Copyright and memes: Drake effect, exceptions to infringement

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In 2015, Drake released “Hotline Bling” with a slick music video. A meme soon emerged using frames from the video, in which Drake is shown reacting to two different images: rejecting image A, and embracing image B.

The images to which Drake reacts are modified by Internet users to convey an opinion on a particular set of alternatives. Half a decade later, it is still making the rounds on Reddit and Twitter. Such memes are the unique product of the Internet, which has ushered in an unprecedented era of creative sharing and remixing. However, the question remains as to whether borrowing a copyrighted work for a meme is actionable infringement.

Section 3(1) of the Copyright Act gives rightsholders the sole right to reproduce a work or “any substantial part thereof.” Reproducing a “substantial part” of someone else’s work without consent thus constitutes copyright infringement. Consequently, the key question for a court to consider is whether a meme uses a “substantial part” of the original work. According to the Supreme Court, a “substantial part” must represent “a substantial portion of the author’s skill and judgment expressed therein” (Cikar Corporation v. Robinson 2013 SCC 73 at para. 26).

This test significantly restricts claims of infringement. The Act does not protect “any little piece the taking of which cannot affect the value of [the] work as a whole” (David Vaver, Intellectual Property Law: Copyright, Patents, Trade-marks [2nd ed. 2011] at 182, cited in Cinar at para. 25). By allowing non-substantial taking, the Act seeks to balance creators’ rights with the promotion of the public domain.

Factors used to assess whether a substantial part has been taken include the quality and quantity of the material copied, any negative impact on the creator and the work, whether the copying was used to save time and effort and whether the copier used the material in a manner similar to that of the rightsholder (U & R Tax Services Ltd. v. H & R Block Canada Inc. [1995] F.C.J. No. 962 at para. 35).

Because of the variety of approaches to meme creation, assessments of substantiality will be fact-based. While the Drake meme only borrows two stills from a video, distracted boyfriend uses a photo comprising the entirety of the work. Others draw on a phrase (“I haven’t heard that name in years”), with the image varying each time. Given the endless permutations memes can take, there is no hard-and-fast rule for assessing substantiality.
If a court finds that a meme contains a “substantial part” of a work, liability may still be avoided by relying on a fair dealing exception. Like substantiability, fair dealing helps strike a “balance between the rights of a copyright owner and users’ interests” (CCH Canadian Ltd. v. Law Society of Upper Canada 2004 SCC 13 at para. 48). Statutory amendments in the 2012 Copyright Modernization Act (CMA) added parody, satire and education as fair dealing exceptions in addition to research, private study, criticism, review and news reporting. Memes may fall under parody or satire.

It appears that there has yet to be an in-depth discussion of “satire” as a fair dealing exception by Canadian courts. However, “parody” has been defined. In Productions Avanti Ciné Vidéo inc. c. Favreau [1999] J.Q. no 2725 the Quebec Court of Appeal observed that “[p]arody normally involves the humorous imitation of the work of another writer, often exaggerated, for purposes of criticism or comment.” In United Airlines, Inc. v. Cooperstock 2017 FC 616, the Federal Court echoed the U.S. Supreme Court in remarking that “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” (Campbell v. Acuff-Rose Music, Inc., 510 US 569 [1994]).

The Federal Court ultimately concluded that parody has “two basic elements: the evocation of an existing work while exhibiting noticeable differences and the expression of mockery or humour.” The mockery need not be aimed at original work’s source, and could be directed elsewhere (para. 119).

While memes typically draw on existing works, many of them may not “exhibit noticeable differences.” The Drake meme arguably does so by taking fractions of a video and placing them in dialogue with other images to express an opinion. Meanwhile, Mocking SpongeBob expresses mockery, but only places captions above a copyrighted image.

A fair dealing analysis considers the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work (CCH at para. 53). In Cooperstock, the court observed that when assessing the fairness of parody, “available alternatives to the dealing cannot be weighed too heavily.” Using an alternative “may not be as effective in meeting the goals of parody” (para. 132).

Nevertheless, the court found that the defendant — who made a mock United Airlines website to post complaints about the airline and outline consumer rights — could have used non-infringing materials to meet this goal. This assessment narrows the availability of the fair dealing exception for parodies.

Questioning whether it is necessary to use images from “Hotline Bling” to convey a message would not favour the user. The meme-creator could have drawn figures showing approval and disapproval. However, it is unlikely that the drawings would have the same effect or would have generated as much interest, without Drake as the central character. By contrast, posts lampooning the initial Sonic the Hedgehog movie character design might serve as an example of where no alternative could be shown, because images of the poorly received version of the hedgehog had to be included for the purpose of ridiculing the earlier work. As with questions of substantiability, fair dealing assessment will have to be made on a case-by-case basis.

The fraught analysis of substantiability and fair dealing might be avoided altogether if memes qualify for the non-commercial user-generated content exception introduced by the CMA. The “flash-up” or “YouTube” exception allows Internet users to copy works into their own creations (s. 29.21[1]). This relatively new exception imposes a number of conditions, specifically limiting the use of the works to non-commercial purposes.
Users must attribute the source of the original work, where reasonably possible, and have reasonable grounds to believe the use does not infringe copyright. Additionally, the use must not have a substantial adverse effect on the exploitation of the original work or an existing potential market for it.

Internet users posting memes on the Internet as a hobby can likely avail themselves of this exception. Meanwhile, “influencers” or meme accounts seeking to make a profit from advertising and endorsements are more at risk of running afoul of the conditions to avoid infringement. May this serve as a fair warning to the @memelords of the Internet.

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This article was originally published by The Lawyer’s Daily (1999). The Drake effect, a relative of the internet’s viral paradox, is a case in point. When the evidence suggests that the effect is at work, the public response is likely to be more passionate and creative than the original source.

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