Need a good laugh? Memes and copyright

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In July 2016, which by now seems like a century ago, Internet denizen @AlmostJT tweeted a frame from Arthur, the PBS cartoon, that went viral. In it, Arthur clenches his fist before punching his sister because she broke his toy. Alongside the image, @AlmostJT wrote: “This is just a pic of Arthur’s fist but idk how I feel that it’s just so relatable. So many emotions in one fist.”

Images of the aardvark’s fist soon flooded the Internet with captions describing relatable instances of frustration. One said, “this email and password combination could not be found.” Another: “when ur friend texts u “I’m here” and u walk outside and they’re not.” A meme was born.

Almost a year later, luxury brand Gucci posted Arthur’s fist ad on Instagram. In it a model wears Arthur’s yellow sweater and pale jeans. His fist, clenched with anger, dons a Gucci watch. The caption reads: “When your girl doesn’t notice your new watch.”

More and more, companies and public figures are getting in on the memes bandwagon. Aidan Cole at Forbes writes that “[m]emes work for brands because they’re designed specifically for social platforms and provide value through entertainment.” In another article in Forbes (an emerging authority on meme marketing), James McCrae observes that “[t]aking a trending meme and applying it to a brand or product can be a fast way to resonate with your audience.” Memes are thus an unusual analogue to goodwill that companies or others can capitalize on.

Although easily recognizable, memes are harder to define. However, in Memes in Digital Culture, professor Limor Shifman successfully distills the essentials of online memes. They are:

(a) a group of digital items sharing common characteristics of content, form, and/or stance, which

(b) were created with awareness of each other, and

(c) were circulated, imitated, and/or transformed via the Internet by many users.

Crucially, Shifman refers to memes as a group of items. A meme is not a single image, but a collection of self-referential images common in form, distributed and altered by multiple Internet users. Images created by those like @AlmostJT are not yet memes. They are merely launchpads for them. By adopting, transforming and disseminating Arthur’s fist, the Internet’s many users created the meme.

How does this distinctly Internet-age form of creativity fit within copyright law? A review of the regime’s 18th century origins and ideals suggests, not readily.
First, there’s the issue of authorship. As professor emeritus at American University Law School Peter Jaszi notes in Toward a Theory of Copyright: the Metamorphoses of Authorship, the concept of “authorship” is arguably the “most resonant, of the foundational concepts associated with Anglo-American copyright doctrine.” While the archetype of “authorship” made its legal debut in the 1709 Statute of Anne, it first emerged in artistic realms of the 17th century. The notion of the “author” then fused with the ideals of individual self-expression in the Romantic period. To this day, copyright law is heavily influenced by individualistic conceptions of authorship. Yet unlike a literary work penned by the “author-genius,” memes are collective creations comprising diffuse and oft-anonymous involvement.

In The Social Media Reader, media historian Patrick Davidson writes that these series often originate from online spheres of anonymity such as 4chan, which “actively prevent and dismantle attribution.” While initial meme images are brought into existence by one individual, scholars like professor Stacey Lantagne and Ronak Patel note that they outgrow their initial progenitor and acquire “a life of their own” through collaboration. Lantagne describes the risk of memes being “ideas” rather than images diffusible in some reasonably permanent form. Yet, the digitally dynamic and generative nature of memes brings the question of fixation to the fore.

Lantagne observes that the “mastermind” philosophy of copyright does not square with the notion that there can be multiple equivalent creators. Scholars Michael Soha and Zachary J. McDowell describe this as a “distributed and networked” genre of authorship contrary to that enshrined in law in Monetizing a Meme: YouTube, Content ID, and the Harlem Shake. The value of a meme arises not from the work of one author but from that of many.

Another pain point for memes is originality — as Jaszi notes, a Romantic virtue of creative genius. Per s. 5(1) of the Copyright Act, originality is an essential condition of copyright. In CCH Canadian Ltd. v. Law Society of Upper Canada 2004 SCC 13, the Supreme Court of Canada affirmed that an original work “originates from an author and is not copied from another work” and is the “product of an author’s exercise of skill and judgment.”

Yet, a key component of the value in memes comes not from their originality, but from their self-referential commitment to a prescribed form. Media law professors Victoria Ekstrand and Derigan Silver argue that the recurring motifs underlying memes, comparable to scènes à faire, deny the originality demanded by copyright (Remixing, Reposting, and Reblogging: Digital Media, Theories of the Image, and Copyright Law). Arthur’s fist is illustrative. While the image changes with each iteration, the idea and format underlying the meme — a yellow-sweatered fist clenched in frustration — remains.

As a foundational principle, copyright law protects original artistic expression, but not ideas themselves. This should come as no surprise given copyright’s printing press origins. As stated in Théberge v. Galerie d’Art du Petit Champlain inc. 2002 SCC 34, copyright materializes when a “work is written down or otherwise recorded in some reasonably permanent form.” Yet, the digitally dynamic and generative nature of memes brings the question of fixation to the fore.

Surely, a single variation of Arthur’s fist is fixed. For example, the one complaining about password difficulties. However, when conceived as, in Schifman’s words, “a group of digital items,” the tangibility of memes begins to fall away. Lantagne describes the risk of memes being “ideas” rather than images susceptible to copyright claims. Commenting on digital media more broadly, Ekstrand and Silver note its value is found less in a single version (the “thing”) but rather in the “process” or “state of play” of its distribution — something not easily attributable to copyright.
At the heart of this problem lies copyright’s idea/expression dichotomy. @AlmostJT realized that the still from Arthur captures a relatable frustration. Others then placed the image into the malleable reaction format. The idea underlying every Arthur’s fist meme is a relatable reaction image of frustration. Yet another common thread among the Arthur’s fist meme is the expression: every image follows the same formula. In this fashion, memes straddle idea and expression.

Where do memes land under copyright law? The collectivity of memes spurns Romantic notions of authorship. Their collaborative nature defies traditional conceptions of originality. Due to their indeterminate and multivariate form, the meme as an ever-evolving idea escapes fixation while simultaneously drawing on a pre-set prototype.

If this article raises more questions than answers, stay tuned for the second instalment of this two-part article on memes and copyright, in which we discuss the applicability of exceptions to copyright infringement such as fair dealing and non-commercial user generated content. In the meantime, please feel free to share the latest memes as we all need a laugh at the moment.

This article was originally published by The Lawyer’s Daily (www.thelawyersdaily.ca), part of LexisNexis Canada Inc. It is part one of a two-part series. Read part two: "Copyright and memes: Drake effect, exceptions to infringement."
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