

MEME IN INDIA AND US

Khushboo Soni*

Abstract

A Meme is an image, a video, a piece of text, etc. that is passed very quickly from one internet user to another, often with slight changes that make it humorous. They are communicative expressions used as a source of entertainment, marketing, and commercial gains. They are easily accessible and widely distributed without any supervision. They might be used for private consumption or for generating monetary benefits. It is an element of a culture or system of behavior passed from one individual to another usually by imitation. This paper seeks to analyze the legal jurisprudence surrounding memes and elucidates legal implications of creating and sharing memes under copyright laws, trademark laws and the right to publicity or personality rights in India and the United States. Memes may include copyrighted images, artwork or videos of another without the consent of the author. The use of a copyrighted work as a meme can be regarded as an unprotectable idea or as a parodic fair use expression. Creators of meme may also desire copyright protection. A meme may also include a trademark of another. In such instances, a trademark owner can raise legal claims for dilution or infringement against unauthorized use of the mark. Trademark protection may also be accorded to the creator of a meme as a source indicator in certain circumstances. Often memes include images of people and thereby violate an individual's right to commercially use and exploit their name, likeness or persona by infringing their right of publicity or personality rights. In such situations, the outcome of a claim may vary depending on whether the person involved is a celebrity or a common person. The article highlights various gaps in the laws surrounding memes. It emphasizes on excessive dependence on judges in the determination of the validity of a meme. It further enunciates the significance of memes as a method of communication and political dissent and the need for the legal system to develop with current cultural and technological advances.

Introduction

A meme is defined as “an image, video, piece of text, etc., typically humorous in nature, which is copied and spread rapidly by internet users, often with slight variations”.¹ With a substantial amount of time and resources spent by users on social media,² these memes are often used as a source of entertainment, communication, and even marketing.³ Memes are freely accessible, unsupervised and widely distributed. Some users utilize memes for private consumption and others generate memes for monetary benefits. Though memes gain recognition and attention for a very short period of time, they can infringe intellectual property of others. They often can either be created from scratch or use trademarks, copyrights or pictures or likeness of another. The legal implications of such use vary. In the present society, memes act as an “artistic expression of symbolic or visual speech.”⁴ They provide not only entertainment and social and political commentary but at times are also defamatory or malicious. This article seeks to analyze the legality of consumer behavior in the creation and sharing of memes and seeks to highlight the gaps in law and limited available jurisprudence concerning memes. Part I of the paper elaborates on the copyright law concerns pertaining to memes. The section further enunciates and distinguishes the legal regime in India and the United States. Part II explores the trademark law legal regime applicable to memes in India and the United States. Part III delves into the legal implications of a meme when it uses likeness or pictures of individuals under the right of publicity or personality rights in India and the United States. Part IV concludes by highlighting the multiple gaps in the law, excessive dependence on the judges in the determination of the validity of memes and the trends of the “golden age of modern parody.”⁵

Memes and Copyright

Memes incorporate pictures, artwork or videos which can be either the meme maker’s creation or more often than not, are derived from another’s copyrighted work. “Copyright law is

* LL.M in Competition, Innovation and Information Law at New York University School of Law and Associate at Singh&Singh | Malhotra&Hegde, Email Id: Kboo.soni@gmail.com

¹ MEME, OXFORD ENGLISH DICTIONARY (7th ed. 2012).

² *Average digital time spent online by teenage and millennials worldwide*, STATISTA (May. 4, 2019) <https://www.statista.com/statistics/736727/worldwide-teen-average-online-time-devices/>.

³ Riley C. & Mohaghegh D, *Leveraging trademark Law to Commercialize A Meme*, LAW 360 (May. 4, 2019), <https://advance.lexis.com/api/permalink/94482a4c-9429-4816-b14c-3651096bedb6/?context=1000516>.

⁴ Steiner C, *Intellectual Property and the Rights to Culture*, WIPO (Nov. 9, 1998), https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_2.pdf.

⁵ William McGeeveran, *The imaginary parody crisis (and the real one)*, 90 WASHINGTON LAW REVIEW 713, 713

generally tricky for contents over the computer including memes.”⁶ There are several ways to analyze the implications of copyright law in the present situation. Memes can be determined as unprotected ideas⁷ or permitted under the fair use exception. Considering memes as mere ideas and not expression undermines both the rights of the original author and the creative expression of the meme creator. Whereas when analyzing a meme from a fair use perspective, the meme is automatically assumed to be an infringement and permissibility of the use is assessed. Fair use of a copyrighted work in the United States is determined through a four-prong inquiry. The purpose and character of the use, nature of the copyrighted work, the amount and substantiality of the portion used and the effects of the use on the potential market for the copyrighted work. Memes can be analyzed as a parody under the fair use doctrine. “A parody conveys two simultaneous and contradictory messages.”⁸ It reminds the reader of the original work but also adds parodic expression (distinguishing itself from the original work). The fair use analyses of a meme as a parody have been stated below. The purpose and character of a work is regarded as the determinative factor while analyzing fair use.⁹

Courts predominantly determine whether the use of the work is transformative, i.e. whether the work adds something new with a further purpose or different character, making it a new expression. Memes can be considered parodies of the original work or even a new method of communication. In *Campbell*, the court regards a parody as a humorous form of criticism, a work that comments on or criticizes the work used.¹⁰ In a parody, it is essential that the reader recognizes the work to be ridiculed and adds the transformative element of humor. If a meme is critical of the work used, it will be regarded as a parody. However, if it seeks to criticize or comments on another work, the “use of the work must be justified.”¹¹ Though the distinction between parody and satire often blurs when a work is established to be transformative, the tedious task of determining the same has been left to the courts. Another method for establishing transformative use of a meme is to regard them as a method of communication. Millennials often

⁶ Lantagne S, *The famous on internet: internet memes and legal challenges of evolving the methods of communication*, 52 U. Rich. L. Rev. 387, 387 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944804. In *Sony Corp. v. Universal City Studios* 464 U.S. 417 (1984).

⁷ *Id.*

⁸ *Cliff Notes v. Bantam Doubleday Dell Publishing Group* 886 F.2d 490 (2d Cir. 1989).

⁹ Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1581, 1595 (2006), <https://www.jstor.org/stable/20439078?origin=crossref>.

¹⁰ *Acuff-Rose Music, Inc. v. Campbell* 510 U.S. 569 (1994).

¹¹ *Id.*

use memes to express themselves. Such use can be regarded as a constructed language, conveying a specific idea which cannot be expressed as effectively in other ways.¹² As stated by the court, the nature of the work is not the determinative factor in analyzing parodies as they borrow heavily from the core expressive work. For the amount and substantiality of the copyrighted work used, the courts have dictated both a quantitative and qualitative analysis, permitting variable degrees of copying in accordance with the purpose, character and the transformative use of the work. Memes associated with the pop culture often reproduce quantitatively insubstantial bits but the heart of the work. When reproducing a certain artwork or picture, it can be arduous to determine whether the work is mere imitation or includes creative expression. A parody while using the old work must inform the audience of the new work and must have substantial comments or criticisms. This establishment of creative expression for memes can be extremely difficult and requires the judges to be aware of the pop-culture. The creative expression used is not always obvious. There can be implied meaning, explanation or no criticism but just expression of relatability or appreciation of a situation.

Thus, making such expression another form of communication. The judges need to understand the reason behind the use and determine the transformative use not via additional visible expression supplanted. The judges must consider the use as another method of communication prevalent in social media. For the fourth factor, it must be noted that memes often increase the marketability of the previous use rather than harm it. It is not a substitute for the original copyrighted work. Copyright owners often judge not to take any actions against such memes as the use of such memes provides for a symbiotic benefit of promoting their works.¹³ Such copying generally tends to have positive effects on their potential markets. However, leniency is granted only for commercial benefits accrued due to the making and dissemination of memes and not merchandising their works.¹⁴ The commercial use of a meme might be a factor considered against the creators as it uses another work to generate revenues.¹⁵ Commercial

¹² LANTAGNE, *supra* note 6.

¹³ Clare Martin, *HBO addresses Trump Tweeting Game of Thrones Meme in Response to Mueller Report*, PASTEL MAGAZINE (Apr. 18, 2019), <https://www.pastemagazine.com/articles/2019/04/trump-mueller-report-game-of-thrones-meme.html>.

¹⁴ In *Grumpy Cat Ltd. v. Grenade Bev. LLC*, No. SA CV 15-2063-DOC (DFMx), 2018 U.S. Dist. LEXIS 91342 (C.D. Cal. May 31, 2018).

¹⁵ Rocha Elizabeth, *Y U No Let Me Share Memes?!- How meme culture needs a definitive test for non-commercial speech*, 28 DEPAUL J. ART TECH. & INTELL. PROP. L. 37 (2019).

speech often accords less First Amendment protection than non-commercial speech.¹⁶ Thereby, sharing memes on social media accounts or within peers might not be actionable. The same cannot be said so for websites or Instagram handles which generate revenue by creating memes or sharing memes created by others. The courts in the US have been particularly mindful of the First Amendment implications while analyzing fair use of a work. They have permitted parodic works even in spite of their offensive nature.¹⁷ Prohibiting memes can act as a mean of censorship and restriction on social dialogue.¹⁸ It can be stated that the social value derived from such usage is substantially high and in the public interest. The culture of the wide dissemination of another's meme is still contentious. Parts or entirety of such memes can be copyrighted by another. The legality and limitations of such use is yet to be determined. Section 52 of the Indian Copyright Act, 1976 provides for certain acts which are not an infringement of the copyright.¹⁹ Courts have regarded the fair dealing provision as a balance between Freedom of Free Speech guaranteed under the Constitution and copyright law.²⁰ It is noted that while the law doesn't explicitly establish a parody defense, the courts recognize both parodies and satires do not amount to copyright infringement.²¹ To constitute fair dealing under the act several factors are analyzed by the court. One of the main criteria is that the intention of the new work must not be to compete with the copyright owner.²² The use must also not be improper and lastly, the court explores the purpose and contributions made by the subsequent work.²³ Determining the legal validity of a meme in the Indian scenario is an onerous task and has been left at the hand of the court.²⁴ Intent to compete is considered as one of the most important factors. It validates a meme created by the use of another's work but not a meme which draws from another meme. A meme is often based on fads prevalent in social media. Creators often copy memes of another and

¹⁶ Deborah J. Kemp, *Lynn M. Forsythe & Ida M. Jones, Parody in Trademark Law: Dumb Starbucks Makes Trademark Law Look Dumb*, 14 J. MARSHALL REV. INTELL. PROP. L. 140, 143 (2015), <https://repository.law.uic.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1348&context=ripl>.

¹⁷ *Shaw v. Dallas Cowboys*, 604 F.3d at 206.

¹⁸ Caitlin Dewey, *Russian just made a ton of Internet memes illegal*, THE WASHINGTON POST (Apr. 10, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/04/10/russia-just-made-a-ton-of-internet-memes-illegal/?utm_term=.fa29f751bd26.

¹⁹ The Indian Copyright Act, 1957, § 52, No. 14, Acts of Parliament, 1957 (India).

²⁰ *Wiley Eastern & Ors v. Indian Institute of Management*, 58 (1995) DLT 449.

²¹ *Super Cassettes Industries Limited and Ors. v. Chintamani Rao and Ors*, 2012 (49) PTC1 (Del).

²² *Blackwood and Sons v. A.N. Parasuraman*, AIR 1959 Mad 410.

²³ *Civic Chandaran v. Ammi Amma*, 996 (16) PTC 670.

²⁴ *Tata Sons Limited v. Greenpeace International Limited*, (2011) 1 MIPR 107 (Del).

tweak parts of it. This part of the test allows for copying of another's copyrighted work as the intention is to ridicule or criticize and not compete in the market of the original work. It implicates use when there are subtle changes to another's meme and then both works compete in the market. The analyses whether of the use is improper leaves much to a court's discretion. Such analysis by the court can be tainted by conservatism and political influence or sympathies.²⁵ Thereby, substantially curtailing Freedom of Speech and Expression. The third factor, which analyses the extent of matter taken, can have varied outcomes depending on whether the court considers the meme completely dependent on the copyrighted work and as a means to attain publicity or it realized the hidden expression added to the copyrighted work. The courts have also noted that the purpose of reproduction shall not be considered fair dealing unless the criticism is fair and justifiable.²⁶ Memes as a parodic reproduction fail miserably as it incorporates implied humor, necessitates contextual understanding and entertaining nature than fair and justifiable comment, irrespective of commercial exploitation of another's goodwill.

Memes and Trademark

Memes often ridicule or are accompanied by non-economic comments passed on brands.²⁷ They incorporate the trademarks of the brands with or without any modifications. The owner of a trademark must tediously police its use by others to maintain and assert its intellectual property and to avoid acquiescence or abandonment.²⁸ Widespread use of the mark with minor modifications can render it generic. Memes also undermine one of the primary incentives to maintain a trademark, which is to maintain the image of the brand.²⁹ Unlike copyright law which seeks to prevent unauthorized copying barring certain circumstances, the trademark law aims to prevent consumer confusion.³⁰ Even if there is confusion regarding sponsorship or affiliation with the use of a trademark, unauthorized use can be prevented. A trademark owner can raise claims for either dilution or infringement for unauthorized use of the mark in a meme.

²⁵ Leeza Mangaldas, *How a Meme of Indian PM Modi with Puppy Ears Provoked Police Complaints in India*, FORBES (Jul. 17, 2017), <https://www.forbes.com/sites/leezamangaldas/2017/07/17/how-a-meme-of-indian-pm-modi-with-puppy-ears-provoked-police-complaints-in-india/#79741b846570>.

²⁶ C Civic Chandaran v. Ammi Amma, 996 (16) PTC 670.

²⁷ Myers C, *Protecting online image in digital age: how trademark issues affect PR practice*, 3(1) RESEARCH JOURNAL OF INSTITUTE FOR PUBLIC RELATIONS (Aug. 16, 2016), <https://instituteforpr.org/protecting-online-image-digital-age-trademark-issues-affect-pr-practice/>.

²⁸ RILEY C. & MOHAGHEGH D, *supra* note 3.

²⁹ MYERS, *supra* note 30.

³⁰ MC GEVERAN, *supra* note 5.

Trademark protection can also be asserted by creators of a meme when the object or the ‘keystone’ in certain memes are constant and acts as an indicator of source, especially for merchandising³¹. At the same time, trademark protection cannot be accrued when a creator has used someone else’s identity, work or trademark while creating the meme.³² A meme creator who seeks to trademark a ‘keystone’ which is similar to someone’s copyright or trademark is likely to be denied as the USPTO is not authorized to determine whether a certain mark heavily influenced by other, falls under the fair use while granting registration.³³ In the United States, the use of another’s mark is infringing if it’s likely to cause consumer confusion. A mark must be used in commerce under the Lanham Act to substantiate liability.³⁴ Such use might not establish if the meme is shared between individuals as entertainment. However, for websites generating memes for revenue, the use in commerce requirement can be established as “there is sufficient nexus between the use of the trademark with services provided.”³⁵ In such cases, the rights of the trademark owner must be balanced with the First Amendment rights in the creation of memes. Early case laws prohibited use by the defendant “if adequate alternatives were available to communicate a message”.³⁶

However, while using a mark in the meme, the mark is used as a communicative expression and not as an indicator of source. There exists no likelihood of confusion as periodic use of the mark does not confuse consumers regarding the source of a given product. To determine the likelihood of confusion, the court analyses several factors.³⁷ The first factor analyses the strength of the mark which works in favor of parodies and for memes as the consumers are unlikely to be confused. In determining the similarity of the mark, memes can use just the mark or modified mark. Even when memes use the mark itself, it distinguishes itself as an expressive communication and not a source identifier. The products in the present case are dissimilar and so are the facilities and advertising channels. Also, the determination of intent sides towards the meme owners as they lack any intent to confuse the consumers. Both commercial and non-commercial parodies are permitted if they pass the likelihood of confusion

³¹ RILEY C. & MOHAGHEGH D, *supra* note 3.

³² JUSTIA TRADEMARKS, <https://trademarks.justia.com/858/36/grumpy-85836805.html>, (last visited Mar. 5, 2018).

³³ Riley C. & Mohaghegh D, *supra* note 3.

³⁴ The Lanham Act 15 U.S.C. §§1051(a), 1053.

³⁵ *Radiance Foundation v. NAACP*, 25 F.Supp.3d. 865 (2014).

³⁶ *Shaw v. Dallas Cowboys*, 604 F.3d at 206.

³⁷ *Polaroid Corp. v. Polaroid Inc.*, 319 F.2d 830.

test. However, certain types of parodies are not permitted if they are too proximate to commercial use.³⁸ The interpretation of whether the use is parodic, satire, or permissible has not been uniform. Another cause of action available to the trademark owners is infringement through dilution. Such protection is only accorded to marks that are famous and often used by the creators of the meme. The trademark owner first must establish that it is widely recognized by the “general United States consuming public” and then establish whether the use by the defendant dilutes the mark by either blurring or tarnishing it.³⁹ To establish blurring the “trademark owner must establish an actual association between the marks”.⁴⁰ Such “association must impair the distinctiveness or the link between mark and goods or services”⁴¹ offered.

To establish tarnishment, the trademark owner must establish that “use is likely to harm its reputation” and whether the portrayal of the mark is in a “disparaging or derogatory manner”.⁴² Sexually explicit or drug references are often upheld for dilution.⁴³ A meme which is based on a brand definitely establishes an association between the marks. Memes are also unaccompanied by unsolicited humor which can harm the reputation of the mark and may portray the mark in a disparaging or derogatory manner. However, the use of a mark for criticizing and commenting is non-actionable. In the case of *Rogers v. Grimaldi*, the court established a test balancing the right of the trademark owner and First Amendment rights involved in an expressive work.⁴⁴ The test first analyses “whether the work is expressive”.⁴⁵ Commercial speeches are might be at a certain disadvantage but are not prohibited.⁴⁶ The second question is to consider “whether the use is artistically relevant to the work, irrespective of the amount contributed”.⁴⁷ Lastly, the court considers “whether the defendant’s use explicitly misleads consumers.”⁴⁸ The memes as a method of communication are definitely expressive works. The creation and use of such memes irrespective of their commercial nature are protected

³⁸ Coca-Cola Co. v. Gemini Rising Inc, 46 F. Supp. 1183 (E.D.N.Y. 1972).

³⁹ Section 2 Trademark Dilution Revision Act of 2006 (H.R. 683).

⁴⁰ Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC; 507 F.3d 252 (4th Cir 2007).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

⁴⁵ *Ibid.*

⁴⁶ Dogan S. & Lemley M, *Parody as Brand*, 105(5) THE L. JOURNAL OF INT’L TRADEMARK ASSOCIATION See Myers C, *supra* note 30.

⁴⁷ *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

⁴⁸ *Ibid.*

as it is artistically relevant, adds expressive content beyond the mark and does not mislead the consumers. Like the United States, the Indian Trademark Act is also based on the first use system. However, the requirement of ‘use’ is not as stringent and is satisfied by first use anywhere accompanied by cross border reputation.⁴⁹ In order to accord protection, the mark must have goodwill or reputation in Indian which can be even fulfilled via advertisements.⁵⁰ Section 29 of the Indian Trademark Act, 1999 illustrates various acts that amount to infringement of a registered trademark.⁵¹ Unregistered trademarks may have a valid cause of action under ‘passing off’ provisions.⁵² The three elements of ‘passing off’ are 1) “the mark owner has ‘established goodwill’”; 2) the “defendant misrepresents and demonstrate its goods to be plaintiff’s” and 3) “such use causes Plaintiff damages”.⁵³

The Apex Court in *Cadila Health care Ltd. v. Cadila Pharmaceuticals Ltd.*, has also analyzed the Polaroid ‘likelihood of confusion test’ to determine a case of ‘passing off’.⁵⁴ Also, dilution is governed under Section 29 (4) of the Act. It provides a cause of action for 1) “identical or similar” use of, 2) well-known or “mark that has a reputation in India” and 3) “in relation to goods or services which are not similar”.⁵⁵ The use of such mark must be “without due cause” taking “unfair advantage of or is detrimental to, distinctive character or repute” of the mark”.⁵⁶ Section 30 of the Act provides for exceptions to the use of a registered trademark.⁵⁷ Section 30 (1) of the Act says that “is in accordance with honest industrial practices or doesn’t take unfair advantage to the detrimental character or repute of the mark.”⁵⁸ In the progressive judgment of *Tata Sons Ltd. v. Greenpeace and Anr.*, the Delhi High Court upheld the validity of the parody of trademarks.⁵⁹ The Court, in its analysis, emphasizes on the Constitutional ‘Freedom of Speech and Expression’⁶⁰ and holds that Section 30 of the Act “enables the use of a

⁴⁹ *Kabushiki Kaisha Toshiba v. TOSIBA Appliances Co. & Ors.* MANU/SC/2223/2008.

⁵⁰ *Ibid.* The Indian Copyright Act, 1957, § 52, No. 14, Acts of Parliament, 1957 (India).

⁵¹ Trade Marks Act, 1999, § 29, No. 47, Acts of Parliament (India).

⁵² Trade Marks Act, 1999, § 27(1), No. 47, Acts of Parliament (India).

⁵³ *Reckitt & Coloman v. Borden* (1990) RPC 341 (HL)

⁵⁴ *Cadila Health care Ltd. v. Cadila Pharmaceuticals Ltd.* AIR 2001 SC 1952

⁵⁵ Trade Marks Act, 1999, § 29(4), No. 47, Acts of Parliament (India).

⁵⁶ Trade Marks Act, 1999, § 29(4), No. 47, Acts of Parliament (India).

⁵⁷ Trade Marks Act, 1999, § 30, No. 47, Acts of Parliament (India).

⁵⁸ Trade Marks Act, 1999, § 31(1), No. 47, Acts of Parliament (India).

⁵⁹ *Tata Sons Limited v. Greenpeace and Anr.*, 178 (2011) DLT 705.

⁶⁰ INDIA CONST. art. 19.

mark when it's with due cause and non-commercial".⁶¹ It has been argued that the Indian Courts use "good cause for the use of the mark in furtherance of public domain requests."⁶² Therefore, owners of the mark can essentially raise two types of cause of action against meme, i.e., claims for infringement of a registered mark or dilution of a famous mark. Passing of claims available to unregistered (not famous) marks are unlikely to succeed because memes do not use a mark as a source indicator. A meme maker does not "misrepresent and demonstrate the Plaintiff's goods as his own".⁶³ The emphasis on Freedom of Speech and Expression by the court renders any legal actions against the creator of the memes highly improbable.⁶⁴

Memes and Right of Publicity

Memes often contain pictures or videos of individuals irrespective of their status as celebrities. In fact, there are instances where people attain public recognition as their images turn viral in memes. Such images often implicate the right of publicity of an individual. An individual has the right to commercially use and control their name, likeness or persona.⁶⁵ In the United States, the right of publicity comes under the ambit of state laws and common law. In principle, these rights belong to all celebrities and commoners alike. A 9th circuit judgment elaborated a test balancing right of publicity and First Amendment rights of an individual.⁶⁶ The test emphasizes on whether the work adds "significant creative element so as to be transformed into something more than mere likeness or imitation", "whether the likeness of a person is one of the ingredients or the very substance of the work" and "whether the marketability and economic value of the work is derived primarily from the fame of the celebrity".⁶⁷ Analysis of this test for memes can be very tricky and is highly dependent on the judge. A meme with an individual's photograph can include just the picture, a picture with some phrase related to the individual or a picture with a phrase in a different context. It can be argued that a picture in a descriptive phrase in a different context had creative elements included, rendering the image to be transformative or more than the likeness or imitation of someone's personality. However, memes that include just

⁶¹ Tata Sons Limited v. Greenpeace and Anr, 178 (2011) DLT 705.

⁶² *Study of Misappropriation of Signs Committee on Development and Intellectual Property (CDIP)* CDIP/9/INF/5, WIPO (Mar. 14, 2012), https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_inf_5

⁶³ Trade Marks Act, 1999, § 27(2), No. 47, Acts of Parliament (India).

⁶⁴ CDIP, *supra* note 65.

⁶⁵ *In re NCAA Student Athlete Name and Likeness Licensing Litigation* 724 F.3d 1268 (9th Cir. 2013).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

the images or images with a saying or dialogue of a celebrity might not have some observable added creative element and arguably is an imitation or mere likeness of an individual. The celebrities in all such memes are the main substance of the work and the economic value or marketability is derived primarily from the reference to such person. Courts in their analysis have realized the importance of excluding parodies from the right of publicity even when an individual is mocked for profit.⁶⁸ It is essential to remind the public of someone in order to have a successful parody and therefore, the use of name or likeness is permitted.⁶⁹ The Supreme Court dictates a stringent test for public figures to recover from intentional infliction of emotional distress.⁷⁰

The public figure must not only prove that the published material consists of a false statement but such statements must also be made with actual malice as well.⁷¹ The court provides expansive scope to the First Amendment right by forbidding suppressions of materials based on offensiveness.⁷² Such views of the court encourage political dialogue in society. One of the major concerns or uncertainty in law involves memes including ordinary people. One of the ‘Dancing with the Stars’ celebrities posted a meme commenting that obesity must be considered as child abuse.⁷³ It was later found that the child in the meme had Down’s syndrome and the picture was taken without her consent.⁷⁴ Her parents filed a suit under the state laws for misappropriation of likeness and image, false light, invasion of privacy and intentional infliction of emotional distress.⁷⁵ The court held the defendant accountable by stating that the child had a visible mental disability and her condition was not due to parental neglect.⁷⁶ In another similar case, a picture of a child with down syndrome was altered with defamatory messages.⁷⁷ The

⁶⁸ *White v. Samsung Electronic America* 971 F.2d 1395 (9th circ. 1992).

⁶⁹ *Ibid.*

⁷⁰ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Larry Flowers, ‘Dancing with the Stars’ pro posts meme of Springfield teen with Down syndrome, WKRN (May. 4, 2019), <https://www.wkrn.com/news/dancing-with-the-stars-pro-posts-meme-of-springfield-teen-with-down-syndrome/1091590447>.

⁷⁴ *S.E. v. Chmerkovskiy*, 221 F. Supp. 3d 980 (M.D. Tenn. 2016).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ COURT LISTENER, <https://www.courtlistener.com/docket/4383563/85/holland-v-lalevee/>, (last visited May. 4, 2019).

negative popularity attached to the meme allegedly made the child physically sick.⁷⁸ Eventually, the parents filed a suit against the radio broadcaster who popularized the meme, owner of a user-generated meme website and a user who generated a meme which received significant views.⁷⁹ The court ruled in favor of the Plaintiffs and awarded damages.⁸⁰ The right of publicity or personality rights in India is not governed by any legislation and has been established by judicial precedents under Article 21 of the Constitution.⁸¹ The development of such a right is still at a nascent stage. The basis of such right stems from the right to privacy wherein the court focus on an individual's right to their identity. The court has observed that personality right vests on celebrities and a "celebrity must be identifiable from the defendant's unauthorized use".⁸² "Infringement of such right does not require proof of falsity, deception, confusion if the celebrity is identifiable."⁸³ However, the meaning of celebrity and methods or extent of identifiability is yet to be determined by the courts and may vary. An exception has been carved for the right of publicity against public figures. It provides that a parody which aims to criticize or satirize the personality of a public figure and uses the identity must be permitted. An artist's expression is permitted unless it "affects public order, decency, morality, defames or incites offenses".⁸⁴ A meme in India reproducing the personality of a public figure should ideally be permitted even if the celebrity is identifiable as the parody seeks to satire or comment on the personality of the public figure or celebrity. However, one must note that such rights are only applicable when a celebrity is involved. The use of the likeness of an ordinary person would probably be liable under the right to privacy and is yet to be determined.

Conclusion

Memes help integrate the original author's work to culture.⁸⁵ They do not cause any direct economic loss to the holder of the intellectual property and often promote their work to the

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ ICC Development (International) Ltd., v. Arvee Enterprises & Anr. MANU/DE/0053/2003.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Ashwani v. State of Bihar, AIR 2005 Pat 101.

⁸⁵ *Do memes violate copyright law?*, THE LAW TOG (May. 4, 2019), <https://thelawtog.com/memes-violate-copyright-law/>.

public.⁸⁶ The trend creators constantly generate new ideas deriving elements of other's work. Often such usage is without authorization due to the short attention span for online content and ever so evolving trends.⁸⁷ As argued, parodies usually win in court.⁸⁸ However, parodists including meme makers are not always aware of the law, nor do they possess high incentives, leverage, and investment to pursue their cause.⁸⁹ Such use often lacks litigation and is prevented by mere cease and desist notices.⁹⁰ Also, like parodies, legality of memes is almost left at the mercy of the courts. Interpretation of what is parodic, satire or obscenity by the courts can be uncertain. For memes, there are additional burdens as the judges need to realize the latest trends, accompanied by unstated expression and context of the work.⁹¹ The decisions of the court can be influenced by the judge's notion of morality, political afflictions and conservatism. However, we must recognize that the sole purpose of memes is not to entertain. Memes act as one of the most efficient forms of dissent provides a non-economic commentary, make people much more socially aware and promote dialogues in society. The adeptness of the current legal system is not at par to deal with the multiple actors and intellectual property rights associated with memes.

⁸⁶ Jamie Condliffe, *Warner Brothers is Being Sued for Using Nyan Cat Without Permission*, GIZMODO (Mar. 5, 2013), <https://gizmodo.com/warner-brothers-is-being-sued-for-using-nyan-cat-withou-488315498>.

⁸⁷ Vatsal Raval, *Marketing with the Memes: A Double-Edged Sword*, AARASH (May. 4, 2019) <https://medium.com/aarash-bk/marketing-with-memes-a-double-edged-sword-aarash-vatsal-raval-7064e56d5bc7>.

⁸⁸ McGeeveran, *supra* note 5.

⁸⁹ *Ibid.*

⁹⁰ Twin Hwang, *How Copyright is killing your favorite memes*, THE WASHINGTON POST (Sep. 8, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/?utm_term=.2a21ce6cdb41. Steve Schlackman, *How to Respond to a Getty Extortion Letter*, ART LAW JOURNAL (Jul. 25, 2014), <https://alj.artpreneur.com/respond-getty-images-demand-letter/>

⁹¹ Lantagne, *supra* note 6.