrighted work taken, and the potential effect on the market for the copyrighted work or the market for derivative works.<sup>20</sup>

The fair use factors are not the sole means of comprehending the meaning of “such as,” however; “criticism, comment, news, reporting, teaching, . . . scholarship, and research” also provide important indications by showing which activities receive protection. Each of these uses involves cultural interchange—namely, how we review and learn from expressive works. In other words, we protect these uses because they “help . . . produce a public that is educated and informed not only about current events, but about shared values, interests and debates.”<sup>21</sup> For example, scholarship facilitates the assessment of existing works and the formulation of new theories that address those works’ failings or build on those works’ successes. Likewise, criticism is needed in order to objectively evaluate a work, and the news promotes the dissemination of information about current events. These elements work together to achieve the central purpose of copyright—the advance of progress.<sup>22</sup>

Thus, in considering the fair use defense from a cultural interchange perspective, a key question is what role do the activities we choose to protect play in our culture? Is the activity we seek to protect one of social value or necessity? Does providing copyright protection to it aid in the “Progress of Science and useful Arts”?<sup>23</sup>

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<sup>19</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (finding an excise of 300 words from an autobiography was not fair use because it appropriated the heart of the work).

<sup>20</sup> 17 U.S.C. 107.

<sup>21</sup> *COHEN ET. AL*, *supra* note 17.

<sup>22</sup> U.S. CONST. art. I, § 8, cl. 8 (providing that Congress can grant copyright protection, but only to the extent that it is needed “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

<sup>23</sup> See U.S. CONST. art. I, § 8, cl. 8.

## 2. Market Failure

A second normative theory concerns market failure. “A market failure occurs when, owing to the inherent characteristics of the market, too much or too little will be produced or consumed.”<sup>24</sup> Copyright itself is a system that is designed, ostensibly, to deal with market failure.<sup>25</sup> By nature, expressive works without the protection of intellectual property laws are difficult to capitalize on in the free market because they are intangible, non-excludable, and non-rivalrous.<sup>26</sup> For example, consider a tangible, excludable, and rivalrous good: a kitchen knife. If you are using a kitchen knife to slice an apple, no one else can use it at the same time that you are using it. Thus, if another person wants to cut something without having to wait for you to finish using the knife, he will need a second knife. While a family may be able to do with a single knife, an entire neighborhood likely could not, at least not without great inconvenience, and each household of the neighborhood will thus buy at least one knife of their own.

Now take a moment to consider another example: a movie. While multiple people in a neighborhood could not use a single DVD in separate locations at the same time, a person could copy the DVD or extract the media file and give the copies to the rest of your neighborhood. Then, every member of the neighborhood could watch the film at any time they want, no matter who else is using it.<sup>27</sup> This discourages individuals from purchasing the expressive work from the individual who created it, as the price needed to profit from an expressive work far outweighs the cost—if any—of copying it. Consequently, this also increases the price of the DVD for legal purchasers, as the creator of the work, with a smaller pool of potential buyers, may need to raise the price in order to recoup the same amount of profit, or, at least, to miti-

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<sup>24</sup> Pete Morton, *The Economic Benefits of Wilderness: Theory and Practice*, 76 DENV. U. L. REV 465, 511 (1999).

<sup>25</sup> Aaron Xavier Fellmeth, *Copyright Misuse and the Limits of the Intellectual Property Monopoly*, 6 J. INTEL. PROP. L. 1, 3 (1998); see also COHEN ET. AL., *supra* note 17, at 6-7.

<sup>26</sup> COHEN ET. AL., *supra* note 17, at 6 (listing non-rivalrousness and intangibility as copyrighted works’ “public goods” problem); LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, *INTELLECTUAL PROPERTY LAW: CASES & MATERIALS* (Ver 3.0 2012) (noting that because “intangible assets have a risk of underproduction because of their characteristics of non-rivalrous consumption and non-excludability [,] . . . copyright law . . . [grants] exclusive rights in expressive works . . . [in order to] solve the underproduction problem.”).

<sup>27</sup> And, in fact, one could elect to upload the file onto a file-sharing site or a video streaming site, where millions of people may be able to access and use it without ever paying a cent.



gate the amount of profit lost due to copying. This, in turn, may drive more market users to black market sources, causing the cycle to repeat. To avoid this problem, a copyright provides its holder with a limited monopoly over the exploitation of an expressive work by making it illegal to exploit the work in certain ways—including reproduction—thus circumventing the problems posed by intangibility, non-excludability, and non-rivalrousness.<sup>28</sup>

Monopolies, notably, are considered market failures themselves in terms of general free market theory.<sup>29</sup> Copyright is an exception to the general rule, however, because of the problems posed by the intangible nature of the protected good, which makes it difficult or impossible to profit from a copyright without monopolistic protection.<sup>30</sup> The grant is seen as an exchange—a limited term monopoly which incentivizes authors to produce and disseminate original works in return for the ability of the public to access those works in the market and, eventually, to use them without restriction when the copyright term expires<sup>31</sup> and the work enters the public domain.<sup>32</sup>

Yet, as is the case with any system of law, this regime produces externalities. For example, consider the case of scholarship. Scholarship provides an important societal benefit—the discussion of current topics, events, and pre-existing scholarship. Scholars routinely quote previous scholarship in building upon their own scholarship; yet that pre-

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<sup>28</sup> COHEN ET. AL, *supra* note 17, at 6; LOREN & MILLER, *supra* note 26.

<sup>29</sup> Noel M. Edelson, *Congestion Tolls Under Monopoly*, 61 AM. ECON. REV. 873, 873 (1971).

<sup>30</sup> See Fellmeth, *supra* note 25; see also COHEN ET. AL, *supra* note 17, at 6; see also LOREN & MILLER, *supra* note 26.

<sup>31</sup> Notably, we may be fast approaching a point where a copyright lasts in perpetuity. While the Constitution explicitly requires that copyrights are only issued for a limited period of time, the length of a copyright term has exploded over the course of the nation's history. Initially, a copyright only lasted for a term of seven years, subject to a single extension of another seven years. This steadily grew over time, and, in 1976, Congress extended the period to the life of the author plus fifty years after his death. This change was deemed necessary as it was a prerequisite to the United States' ascension to the Berne Convention, an international copyright treaty which provides reciprocal protection to treaty members' copyrights in other treaty members' nations. Later, in what has been dubbed the "Mickey Mouse Copyright Law," Congress extended the term in 1998 by another twenty years after intense lobbying efforts by the Walt Disney Company, which feared losing its copyright over its flagship character Mickey Mouse. Since the extension, the Supreme Court has refused to invalidate the law in spite of the Constitutional directive, indicating that the only real limitation is that copyrights cannot be extended in perpetuity. Thus, many expect that, in the coming years, as the copyright for Mickey Mouse and other property owned by large corporations nears expiration, the term will likely be extended once again, and so on and so forth—in perpetuity by any other name.

<sup>32</sup> See Fellmeth, *supra* note 25; see also COHEN ET. AL, *supra* note 17, at 6; see also LOREN & MILLER, *supra* note 26.

vious scholarship frequently is protected by copyright. Because of the nature of scholarship, however, it may be difficult to contract with copyright holders to obtain permission to use quotations, and scholars may not have the funds to pay for those excerpts if compensation is demanded. In other words, “[t]he costs and benefits of the parties contracting for the uses often differ from the social costs and benefits at stake, so that transactions leading to an increase in social benefit may not occur.”<sup>33</sup>

Market failure theory seeks to deal with this problem by reasoning that a fair use exists where, by virtue of market realities, “the market cannot be relied upon as a mechanism for facilitating socially desirable transactions.”<sup>34</sup> Fair use is specifically designed to mitigate this problem, as signaled by Congress’s direction that courts should consider the first factor, the “purpose and character of the use.”<sup>35</sup> This factor is concomitant with the underlying aims articulated in the intellectual property clause, as it ensures that copyrights are only available to the extent that they induce progress in the arts and sciences.

### 3. Productive Consumption Theory

Productive consumption theory posits that an otherwise infringing use should be allowed where the use serves some productive goal.<sup>36</sup> For instance, in *Sony Corporation of America v. Universal Studios, Inc.*, the U.S. Supreme Court held that individual users could record television programs to watch them later without infringing the copyright holder’s reproduction right.<sup>37</sup>

While the court addresses the notion of productive consumption in its opinion,<sup>38</sup> it is perhaps more useful to consider Justice Blackmun’s dissent, as anything within the narrower limits of Blackmun’s dissent would also be within the broader view of fair use adopted by the Court. In his dissent, Justice Blackmun argues that time shifting is not a productive use because it provides only personal benefits—the recording

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<sup>33</sup> Gordon, *supra* note 2, at 1630-31. It should be noted, however, that it is possible for scholarship to violate the Copyright Act and not fall within the fair use defense. *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

<sup>34</sup> *Id.*

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

<sup>36</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n. 40 (1984).

<sup>37</sup> *See generally Sony*, 464 U.S. at 417.

<sup>38</sup> *Id.* at 455 n. 40.

of a show for an individual end user's entertainment—as opposed to larger societal benefits.<sup>39</sup> Thus, a use that provides public benefits has a stronger case for falling under the umbrella of fair use.

### B. *Fair Use Factors*

With these normative theories in mind, let us consider the four-factor analysis required when the fair use defense is invoked. The first factor considers “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”<sup>40</sup> The second factor evaluates the “nature of the copyrighted work.”<sup>41</sup> The third factor looks to “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>42</sup> The fourth and final factor is concerned with “the effect of the use upon the potential market for or value of the copyrighted works.”<sup>43</sup>

#### 1. Factor One: Purpose of the Infringing Use

The first factor is often the most influential, because it concerns the purpose of the infringing use and thus serves as a strong opportunity to consider fair use's normative theories.<sup>44</sup> With respect to this factor, the strongest argument for fair use exists where the judge<sup>45</sup> deems the work to be “transformative.”<sup>46</sup> A transformative work is one that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>47</sup> A court is unlikely to find such a work to be infringing because it furthers the goal of cultural interchange—it provides an avenue for building on the orig-

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<sup>39</sup> See *id.* at 480 (Blackmun, J., dissenting)

<sup>40</sup> 17 U.S.C. § 107(1) (2011).

<sup>41</sup> 17 U.S.C. § 107(2) (2011).

<sup>42</sup> 17 U.S.C. § 107(3) (2011).

<sup>43</sup> 17 U.S.C. § 107(4) (2011).

<sup>44</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>45</sup> Notably, fair use has historically been decided by juries; today, nearly all judges deem the issue of fair use as a matter of law and deal with it as a matter of summary disposition. Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 485 (2010).

<sup>46</sup> *Campbell*, 510 U.S. at 579.

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

inal work and thereby expands public discourse and knowledge.<sup>48</sup> This analysis is true even if the work is commercial in nature.<sup>49</sup>

The commercial versus nonprofit distinction is important, too, with fair use preferring not-for-profit uses. Again, this aligns with normative values. A nonprofit use serves to achieve the goals of productive consumption theory because the undertaking is one that commercial ventures do not undertake, as there would be no significant potential to profit off the venture. This distinction also furthers cultural interchange because, without the incentive of fair use, works that cannot easily be monetized might not come forward into the public discourse—and thus, the cultural discourse—because otherwise potential infringement liability would provide scant incentive to do so.

## 2. Factor Two: Nature of the Work

The nature of the copyrighted work is important because it influences how much society is willing to allow otherwise infringing uses of a copyrighted work. For instance, if we consider a copyrighted work detailing current events, the nature of the work—informing the public about societal happenings—would provide a strong reason to find fair use.<sup>50</sup> On the other hand, courts would be less inclined to excuse infringement of an artistic work, such as a photographic portrait.<sup>51</sup> While culturally relevant, the work's core concerns the artist's individual expression, whereas in a factual work the heart of the work is the facts contained therein.<sup>52</sup> The Second Circuit explored this distinction in *Nunez v. Caribbean International News Corporation*, where it considered the copyright of a photo of a pageant contestant.<sup>53</sup> The Court noted that such photographs were often more artistic in nature because they were meant to depict beauty in an imaginative fashion. Notwithstanding, the court went on to argue that that if the photo was used primarily to indicate something factual—i.e., that the depicted contest-

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<sup>48</sup> *Campbell*, 510 U.S. at 579 (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”).

<sup>49</sup> *Id.* (“[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>50</sup> *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (noting that works referenced in factual works deserve less protection because their information needs to be disseminated).

<sup>51</sup> *See Id.*

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

<sup>53</sup> *Id.*

ant appeared in the contest—the work would be more deserving of a fair use finding.<sup>54</sup> The court argued that society would benefit from dissemination of the work because it informed the public about the contestant.<sup>55</sup> The factor is significant because it speaks to our values and needs for certain works; for example, the higher likelihood that news reporting will be considered fair use reflects society's need for knowledge about current events, while the lower probability that an artistic work would be considered non-actionable infringement speaks to our value for art and ensuring that it remains incentivized.

### 3. Factor Three: Amount and Substantiality of the Portion Used

Under this factor, courts consider how much of the copyrighted work was used, and how that use compares to the entirety of the work. It is not only size alone that matters, however, but also the substantive context of the excised portion of the copyrighted work. For instance, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the court considered a fair use defense argument for a book review which excerpted 300 words from a yet to be released autobiography about former president Gerald Ford.<sup>56</sup> In terms of a book, 300 words is merely a small fraction of the entire work, and usually normative principles of cultural interchange would permit such a use where it is necessary to discuss the content of an expressive work dealing with factual matters.<sup>57</sup> In this case, however, the court found that the 300 words taken encompassed the “heart” of the memoir (the excerpt concerned President Ford's motives for pardoning President Nixon).<sup>58</sup> As such, it was viewed as a qualitatively large excise in relation to the copyrighted work as a whole, and the court found the excise to be infringing.<sup>59</sup> Thus, consideration of this factor requires two things: a quantitative analysis of how much of the infringing work is from the original copyrighted work, and a qualitative analysis as to the value of the excise to the original copyrighted work.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

<sup>57</sup> *See Harper*, 471 U.S. at 545; *see also Nunez*, 235 F.3d at 23.

<sup>58</sup> *Harper*, 471 U.S. at 565.

<sup>59</sup> *Harper*, 471 U.S. at 565.

#### 4. Factor Four: Effect on the Potential Market for or Value of the Work

The final factor considers the market impact of the infringing work on the infringed work.<sup>60</sup> Quite obviously, works that negatively impact the value of the work are less likely to prevail under the defense; on the other hand, where a work does not impact the marketability of the copyrighted work or derivatives of that work—or even enhances it—a fair use finding is more likely to be deemed appropriate.

A recurring problem with this factor is circularity.<sup>61</sup> This problem concerns arguments that a market for derivative works must exist—and thus, the original author has a right to make derivative works in that market<sup>62</sup>—by virtue of the fact that the allegedly infringing work has had success in the market.<sup>63</sup> It may be unclear, however, whether that market—and thus the potential for derivative works to exist and serve as a substitute for the original work—would have existed if not for the infringing work.<sup>64</sup> In terms of our normative theories, productive use and market failure are particularly important to this factor.

#### 5. Factor Analysis

On a final note, it is important to remember that this is not a straight balancing of factors—finding three factors in favor of fair use does not necessitate that fair use must exist. Every factor can be relevant, and the inquiry is highly fact-specific. For instance, in *Harper & Row*,<sup>65</sup> the third factor weighed quite heavily, as there was an excise of the critical component of the book, and thus cultural interchange interests were outweighed by the need to mitigate the market problems facing non-rivalrous goods. Yet, in parody cases, courts might be more interested in the first factor than the third factor, as the nature and character of the use may help achieve cultural advancement.<sup>66</sup> Thus, when applying the fair use test, the individual facts of the use in question are paramount, as they indicate which factors will be relevant and thus

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<sup>60</sup> 17 U.S.C. § 107(4) (2011).

<sup>61</sup> *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 146 (2d Cir. 1998).

<sup>62</sup> 17 U.S.C. § 106(2) grants the copyright owner with the right to create derivative works.

<sup>63</sup> *Castle*, 150 F.3d at 146.

<sup>64</sup> *Castle*, 150 F.3d at 146.

<sup>65</sup> See *supra* notes 50-53 and accompanying text.

<sup>66</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584-585 (1994).

shape the outcome. Within the context of this Article, then, we must ask: what is an Internet meme?

### III. INTERNET MEMES

#### A. *Memes Generally*

For nearly a century, the concept of a “meme” has been used in a litany of fields, from biology to sociology.<sup>67</sup> Memes can include units, patterns, ideas, and sets.<sup>68</sup> The concept did not truly come to the forefront of scholarly discourse, however, until the release of Richard Dawkins’ *The Selfish Gene*, which coined the term.<sup>69</sup> According to Professors Knobel and Lankshear, Dawkins posited that memes were a “substantial evolutionary model of cultural development and change grounded in the replication of ideas, knowledge, and other cultural information through imitation and transfer.”<sup>70</sup> Memes start off in one form, but then are subject to mutation, which helps spread the meme.<sup>71</sup> Notably, Dawkins argues that memes have such great potential that they can even influence their own probability of reproduction.

With respect to the social and cultural exploration of memes, memes are relevant and studied in terms of how they operate in a particular cultural space.<sup>72</sup> What distinguishes a simple picture with juxtaposed text from true memes is that memes are “recognizable, bounded phenomena that have material effects in the world and that can be scrutinized,”<sup>73</sup> and which develop through the production of additional copies. Under Dawkins’ theory, “*any* entity that can make copies of itself will evolve by natural selection, as long as three conditions are present in the right proportions:”<sup>74</sup> replicability (heritability), variability, and fitness.<sup>75</sup>

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<sup>67</sup> See generally RICHARD DAWKINS, *THE SELFISH GENE* (1976); Michelle Knobel & Colin Lankshear, *Online Memes, Affinities, and Cultural Production*, in *A NEW LITERACIES SAMPLER* 200 (eds. Michele Knobel & Colin Lankshear, 2007).

<sup>68</sup> See Knobel & Lankshear, *supra* note 67, at 201.

<sup>69</sup> See generally DAWKINS, *supra* note 67; Knobel & Lankshear, *supra* note 67.

<sup>70</sup> Knobel & Lankshear, *supra* note 67.

<sup>71</sup> *Id.*

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

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

<sup>74</sup> Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 337 (2005); see also DAWKINS, *supra* note 67.

<sup>75</sup> Cotter, *supra* note 74; see also DAWKINS, *supra* note 67.

Three attributes influence replicability: fidelity, fecundity, and longevity.<sup>76</sup> Memes with fidelity are memorable, meaningful, and intuitive—regardless of their utility or their truthfulness—and thus are easily replicated and disseminated without losing their inherent value.<sup>77</sup> Fecundity refers to the degree of reproduction and dissemination of a meme; successful memes must achieve a high degree of fecundity.<sup>78</sup> Other scholars, building on Dawkins' work, have identified susceptibility as a key subpart of fecundity, in the sense that it relates to “the ‘timing’ or ‘location’ of a meme with respect to people’s openness to the meme and their propensity to be infected by it.”<sup>79</sup> Meme creators can achieve this effect most easily when their memes contain attributes within themselves, either consciously or unconsciously inserted by the meme creator, which allow the meme to garner greater attention by the person whom it is attempting to infect.<sup>80</sup> Doing this enables greater transmission because the meme’s design ensures that the next person’s cultural dispositions do not hinder the meme’s ability to infect that person.<sup>81</sup> Longevity is also a key element of replicability because the longer a meme exists, the more recognized it becomes, and this recognition in turn enables easier reproduction, mutation, and dissemination.<sup>82</sup>

Mutation achieves the second requirement, variability, as transformation leads to a large variety of memes for the public’s consumption.<sup>83</sup> That, in turn, feeds the third requirement, fitness, which focuses on the ability of a mutated version of the meme to survive and grow.<sup>84</sup>

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<sup>76</sup> Cotter, *supra* note 74; *see also* DAWKINS, *supra* note 67; LITERACIES, *supra* note 67, at 201.

<sup>77</sup> Cotter, *supra* note 74; *see also* DAWKINS, *supra* note 67; LITERACIES, *supra* note 67, at 201.

<sup>78</sup> *See* Cotter, *supra* note 74; *see also* DAWKINS, *supra* note 67; LITERACIES, *supra* note 67, at 201-202.

<sup>79</sup> LITERACIES, *supra* note 67, at 200-202.

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

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

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

<sup>83</sup> *See* Cotter, *supra* note 74; *see also* DAWKINS, *supra* note 67.

<sup>84</sup> *See* Cotter, *supra* note 74; *see also* DAWKINS, *supra* note 67.



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## B. Internet Memes<sup>85</sup>

Memetics, notably, was developed far before the advent of the Internet, and many—including Dawkins himself—claim that the popular term “Internet meme” does not actually refer to real memes, except perhaps to the extent that the term has become a meme itself.<sup>86</sup> This Article does not seek to provide a definitive answer as to this question, but simply argues that the Internet meme, as discussed and (narrowly) defined herein, is a meme—or, at least, shares significant qualities with a meme.

Mememes begin with originators—people who create new memes or the underlying images that will become memes at someone else’s hand. The originators’ work is then taken by derivative authors who create new posts that are similar but slightly different from the original memes.

From this point on, future derivative authors either build on previous derivative authors’ work or the original authors’ work and create many strands of memes which are all ultimately connected to the original meme.<sup>87</sup> Some mutations build in the general direction of the meme and its previous versions, while others change the meme drastically.<sup>88</sup> Sometimes memes change so drastically that an entirely new meme emerges.<sup>89</sup> Ultimately, something becomes a meme when it reaches significant volume and is easily recognizable by the Internet community.<sup>90</sup> The meme may be so recognizable that its underlying image originators may try to appropriate the meme for their own ends.<sup>91</sup>

Thus, an Internet meme, like the meme described by Dawkins, evolves through imitation, reproduction, and mutation. It is this constant spread and alteration that makes Internet memes so popular. Over

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<sup>85</sup> In this Section, the Article will discuss the evolutions of memes, which is largely developed from personal observation. For a representative example, which would allow a person to test these observations, see *Socially Awkward Penguin*, *supra* note 6 (detailing the evolution of the “socially awkward” penguin meme).

<sup>86</sup> The Saatchi & Saatchi New Director’s Showcase, *Just for Hits – Richard Dawkins*, YOUTUBE, June 22, 2013, [www.youtube.com/watch?v=GFn-ixX9edg](http://www.youtube.com/watch?v=GFn-ixX9edg); LITERACIES, *supra* note 67, at 202.

<sup>87</sup> See *Socially Awkward Penguin*, *supra* note 6 (tracking the development of the Socially Awkward Penguin meme).

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See also *supra* text accompanying notes 11-12.

the years, memes have proliferated “by means of email, instant messaging, forums, blogs, or social networking sites.”<sup>92</sup> Internet memes take different paths, with some memes developing differently than the original trajectory would have suggested. Likewise, as discussed above, Internet memes eventually achieve such popularity that simple references to the meme can automatically trigger certain expectations as to what point an author is trying to convey.<sup>93</sup>

For example, consider the meme known as “Socially Awkward Penguin.” Inspired by a video of a penguin acting awkwardly, the first version of the meme included a picture of a penguin, its wings spread, walking backwards, with text describing a moment of social awkwardness that the meme creator experienced.<sup>94</sup> The meme spread quickly and, along the way, multiple derivative memes developed, including the popular Socially Awesome Penguin meme, which is similar to the socially awkward penguin, except the penguin is walking forward, the background color is red, and the text discusses some success in a social setting.<sup>95</sup> Later, a hybrid of the two formed, with the top portion dedicated to socially awesome penguin—listing some success—while the bottom portion is taken from the socially awkward penguin—noting some realization after the fact that turns the awesome situation awkward.<sup>96</sup> Having considered an example of Internet memes, we can now look at the key question: do they fall within the fair use doctrine?

#### IV. INTERNET MEMES AND FAIR USE

In this Part, the Article analyzes Internet memes—using the *Futurama* “Zoidberg” meme as an example—under each fair use factor. The Article will then discuss how these factors interact. The factors will be discussed out of order for more efficient organization.

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<sup>92</sup> Bauckhage, *supra* note 9.

<sup>93</sup> For example, *Futurama* began to simply use the meme language itself without the picture, showing how much power the phrase gained through its spread.

<sup>94</sup> See *Socially Awkward Penguin*, *supra* note 6.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

A. *Factor Two: Nature of the Work, and Factor Three: Amount and Substantiality of the Work*

Factors two and three can be quickly disposed. The second factor, the nature of the copyrighted work, weighs in favor of copyright holders, at least in cases like *Futurama*, where the work is commercial and artistic. On the other hand, the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, likely weighs in favor of the meme creators, as a meme usually only takes a single joke and a still frame from the original work, at least where the original work is a television show like *Futurama* or based on a video as in the *Socially Awkward Penguin*. This factor would weigh in favor of the copyright holder if the meme were instead based on a photograph or other single-frame visual artwork, as it then would constitute a taking of the entire work. Likewise, if the words used by the meme took the “heart” of a work, it is conceivable that this could be an infringement, too.

B. *Factor One: Character and Purpose of the Use*

The first factor—character and purpose of the use—tilts strongly towards a fair use finding. This is particularly true when one views the function of Internet memes through the lens of our first normative theory, cultural interchange. As stated above, cultural interchange theory dictates that an otherwise infringing use is socially desirable if it advances culture by commenting on art or reporting the news. Memes advance culture. They are a system of explaining events by reducing them to a simple and well-known joke. Their fast dissemination, imitation, and mutation causes them to become cultural phenomena that are recognizable not because of the underlying works, but because of the meme itself. This is significant because, while a single meme in and of itself cannot cause cultural advancement, it is not the meme itself that is important, but the fact that memes provide more avenues of expression, thus increasing the chance that a message can be transmitted to someone in an effective way. In other words, when society and intellectual property laws allow memes to develop, the arsenal of means of expression to the average Internet originator—and to those referring to memes in regular conversation in order to elucidate their argument—expands. With such development, the potential audience who might be influenced grows, and the ability to discuss and participate in culture increases.

Consider one particular *Futurama* Zoidberg meme.<sup>97</sup> This *Futurama* Zoidberg meme borrows from an episode of *Futurama* where the character Zoidberg insults his friend, Fry, who is performing a musical piece.<sup>98</sup> As the crowd boos Fry, Zoidberg proclaims: “Your music is bad, and you should feel bad!”<sup>99</sup> Notably, the initial meme post was successful because of the reference to this scene—people (likely) remembered the scene and recognized the connection between the new text and the underlying joke.

Yet, as the meme spread, it inevitably reached a wider audience than the *Futurama* fan base. Accordingly, the meme developed a distinct value that superseded the original underlying joke, breathing new life into the meme and the underlying work. This is precisely why *Futurama* used Zoidberg’s voice without playing the actual clip or using the meme picture in its advertisements. The strategy was successful because the background scene no longer truly mattered. It is no longer simply a joke to insult the character Fry, but instead indicates how strongly the creator feels about certain subject matter addressed by the meme’s specific sentence structure (“X is bad and you should feel bad.”).<sup>100</sup>

The meme has become a vehicle for expressing ideas in a way that is unique and that clearly communicates the author’s message. Importantly, Internet memes, like Dawkins’ memes, influence the development of their own meaning and significance. The recognizability of the concept did not exist in the original joke, but was born out of the evolution of the meme—through its dissemination, imitation, and mutation—and reinforced, through repetition, in the same way that Dawkins’ memes reinforce patterns and shape the way we process information. In this sense, the meme serves the transformative function that the first factor values.<sup>101</sup>

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<sup>97</sup> This meme is sometimes referred to as the “X Is Bad And You Should Feel Bad!” meme. *X Is Bad And You Should Feel Bad!*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/x-is-bad-and-you-should-feel-bad> (last visited Jan. 30, 2013).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See id.* (labeling the meme by its sentence structure as opposed to the *Futurama* reference).

<sup>101</sup> One possible counterargument to the preceding discussion is that an Internet meme is too simplistic to warrant special protection under the fair use defense. In other words, one could argue that by taking such a narrow excise of the original copyrighted work, there is nothing necessarily “new” about the Internet meme; rather, it is simply a repetitive derivative work. This would, if that argument held mettle, be similar to an alleged infringer taking a chapter

Moreover, productive consumption theory also weighs in favor of allowing Internet memes to be viewed as transformative uses of the content that underlies them. As discussed above, memes take on a new life through their growth and evolution. Memes ultimately become something that the original joke could never have been but for the unimpeded spread of the meme. Thus, allowing Internet memes to proliferate serves the productive consumption function. Memes facilitate the consumption of copyrighted works in a way that would not otherwise be possible but for massive unauthorized copying, because it is through such copying that the meme achieves instant recognizability. Notably, the court does not require a use to be purely productive or purely public in order for the fair use defense to apply. But even within Justice Blackmun's narrower framework, this use is productive because it provides a new vehicle of expression for ideas and cultural interaction, and thus provides a societal benefit.<sup>102</sup>

*C. Factor Four: Effect on the Potential Market or Value of the Copyrighted Work*

Although the second and third factors may weigh in favor of a finding of infringement, the normative values that fuel the first factor suggest that the first factor deserves more attention. Since the first factor favors fair use, the only reason to reject a finding of fair use is to show that the fourth factor poses a problem significant enough to outweigh the cultural interchange and productive consumption functions recognized by the first factor. Even though the first factor is a strong one, it is not insurmountable. Consider *Harper*, for example, where, despite the fact that a book review is normally within the fair use defense, the fact that the writer took the heart of the text called for a greater focus on the third factor. Similarly, a strong showing that the infringing work is detrimental to the original work's derivative market may be cause for reconsideration. In the case of Internet memes, how-

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from a book and publishing it separately. However, this is not the case with Internet memes, because Internet memes evolve over time and produce a number of different varieties. In doing so, the meme transcends the original expression and distills it to its core (and unprotectable) idea. Moreover, memes often times turn the tables on the intent of the original work, breathing criticism purposes into the meme's existence, further strengthening the fair use argument. Even if the first in a series of pictures that constitutes a meme is very similar to the original work—as is the case in the Zoidberg meme—it is a necessary step to forming more distinct derivative memes, without which meme status would never be achieved.

<sup>102</sup> See *supra* text accompanying notes 33-36.

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ever, our normative theories suggest that the fourth factor favors the originators of Internet memes.

Consider the market failure theory in this context. The theory posits that an otherwise infringing use should be permitted where it serves a function that, while socially desirable, could not exist in the market but for fair use.<sup>103</sup> One could argue that such a market could exist, however. After all, *Futurama* could launch its own memes from the show's website and have others post new versions of the meme to the same website, creating a repository for *Futurama* memes. *Futurama* then would be able to reap benefits from the advertising revenue generated by the site. Thus, allowing meme originators to infringe *Futurama*'s content would prevent *Futurama* from capitalizing on its content in this way, thus causing market harm.

However, the argument suffers from severe flaws. Memes grow organically, and require easy recreation (i.e., one not limited by venue). Otherwise, memes would never achieve widespread dissemination, as it would be impossible for an endless number of end users to contract with the original copyright holder. By requiring memes to originate and develop solely on *Futurama*'s website, the potential pool of meme creators would consist only of people who would go to that website, which would likely include only *Futurama*'s fan base. Notably, this could bring in new people through sharing, but such sharing is unlikely to be very successful, as memes achieve the most popularity when they can be seen easily by all Internet users. In other words, memes spread the fastest and become true memes when they are easily accessible and have opportunities to engrain themselves into viewers' minds, which they do best when there are few barriers to their mass dissemination. In this sense, the market fails to provide a legitimate means of producing Internet memes because Internet memes, by their very existence, require infringement of the intellectual property of others. An Internet meme only becomes recognizable if it can be disseminated, imitated, and mutated. All of these activities would violate the original authors' right to reproduce the work, to produce derivative works, to display the work, and to distribute the work under the Copyright Act.<sup>104</sup> The market thus cannot provide for this dissemination in a meaningful way unless some infringement is allowed.

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<sup>103</sup> See *supra* text accompanying notes 33-36.

<sup>104</sup> See 17 U.S.C. § 106.

## V. CONCLUSION

A fair use analysis weighs in favor of protecting Internet memes from copyright liability. Normative theories support this finding. Such theories allow infringement to the extent that it is essential for a potential meme to grow into a true meme; because memes evolve over time, it thus also requires courts to protect developing memes, as, without such protection, memes could be stifled prior to achieving meme status. Memes are worthy of the judicial protection because they effectuate cultural interchange and the productive use of copyright, and because protecting memes responds to a market failure—i.e. the inability for memes to develop without copyright infringement. When analyzing fair use, courts should consider the unique role that Internet memes play in providing clear expression of thought and purpose, as well. When courts do, it will be clear that Internet memes are well deserving of the fair use defense's protections.