

FAIR DEALING IN COPYRIGHT LAW: AN ANALYSIS VIS-À-VIS MEMES

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1. INTRODUCTION

A labourer is worthy of sufficient wages. Likewise, a person is worthy to enjoy the sole benefits accrued from his intellectual property. This basic idea is what led to the conceptualization of the copyright.¹ With technological progress, there can be no denial of the fact that there has been increase in the value of ‘brain work’. The Indian Copyright, 1957 is the legislation that dually serves the purpose of protecting from infringement of original work and providing a breather via §52 so as to make the Act corollary to the fundamental rights of a citizen, especially the right to expression.²

Memes, though a small part of the internet culture, are growing steadily. To define memes, they are actions, notions, and

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¹ See G.N. Okeke & Kennet Urzor, *An Appraisal of the Protection of Copyright under International Law*, 6.1 JOURNAL OF LAW AND CONFLICT RESOLUTION 7, 7-8 (Apr. 2014).

² INDIAN CONST. art.19, cl. 2.

mostly ideas that are transferred amongst individuals within the realms of the community.³

However, it is the very nature of meme, being an art form which derives its source usually from a prior existing work, that draws it into conflict with copyright law. The ensuing sections will deal in detail regarding the provision of fair dealing and its origin, and conclude with how memes are protected and come within the boundary of fair dealing at the hands of the legislature and in terms of prudence shown by the judiciary.

2. **FAIR DEALING: AN OVERVIEW**

Copyright is the legal right of the author, artist, composer, or other creator to control the use of their work. In general, copyright-protected works may not be copied, applied to, or affected by others without the permission of the creator. Release or the implementation of copyrighted works is also limited.⁴ To this general rule, there is an exception (fair use),

³ Charalambos Konstantineas & George Vlachos, *Internet Memes. Humor in late modernity and encroachment upon the mainstream* (Oct. 13, 2016, 11:49 P.M.), <http://www.inter-disciplinary.net/critical-issues/wp-content/uploads/2012/06/vlachosvispaper.pdf>.

⁴ Office Of The General Counsel, *Copyright and Fair Use: A Guide for the Harvard Community*, HARVARD UNIVERSITY (May. 31, 2016), http://ogc.harvard.edu/files/ogc/files/ogc_copyright_and_fair_use_guide_5-31-16.pdf.

which is discussed in detail in this section of the paper. The doctrine of fair use under copyright protection is an exclusive safeguard clause and forms an integral part of the copyright legislation. It is a provision which recognises a particular infringement to be fair. Fair use is the right to use a copyrighted work under certain conditions, without the permission of the copyright holder. The doctrine helps prevent rigid application of copyright law that would stifle the creativity the law strives to promote.⁵ It allows one to use and build on previous work in a way that does not deprive unjustly the copyright owner the right to control their work and profit.⁶ The reason for allowing the exception of fair dealing is that an infringing use of a copyrighted work can bring major public benefit than its denial.⁷

Lord Denning MR, when deciding *Hubbard v. Vosper*, observed that:

“It is impossible to define what is ‘fair dealing.’ It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be

⁵Harper & Row Publishers v Nation Enterprises, 471 US 539, 550 (1985).

⁶ *Supra* note 3.

⁷ T.G. Newby, *What's Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, STANFORD LAW REVIEW 51, 1633 (1999).

fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions.... Other considerations may come to mind also. After all is said and done, it must be a matter of impression....'⁸

2.1. **Historical Background**

More than 40 countries with more than one third of the world population have fair use provisions in their copyright laws. These countries are in all regions of the world and at all levels of development. This doctrine of fair use was first developed by courts in England in the eighteenth century and codified in 1911.⁹ In India, this doctrine is enshrined in §52, Indian Copyright Act, 1957 as 'fair dealing', while in the U.S., it is 'fair use' guaranteed §107, 17 U.S.C.

There are several international copyright treaties governing conditions for copyright exceptions. Copyrighted material is easy to move from one country to another, and is an important part of international trade. As a result, there are long-term

⁸ Hubbard v. Vosper, CA 1971 [1972] 2 WLR 38.

⁹ JONATHAN BAND & JONATHAN GERAFI, THE FAIR USE/FAIR DEALING HANDBOOK 1 (March 2013).

efforts to create an international system of intellectual property rights related to effective protection of material produced in one country in others.¹⁰ India is a party to many of such treaties.

The international standard for copyright exceptions and limitations is referred to as the ‘three-step test.’¹¹ The test has its origins in the work of the 1967 Review Conference at Stockholm of the Berne Convention. Surprisingly, although given before the conference, the right of reproduction, the most fundamental right granted to authors, had not actually been stated in the Treaty, but it was generally recognized by national law. The Stockholm Conference aimed to remedy the situation, but it was difficult to do it without even recognizing that exceptions to the reproduction right already existed in national legislation worldwide. Therefore, the conference had decided to introduce a general right to reproduction in the Convention, while allowing exceptions to the law, but not to an extent that would allow Contracting Parties to maintain exceptions as big as to undermine the right of reproduction. The provision of the Stockholm Conference on the exceptions to the reproduction

¹⁰ Philip Ruddock, *An examination of fair use, fair dealing and other exceptions in the Digital Age*, FAIR USE AND OTHER COPYRIGHT EXCEPTIONS, ISSUES PAPER 10 (May. 2005).

¹¹ *Ibid.*

right, the three-step test, was finally adopted in 1971 in the Berne Act of the Paris Convention as Article 9(2).¹²

Article 9(2) of the Berne Convention provides:

*It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*¹³

Since then, it has gained much more importance, majorly because of GATT 1994 on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Article 13 of the TRIPS Agreement provides:

Members shall confine limitations or exceptions to exclusive rights to certain

¹² Regional Workshop On Copyright And Related Rights In The Information Age organized by the World Intellectual Property Organization (WIPO) in cooperation with the Russian Agency for Patents and Trademarks (Rospatent) Moscow, *Limitations And Exceptions Under The “Three-Step-Test” And In National Legislation – Differences Between The Analog And Digital Environments* by Mr. Roger Knights Assistant Director Copyright Directorate 2-3 (May 22 to 24, 2001).

¹³ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 was completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, and revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, at 1335.

*special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*¹⁴

This Article requires not only that national exceptions comply with the rights of reproduction using the three-step test, but also that exceptions to the exclusive rights of other contracts in the TRIPS Agreement comply with the criteria. Since then, this approach has been used in Article 10 of the WIPO Copyright Treaty of 1996 (WCT)¹⁵ and Article 16 of the WIPO Treaty on Performances and Phonograms Treaty (WPPT).¹⁶ Each of these

¹⁴ Asia-Pacific Industrial Property Centre, JIII, *Introduction to TRIPs Agreement*, JAPAN PATENT OFFICE, 18, ¶4.1.3.4 (Oct. 13, 2016, 08:30 P.M.), https://www.training-jpo.go.jp/en/images_x/uploads/text_vtr/pdf/TRIPs_Agreement.pdf.

¹⁵ Article 10 of the WCT provides as follows:

“(1) Contracting Parties may, in their national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this Treaty *in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.*

“(2) Contracting Parties shall, when applying the Berne Convention, *confine* any limitations or exceptions to rights provided for therein *to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.*” (Emphasis added to highlight the structure of the provision). Paragraph (2) refers to any limitations or exceptions provided for in the Berne Convention. This does not allow any interpretation other than that the three-step test – or at least its second and three criteria – must be taken into account also for the application of the specific exceptions and limitations provided in the Convention.

¹⁶The continued adequacy of the test – also in view of any new technological, business method and social developments – has been further confirmed in the Beijing Treaty on Audiovisual Performances

agreements requires the exclusion of the rights in the contract which do not meet the test. In addition, the WCT, which obliges the parties to abide by all of the major provisions of the Berne Convention, requires that exceptions to the rights provided in Berne must also meet the criteria. Thus, at the international level, the test is now not only on the exceptions to the right of reproduction, but also, for e.g. the right of distributing and publishing of exceptions.¹⁷

As its name suggests, the test consists of three cumulative steps or conditions. Limitations or exceptions to exclusive rights must be confined to:

- a) ‘certain special cases’;
- b) which do ‘not conflict with a normal exploitation’ of the copyright material; and

(BTAP), adopted in June 2012, which, in its Article 13, contains exactly the same provisions on the test as Article 16 of the WPPT adopted 16 years before.

¹⁷Australian Law Reform Commission, *Copyright and the Digital Economy (ALRC Report 122)* (Oct. 13, 2016, 10:20 P.M.), https://www.alrc.gov.au/publications/4-case-fair-use/fair-use-complies#_ftn198.

c) do ‘not unreasonably prejudice the legitimate interests’ of the rights holder.¹⁸

The statute of the United States, on the other hand, provides a broader preamble of representative cases and enunciates a four-factor test on similar lines.¹⁹

2.2. Fair Use vs Fair Dealing

Fair use is not defined in the Copyright Act in the United States, and it is widely accepted that the same definition is open to interpretation by a court on a case to case basis. As a result of the lack of legal definition, the right to use a patent is determined by the four Justice Story factor on the basis of experiments designed in the case of *Folsom v. Marsh*²⁰, which states:

“Look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”

This was used as a basis before the codification of copyright law in the United States. Many of the limitations and exception

¹⁸ *Ibid.*

¹⁹ Copyright Act, 17 U.S.C §107 (1976).

²⁰ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (1841).

factors are now precisely codified in the Copyright Code. However, many non-infringing uses of work in the United States are not specifically listed, but, due to a broad "fair use" provision, are codified in 17 U.S.C. §107, that provides for four factors in determining whether the use is "fair use" and therefore, whether there is any violation of copyright. These four factors include:

- a) the purpose and character of the use, including whether such use is of a commercial nature or for non-profit educational purposes;
- b) the nature of the copyrighted work;
- c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- d) the effect of the use upon the potential market for or value of the copyrighted work.²¹

The United States Supreme Court in the case, *Campbell v. Acuff-Rose Music, Inc.*, emphasized that the four factors may not "*be treated in isolation, one from another. All are to be*

²¹ Copyright Act, 17 U.S.C §107 (1976). The Visual Artists Rights Act of 1990 amended §107 by adding the reference to §106A. P.L. 101-650, December 1, 1990, 104 Stat. 5089. In 1992, §107 was also amended to add the last sentence. P.L. 102-492, November 2012, 106 Stat. 3145. (Oct. 14, 2016, 11:00 P.M.),<http://www.copyright.gov/title17/92chap1.html#107>.

*explored, and the results weighed together in light of the purposes of the copyright."*²²

The open ended fair use doctrine provides a much broader scope as compared to legislations of other states. Moreover, flexibility in the fair use exception has allowed the courts to play an active role in the adaptation of American copyright law to significant changes in technology.²³

The situation in India is different. The copyright holders are provided with rights as to their intellectual property and the fair use exceptions to these rights are given under §§ 39 and 52 of the Act. While §39 deals with acts not infringing broadcast reproduction rights and performer's rights, §52 lists the acts that do not constitute infringement of copyright. §39, besides providing for two exceptions to broadcast reproduction rights and performer's rights under sub-clauses (a) and (b) thereof, extends the exceptions to the protection of these two rights to those provided in respect of copyright infringement under §52 of the Act 'with any necessary adaptations and modifications' under sub-clause (c). The said sub-clause has not specified as to which provisions of §52 will apply to these two rights and has, therefore, left ample scope for the judiciary to interpret the

²² Campbell v. Acuff-Rose, 510 U.S. 569 (1994).

²³ *Supra* note 11, at 20.

same. However, there has not been any occasion for the courts to interpret §39(c) of the Act so far.²⁴

In *Wiley Eastern Ltd. and Ors. v. Indian Institute Management*, in order to enforce the Fair Dealing with reference to the Constitution of India, it was stated by the Delhi High Court that:

*“The basic purpose of Section 52 of the Indian Copyright Act, 1957 is to protect the freedom of expression under Article 19(1) of the Constitution of India...Section 52 is not intended by Parliament to negatively prescribe what infringement is.”*²⁵

The above comparison showcases that the Indian legislations have a very narrow scope as compared to its contemporaries. Therefore, a more precise scheme is required in the line of the U.S. legislation to avoid a legal quagmire.

²⁴ Latha R. Nair, *How Fair Are The Fair Dealing Exceptions Under Indian Copyright Law?*, 2 *IJPL* 171, 172 (2009).

²⁵ *Wiley Eastern Ltd. and Ors. v. Indian Institute Management*, 61 (1996) DLT 28, ¶19.

Thus, the scope and the ambit of §39 is to be examined taking into consideration §52 of the Act. In the case of *ESPN Star Sports v. Global Broadcast News*²⁶, the court observed:

“No universal rule or standard exists; cases have to be decided on the peculiar facts. What may be unfair in one context may be perfectly fair in another and vice versa. There is a certain amount of elusiveness in evolving a thumb rule.”

3. FAIR DEALING VIS-A-VIS MEMES

According to the Oxford Dictionary, 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. Further, it is an element of a culture or system of behaviour passed from one individual to another by imitation or other non-genetic means.²⁷ It had its origin in 1970s from Greek mimēma, i.e. that which is imitated, on the pattern of gene.²⁸

²⁶ *ESPN Star Sports v. Global Broadcast News Ltd and Ors.*, 2008 (36) PTC 492 (Del).

²⁷ “meme.”, *Oxford English Dictionary Online*, 2016, <https://en.oxforddictionaries.com/definition/meme> (Oct. 14, 2016).

²⁸ See, RICHARD DAWKINS, *THE SELFISH GENE*, Chapter 11, 169 (1976).

3.1. Memes: Fair Use of Previous Brainwork

The above definitions and interpretations of a meme as a part of the internet provide that memes are the humorous reproduction of another person's previous work and not necessarily a verbatim copy of it. It can be described as a piece of culture, typically a joke, which gains influence through online transmission.²⁹

A meme, at its best, exposes a truth about something, and in its versatility, allows that truth to be captured and applied in new situations.³⁰ They have become a conventional type of humour which manifests in different formats.³¹ The purpose of sharing memes is to promote an idea within the online community and one may always argue that the act of creating/sharing memes should be protected under the fair use provision. For example, a meme was created to parody the film *12 Years A Slave*, playing off current events related to racism by former owner of the NBA team, Donald Sterling, even using the same aspect to advertise the film. In this ad of the film, the controlled

²⁹ Patrick Davidson, *The Language Of Internet Memes*, THE SOCIAL MEDIA READER (2009).

³⁰ J. L. Zittrain, *Reflections on Internet Culture*, 13.3 JOURNAL OF VISUAL CULTURE 383-394 (2014).

³¹ Linda K. Borzsei, *Makes a Meme Instead: A Concise History of Internet Memes*, NEW MEDIA STUDIES MAGAZINE, Iss. 7 (2013), http://works.bepress.com/linda_borzsei/2/.

protagonist is running - probably out of slavery and into the meme freedom. In the ad, the head of the actor was replaced by the NBA player, Chris Paul, who continues basketball, and the title changed to “12 Years a Clipper”.³² Such editing choices are designed for a description of the conflict between the original work and the underlying message. While the film *12 Years A Slave* brings historical ethnic tensions to the lens, the meme is different in this respect as it refers to both ethnic tensions and modern “plantation mentality”.

Without reference to the original work, the meme would have no comedy value, nor would the message behind it make sense.³³

As mentioned in part I of the paper, the fair use/fair dealing doctrine and its provisions vary from State to State. While the condition of the United States and India has been described above in the previous part of this paper, in Australia, §41A of the Copyright Act, 1968³⁴ provides for fair dealing for the

³² Andrew F. Williams, *OP-ED: 12 Years a Clipper*, POST NEWS GROUP (Oct. 12, 2016, 12:30 P.M.), <http://postnewsgroup.com/blog/2014/04/28/op-ed-12-years-clipper/>.

³³ Terrica Carrington, *Grumpy Cat Or Copy Cat? Mimetic Marketing In The Digital Age*, GEO. MASON J. INT’L COM. L., Vol. 7 Winter Issue No. 2, 139, 152.

³⁴ §41A, The Copyright Act, 1968.

purpose of parody or satire but this is restricted to literary, dramatic or musical work.

§52(1)(a) of the Copyright Act of India allows for 'fair dealing with any work' for the purpose of private or personal use, criticism or review, etc.³⁵ Even though there is no express mention of parody or satire as an exception under the 'fair use' provision, in *Blackwood & Sons Ltd. v. A.N. Parasuraman*³⁶, it was held that:

"In order to constitute a fair dealing, there must be no intention on the part of the alleged infringer, to compete with the copyright holder of the work and to derive profits from such competition and also, the motive of the alleged infringer in dealing with the work must not be improper."

Thus, to be able to come under the ambit of the exception of fair dealing, a meme should:

a) Not intend to compete with the copyright holder, and

³⁵ §52, The Copyright Act, 1957: Certain acts not to be infringement of copyright. (1) The following acts shall not constitute an infringement of copyright, namely:

(a) a fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of-

(i) private use, including research;

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

³⁶ *Blackwood & Sons Ltd. v. A.N. Parasuraman*, AIR 1959 Mad. 410.

- b) Not be created with the motive to derive profit out of competition, and dealing with the work must not be improper.

The Allahabad High Court, in the case of *S.K. Dutt v. Law Book Co. And Ors.*, observed that “*the infringement comes in when it can be shown that someone has, instead of utilising sources to originate his work, appropriated the labours of another by resorting to a slavish copy or more colourable imitation thereof*”.³⁷

There is enough said about the doctrine of fair dealing and its application. However, there is little known about the issue of memes being an infringement of copyrighted pre-existing matter. The following part will give an analysis with respect to the rules established³⁸ on whether memes are impermissible by law?

³⁷ *S.K. Dutt v. Law Book Co. and Ors.*, AIR 1954 All 570.

³⁸ *Supra* note 22.

4. **FACTORS AFFECTING THE DOCTRINE OF FAIR DEALING/FAIR USE: A FAIR ANALYSIS**

In India, §52(1)(a) and (b)³⁹ specifically deal with the doctrine of fair dealing which approves of a fair dealing with a literary, dramatic, musical or artistic work for the purpose of criticism and review. A meme may not always be for criticising or reviewing a particular form of art nor can it be concluded that a meme is not fair dealing with the mentioned works. Thus, this leaves the position of the new-fangled memes vague. In this part of the paper, the position of memes according to the four step test discussed in the previous part will be analysed with reference to an example.

4.1. **Factor one: The purpose and character of the use**

When society and intellectual property laws allow memes to develop an arsenal of means of expression to the average

³⁹ §52, The Copyright Act, 1957: Certain acts not to be infringement of copyright. -(1) The following acts shall not constitute an infringement of copyright, namely:

(a) a fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of-

(i) private use, including research;

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

(b) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events-

(i) in a newspaper, magazine or similar periodical, or

(ii) by [broadcast] or in a cinematograph film or by means of photographs.

Internet intellectual property, the treatment of memes in ordinary conversation to determine their argument expands. In this scenario, the public who can be influenced grows and the opportunity to discuss and participate in the growth of civilization also increases.⁴⁰

Given the example of the Alok Nath memes⁴¹, its purpose was not to demean a television actor, or to infringe the copyright of a particular drama in which the still might have appeared, but rather, solely entertainment. It is with the reference to the particular picture along with the text that the audience understand the underlying meaning of the joke.

4.2. **Factor two: Nature of work**

This factor may or may not be in favour of a meme as, usually, the nature of a meme stands to be artistic. Thus, it would usually weigh in favour of a copyright-holder but only when the meme would stand to compete with the copyrighted work, which is rare. The process of becoming a meme involves a large transformation. Creativity is the means by which memes replicate and, therefore, thrive.⁴²

⁴⁰ *Supra* note 33.

⁴¹ *How It All Started : Alok Nath Memes*, SCION SOCIAL BLOG (Oct. 12, 2016, 08:50 P.M.) <http://scion-social.com/blog/started-alok-nath-memes/>.

⁴² David A. Simon, *Culture, Creativity, and Copyright*, 29 CARDOZO ARTS & ENT. L.J. 279, 294 (2011).

4.3. **Factor three: Amount and substantiality of the work**

The amount and substantiality of the portion used in relation to the copyrighted work as a whole, likely weighs in favour 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, as in the present e.g., of a television personality and his expression or act in a television show. The meme is a still from his shows and does not take the ‘heart’ of the show.⁴³

4.4. **Factor four: Effect on the Potential Market or Value of the Copyrighted Work**

Internet memes, by their existence, require an infringement of the intellectual rights of others. An Internet meme is made presentable, and can only proclaim its purpose when it's echoing mutation and imitation.⁴⁴ Thus, without certain infringement the meme would not be able to exist in its usual sense. Moreover, the effect of a meme, in particular, in the instant e.g., would be an advertisement of the copyrighted work.

There have been many cases upon the copyright issue of memes being used in commercial for marketing in the first

⁴³ *Supra* note , at 252.

⁴⁴ *See* 17 U.S.C. §106.

world countries.⁴⁵ For example, recently, Warner Brothers incorporated memes into its advertising schemes, resulting in lawsuits filed by copyright holders.⁴⁶ It raced into legal trouble, as it used Nyan Cat and keyboard playing cat which are two extremely popular memes as a sign of their video game “Scribblenauts”. It lost the lawsuit against the creators of the meme.⁴⁷ One may conclude that the use of memes on social networking sites is generally ‘fair use’. However, in case of advertising campaigns the advertisers must seek a license from the copyright-holder before cashing in on the popularity of the meme, lest it amounts to copyright infringement.

5. CONCLUSION

The Internet has definitely changed the world of intellectual property - and intends to further do so. But it is clear that while some memes may violate laws on copyright as a derivative work, it is in the interests of content owners that they have small pieces of content passed around on the Internet for free to be useful to provide users of the Internet more freedom to copy, as the very nature of meme brings it into conflict with the copyright laws and the provision of fair dealing in particular.

⁴⁵ C.f. Ronak Patel, *First World Problems: A Fair Use Analysis of Internet Memes*, 20 UCLA ENT. L. REV. 235, 248 (2013).

⁴⁶ *Supra* note 36.

⁴⁷ Schmidt et al. v. Warner Bros. Entm’t Inc., 824 F. Supp. 2d 1003 (2011).

Due to the highly transformative nature inherent to popular memes and the fact that memes often help to create a market for the original work, a meme that incorporates previously published but commercially undesirable photos and images is an exemption under fair use.⁴⁸ It is hard to state, in a dynamic world, whether a trend such as that of a meme is a phase in the history of media and technological communication, or will continue to be a relevant part of it, but analysing the current situation and from the above discussion, a conclusion that memes are not inconsistent with the exception of fair dealing can be drawn. However, whether or not a meme is an infringement of a copyrighted work depends on, inter alia, the purpose, subject matter and its degree of similarity.

⁴⁸ *Id.* at 158.