

THE CHALLENGES OF MEMES IN COPYRIGHT LAW: BETWEEN HUMOUR AND VALUE(S)

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The challenges of memes in copyright law: between humour and value(s)

Michele De Iaco*

Outstanding LLM Dissertations 2022

Abstract

This paper analyses the legal issues concerning the internet memes phenomenon, by evaluating in particular the current EU copyright framework. The search for a definition and copyright classification of memes cannot produce clear results. This is due to the nature of the pre-existing contents that memes usually use, and the fact that the absence of licences may entail infringements where no exception or limitation is applicable. Thus, memes easily imply copyright-relevant acts. On closer inspection, memes seem to occupy a grey area between reproduction, adaptation, transformativeness, and even authorship and originality. This uncertainty, combined with the discrepancy between law and the practice of online communities – which seems to better address the nature of internet memes as ‘commons’ – constitutes a challenge for copyright.

To assess the legal framework, this paper argues the existence of three values hidden behind memes. First, a fundamental-rights-related value, which notably involves the freedom of expression of memes creators, and has an impact on democracy. Secondly, memes represent a remarkable example of the economic value that contents may acquire in the digital environment. In particular, they can lead to indirect benefits (e.g., ‘meme marketing’), create new digital jobs or behave as assets. Thirdly, memes have a cultural value, since not only can they be vehicles for cultural contents – as the promotion of cultural heritage – but also they represent a peculiar kind of ‘contemporary creativity’ that is itself culture. These values together emphasise the relevance and the potentialities of memes, and therefore the need for them to be clearly lawful.

On this basis, this research claims that the current EU copyright framework does not offer the certainty of the lawfulness of memes, and thus it undermines their values. Notably, while

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specific exceptions may apply in narrow cases, there is currently no general defence for memes. Indeed, the parody exception after *Deckmyn* is still critical – especially for the concept of fairness – and similarly the quotation exception is debated among Scholars. Consequently, they might only be applicable to some memes. Furthermore, the new EU intermediaries' liability provision (Article 17 CDSM Directive) was initially perceived as a "Memes ban", but despite the reassurances, its safeguards are not enough. Ultimately, memes fall into the flexibility-certainty debate on exceptions and limitations and this paper argues the importance for EU lawmakers to explore new ways for addressing the issue of this communitarian and valuable phenomenon to reduce the gap between law and practice. Accordingly, it proposes some possible solutions that may be taken into consideration, such as the adoption of a 'right to meme', a more flexible limitation, or a specific exception.

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Introduction

Everyone who has happened to use any of the main social media, or even a blog, is very likely to have seen at least one internet meme within their feed. The reactions to such viewings could be variable, from a genuine laugh to the bitter feeling of not grasping its meaning. What is less common, however, is to question whether or not the memes that are commonly shared every day are actually lawful. This is the starting point of this paper in Chapter I, where an attempt is made to define memes in particular under copyright law. In fact, as the etymology of the term comes from the ancient Greek *mīmēma* (which means 'something imitated'),¹ it is not surprising that conflicts with copyright may arise. The answer to the doubt about the lawfulness of memes is neither easy nor definitive, because they seem to entail acts that might patently infringe copyright, if the pre-existing contents are protected, such acts are unauthorised, and if no exception or limitation applies. Nonetheless, other possible interpretations of memes might offer interesting hints to readapt the status of memes in this field of law. Nevertheless, it is at the least bizarre to question the lawfulness of a phenomenon that is so globally widespread. Indeed, it is much more common to doubt the compatibility of law with acts that are rare or just hypothetical, while in this case the practice of online communities is clear. Therefore, the true problem that is at the core of this paper is to what extent and how law and practice converge in the EU with regard to memes, as is specifically analysed in Chapter III.

However, the sole fact that memes are created and shared is not enough to state that they should be allowed. Hence, Chapter II investigates the values behind memes before coming to such a conclusion. In fact, while the humoristic nature of most (not all) internet memes might easily deceive interpreters into underestimating their potentialities, they could be revalidated at least under three points of view, which are investigated in this research. First, memes may be closely linked to fundamental rights, especially to freedom of expression. Secondly, from an analysis of profit in the Digital Era, the economic value of memes cannot and should not be disregarded. In fact, it seems that they can create it in many ways, both directly and indirectly. Lastly, the cultural value of memes can be appreciated when considering the promotion of something that is considered cultural, such as cultural heritage, or *per se*, when focusing on their essence of expressing contemporary culture. This paper argues that these values should not be ignored in the law-making process, but rather, they should drive the regulation of this phenomenon.

¹ Linda K Börzsei, 'Makes a Meme Instead: A Concise History of Internet Memes' (2013) *New Media Studies Magazine* 13.

The analysis of the EU copyright legal framework might not satisfactorily deal with memes, *a fortiori* in the light of their values. This research particularly focuses on the EU Directives 2001/29/EC² (InfoSoc Directive) and 2019/790³ (CDSM Directive). The main problem is the lack of clarity in the application of exceptions. Remarkably, although the parody exception⁴ seems to be generally applicable to memes, this is not always the case, and problems persist concerning different dogmatic aspects of such defence itself, which are only exacerbated by the complexity of the phenomenon. Other flaws emerge in relation to alternative exceptions, indicating the risk for memes to be deemed unlawful. Furthermore, this issue is also intertwined with the new legislative intervention for intermediaries' liability,⁵ which adds the problem of algorithms. The conclusion and the main claim of this writing is that memes should be more expressly lawful under European copyright law, to recognise their values and to reconcile law and practice. While there is no easy solution, there are different proposals that could be evaluated to make it possible, and to improve the consistency of the EU legal system within the digital environment.

Concerning the methodology of this research, an interdisciplinary approach is necessary to better analyse the phenomenon of memes. For this reason, the argumentation includes sources from different fields of knowledge, notably socio-linguistic and semiotic studies, cultural studies and marketing. The legal reasoning is focused on copyright law and partly human rights, although the author acknowledges that memes also entail interesting implications under other fields of law that, are only mentioned within this paper, but which would deserve separate investigation. A note should be made about the choice of the jurisdiction. In fact, the first chapter offers a wider overview of the definition of memes under copyright law, and because of the global nature of the phenomenon, the author has decided to address it in a more generic way, using the categories of copyright, but of course favouring the EU. Differently, Chapter III specifically assesses EU law, only partially referring to the law of Member States and the US for comparison. Unconventional sources were also necessary to understand this constantly evolving communitarian phenomenon. The author acknowledges and apologises for possible misattributions (especially of images). In fact, despite the *best efforts* to be correct in this regard, the uncertain origin of some online content is still a problem, which is also connected to the subject of this paper.

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society OJ L167 (InfoSoc Directive).

³ Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ L130 (CDSM Directive).

⁴ InfoSoc Directive, Article 5(3)(k).

⁵ CDSM Directive, Article 17.

Chapter I: Defining memes under copyright law

'Meme' is nowadays a word that deeply belongs to the online world, but for the purposes of this research it must be defined more precisely, as is done in Section 1.1. Then, Section 1.2 investigates possible legal definitions of memes, to infer that they can potentially be infringing acts. Lastly, Section 1.3 suggests a different perspective of memes as peculiar commons that should be lawful.

1.1. Memes: a wide concept

'Meme' is a term whose meaning is broader than the average internet user may think. The first use of this term is unanimously attributed to Richard Dawkins' book 'The Selfish Gene'.⁶ Interestingly, Dawkins was an evolutionary biologist who also studied the transmission of non-genetic behaviours and ideas from one person to another by applying evolutionary studies.⁷ He called these 'memes', which mainly differ from genes because of the speed of their modifications.⁸ Dawkins' concept of memes is very broad, as it includes various fields such as fashion, sports, and religion, and this is not necessarily connected to the Web, in contrast to the more recent and common use of this word.⁹



Figure 1 Kara Swanson, 'How to Make a Meme' (The TechSmith Blog, 22 June 2021) <<https://www.techsmith.com/blog/how-to-make-a-meme/>> accessed 3 July 2022.

⁶ Richard Dawkins, *The Selfish Gene* (Paladin 1978).

⁷ Michael Mandiberg, *The Social Media Reader* (New York University Press 2012) 121.

⁸ *Ibid.*, 122.

⁹ *Ibid.*

For the purposes of this writing, the term 'meme' is used in relation to 'internet memes'. These have been constantly changing and becoming broader, as memes (in the general meaning) are strictly linked to evolution and natural selection.¹⁰ In fact, this research focuses on the contemporary meaning of 'meme', which includes the classic 'image macro' (e.g., Fig.2), but it has also been expanding to encompass videos (e.g., Fig.3), GIFs, etc..¹¹ Wikipedia offers a community-made definition of this as 'an idea, behaviour, image, or style that is spread via the Internet, often through social media platforms'.¹² Interestingly, although its aim 'is usually to make a joke or comment',¹³ humour seems not a necessary element for something to be a meme. However, more detailed and updated inventories of what is regarded as a meme can be found in 'Know Your Meme'¹⁴ or by consulting r/Memes on Reddit.¹⁵ Nevertheless, precisely for its intrinsically evolving nature, it is not an easy task to define memes fully objectively and to predict what this term will mean in a few years.

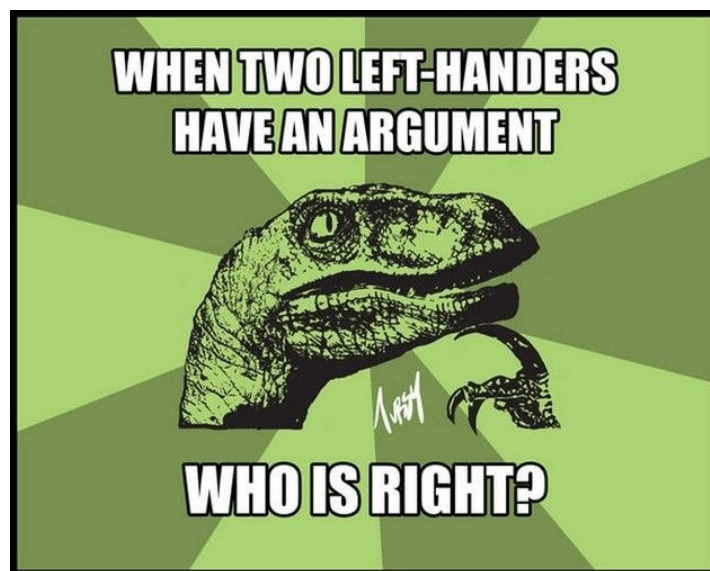


Fig.2 Memes, 'Funniest Philosoraptor Memes' (Memes) <<https://memes.com/philosoraptor-memes-that-are-bizarre-as-they-are-deep>> accessed 6 July 2022.

¹⁰ See Börzsei (n 1).

¹¹ Ibid. 5.

¹² 'Internet Meme', *Wikipedia* (2022)

<https://en.wikipedia.org/w/index.php?title=Internet_meme&oldid=109454211> accessed 4 July 2022.

¹³ Ronak Patel, 'First World Problems: A Fair Use Analysis of Internet Memes' (2013) 20 *UCLA Entertainment Law Review* 235, 237.

¹⁴ 'Know Your Meme' (*Know Your Meme*) <<https://knowyourmeme.com/>> accessed 4 July 2022.

¹⁵ <<https://www.reddit.com/r/memes/>> accessed 4 July 2022.

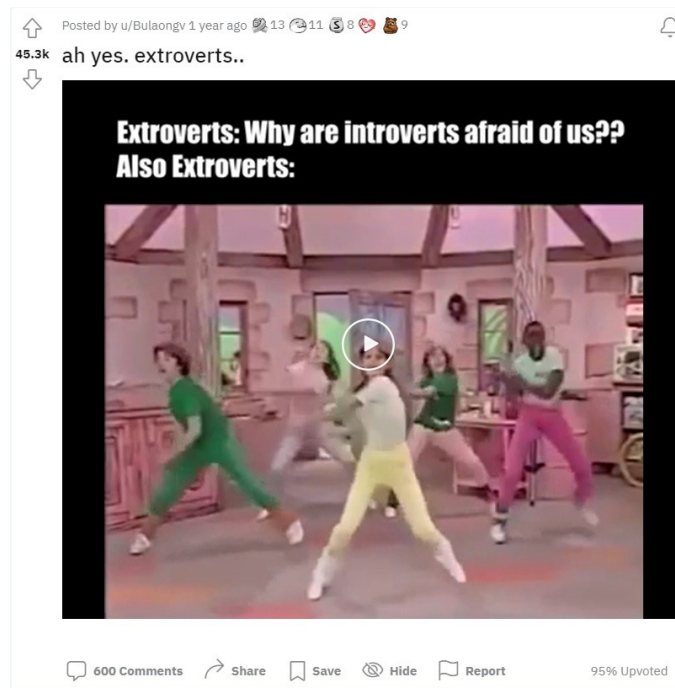


Fig.3 Bulaongv <www.reddit.com/r/memes/comments/o3dhf9/ah_yes_extroverts> accessed 6 July 2022.

1.2. Memes as a disputable copyright-relevant concept

Mememes can have legal implications in several ways. Copyright aside, when a meme includes a photo of a person, this may entail consequences for image rights or privacy law. This is not something uncommon, as there are many cases of people becoming memes, for instance Drake,¹⁶ 'Hide the pain Harold',¹⁷ or the 'WAT Grandma'.¹⁸ Trade marks can also be affected by memes, in particular when trademarks are used to make jokes of brands (e.g., Fig.4). In some of these cases an infringement might hypothetically occur. In addition, on some occasions memes can be registered as trademarks, as was the case of 'Grumpy Cat' (Fig.5).¹⁹ Furthermore, memes may entail criminal offences such as defamation, when they are used as means for discrimination purposes and hate speech.²⁰

¹⁶ 'Drakeposting' (*Know Your Meme*) <<https://knowyourmeme.com/memes/drakeposting>> accessed 4 July 2022.

¹⁷ 'Hide The Pain Harold' (*Know Your Meme*) <<https://knowyourmeme.com/memes/hidden-pain-harold>> accessed 4 July 2022.

¹⁸ 'Wat' (*Know Your Meme*) <<https://knowyourmeme.com/memes/wat>> accessed 4 July 2022.

¹⁹ Anca Draganescu-Pinawin, 'Grumpy Cat: The Feline Who Grew a Business Empire with IP Rights', *WIPO*, (2018) <https://www.wipo.int/wipo_magazine/en/2018/01/article_0008.html> accessed 5 July 2022.

²⁰ Sara Gates, '\$18 Million Lawsuit Over Meme' (*HuffPost*, 29 April 2013) <https://www.huffpost.com/entry/adam-holland-lawsuit-18-million-meme_n_3178945> accessed 5 July 2022.



Fig.4 Shirlyn, '20 McDonald's Memes That Will Surely Make You Happy' (SayingImages.com, 2 January 2018) <<https://sayingimages.com/mcdonalds-meme/>> accessed 6 July 2022.



Fig.5 Nitish Bhardwaj, 'Best of Grumpy Cat Meme' <<https://www.slideshare.net/awesomeworld/best-ofgrumpycatmeme-33836279>> accessed 6 July 2022.

Most memes can be categorised as user-generated contents (UGC), which – despite their diffusion – are considered particularly problematic for copyright law,²¹ notably for the potential piracy and their challenge to the notion of authorship.²² Indeed, it is not easy to state whether memes are lawful or not, because this may vary from case to case, depending on the already existing content that is used, its source, and arguably the level of alteration of the latter, but also the jurisdiction, the context and the aim of its use, which may entail the application of specific exceptions and limitations (E&L). The legal framework is complex, and it seems to envisage the hypothesis of memes being infringing copyright (although E&Ls might be applicable). However, memes might possibly be protected as such. Furthermore, the lack of clarity of the matter is also reflected into the perception of online communities, thus entailing a distortion between law and practice.

1.2.1. Memes as infringing acts

1.2.1.1. The pre-existing content

The majority of memes use pre-existing contents, and the different copyright regime of these is relevant for understanding whether an infringement may occur, although this is something that the practice of online communities seems to ignore. The first and easiest hypothesis is the one of public domain contents, which can generally be freely used. In other cases, memes include copyright protected works or contents that may be covered by neighbouring rights, as might be the case of ‘simple photographs’.²³ However, it is to be noted that, since replicability is the most important feature of memes,²⁴ it is not always easy to track the origin – and thus the hypothetical rightsholder – of the pre-existing work. Websites and platforms can sometimes help in this sense, but even the most accurate of them (‘Know Your Meme’)²⁵ does not always indicate the rightsholder, but rather the first appearance of the content *as a meme*. Furthermore, many memes are taken from stock photos under licences whose terms are not usually known by users. An example of this is the ‘Distracted Boyfriend’ meme, which was first published in a stock photo that has specific licences and requires the payment of a fee.²⁶ In any case, the behaviour of online communities does not seem to care about these differentiations.

²¹ Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11 Vand J Ent & Tech L 841.

²² Simon Stokes, *Art and Copyright* (Hart Publishing 2001) 162.

²³ Eg., Act on Copyright and Related Rights 1965 (*Urheberrechtsgesetz – UrhG*) Section 72 (Germany); Italian Copyright Law 1941 (L. 633/1941 *Legge sul Diritto d’Autore – L.A.*) (Italy) Articles 87 to 92; Spanish reformed Intellectual Property Act 1996 (*Texto Refundido de la Ley de Propiedad Intelectual*) Article 128 (Spain).

²⁴ Börzsei (n 1) 12.

²⁵ n 14.

²⁶ ‘Distracted Boyfriend’ (*Know Your Meme*) <<https://knowyourmeme.com/memes/distracted-boyfriend>> accessed 9 August 2022.

1.2.1.2. *The infringed rights*

When the pre-existing content is protected, and no permission is granted, the creations of memes can entail acts relevant for specific rights that may thus entail infringements.²⁷ In particular, the right of reproduction²⁸ is the right that appears more immediately concerned. Indeed, as the reproduction is such in any means,²⁹ the images, sentences, sounds, videos, and movie frames that are used can qualify as copies.³⁰ Another problem may arise in relation to the right of communication to the public,³¹ which is particularly critical in the EU,³² notably because of its broad interpretation stated at recital 23 of the InfoSoc Directive and confirmed by the jurisprudence of the CJEU since *Rafael Hoteles*.³³

Other rights may also be concerned. In particular, an interesting debate could emerge about the right of adaptation, which is not harmonised in the EU, hence when the work is sufficiently modified this is a matter of national law.³⁴ The overlaps between the reproduction right and the derivative works right, as well as their limits, are unclear and problematic for copyright law.³⁵ Memes further complicate the issue, because of their questionable nature. For instance, it has been argued that image-macros – but this might probably be applicable to other memes – are derivative works,³⁶ thus requiring the authorisation of the rightsholder for the adaptation. At first glance, this appears reasonable as they evidently use pre-existing contents, but on the other hand, they have also been deemed ‘transformative by definition’,³⁷ therefore suggesting that they can be distanced from the latter. Furthermore, considering the current copyright legal frameworks, in addition to seeking a licence the meme creator should worry about the moral right of attribution,³⁸ even considering the case of open licences as the ones of Creative

²⁷ This subsection focuses on EU law for practical reasons, but memes entail copyright-relevant acts also in other jurisdictions, e.g., for the US, See e.g, Elena Elmerinda Scialabba, ‘A Copy of a Copy of a Copy: Internet Mimesis and the Copyrightability of Memes’ (2020) 18 *Duke Law & Technology Review* 332.

²⁸ Revised Berne Convention for the Protection of Literary and Artistic Works (RBC), Article 9; InfoSoc Directive, Article 2.

²⁹ ‘[...] by any means and in any form, in whole or in part’ InfoSoc Directive, Article 2.

³⁰ Giacomo Bonetto, ‘Internet Memes as Derivative Works: Copyright Issues under EU Law’ (2018) 13 *Journal of Intellectual Property Law & Practice* 989.

³¹ InfoSoc Directive Article 3, WIPO Copyright Treaty 1996 (WCT) Article 8, and the specific rights in the RBC.

³² Justin Koo, *The Right of Communication to the Public in EU Copyright Law* (Hart Publishing 2019) Ch 3.

³³ Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECLI:EU:C:2006:764 para 36.

³⁴ Lionel Bently and others, *Intellectual Property Law* (Fifth edition, Oxford University Press 2018) 146.

³⁵ Bernd Justin Jütte, ‘A Reasoned and Reasonable Argument to Untangle the Derivative Works Right’ (2019) 14 *Journal of Intellectual Property Law & Practice* 506.

³⁶ Bonetto (n 30).

³⁷ Natalia Mielczarek and W Wat Hopkins, ‘Copyright, Transformativeness, and Protection for Internet Memes’ (2021) 98 *Journalism & Mass Communication Quarterly* 37 39.

³⁸ RBC Article 6bis.

Commons,³⁹ because this is easily infringed by not acknowledging the author of the pre-existing content.⁴⁰ In reality, this is not what is done. As will be seen in Chapter III, this matter is also relevant for the application of E&Ls. Arguably, most of these problems might also occur when sharing someone else's memes, with the complications of the linking of infringing contents,⁴¹ and the possible protection of the meme itself.

1.2.2. Meme authorship? A comparison with appropriation art

As discussed previously, memes might be derivative works, but this simplifies the diversity of memes,⁴² that might potentially range from being reproduction to autonomous works. Indeed, another point of view may try to find originality within memes, and therefore protect them. If this is quite easy for memes that only use new contents created within them, this might even be the case of derivative works. In fact, derivative works can be protected, even if they infringe copyright, if they are original.⁴³ In the case of memes, a key element can be the frequent addition of words to pre-existing images. Originality is a core concept of copyright, and the most interesting requirement for such protection. There are different standards for originality to be found, which change depending on the jurisdiction.⁴⁴ For example, in the UK the standard used to be the one of 'labour, skill, and judgment',⁴⁵ and it is arguable that these might be found especially in memes that require high technical skills, in fact, quality is one of the criteria of assessment of the meme's value for the community.⁴⁶ In continental Europe the standard has historically been linked to the reflection of the personality of the author,⁴⁷ and the CJEU has developed the interpretation of the concept notably from *Infopaq*.⁴⁸ What emerges is that there is originality where the work is 'the author's own intellectual creation'.⁴⁹ From this definition it

³⁹ 'About The Licenses - Creative Commons' <<https://creativecommons.org/licenses/>> accessed 9 July 2022.

⁴⁰ It is to be noted that some jurisdictions do not permit the waiver of moral rights in licences as CC0. 'CC0' <<https://creativecommons.org/choose/zero/>> accessed 7 July 2022.

⁴¹ João Pedro Quintais, 'Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public' (2018) 21 *The Journal of World Intellectual Property* 385.

⁴² Lantagne identifies a 'spectrum' from 'static memes' to 'mutating memes'. Stacey Lantagne, 'Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication' (2018) 52 *University of Richmond Law Review* 387 409.

⁴³ In such cases, the 'maker of the new version' needs a licence. Lionel Bently and others, *Intellectual Property Law* (n 34) 94.

⁴⁴ Agustín Waisman, 'Revisiting Originality' (2009) 31(7) *E.I.P.R.* 370.

⁴⁵ *University of London Press v. University Tutorial Press* [1916] 2 Ch 601.

⁴⁶ Text to n 142.

⁴⁷ Waisman (n 44).

⁴⁸ *Case C-5/08 Infopaq International v. Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465 para 37.

⁴⁹ This expression comes from the Directive 91/250/EEC on the Legal Protection of Computer Programs, and it was then 'horizontally' extended to authorial works, harmonising the standard of originality in the EU. Thomas Margoni, 'The Harmonisation of EU Copyright Law: The Originality Standard' (2016) <<https://papers.ssrn.com/abstract=2802327>> accessed 14 July 2022.

might be arguable that some memes meet the requirement of originality,⁵⁰ as they represent ‘free and creative choices’⁵¹ of the author, their sense of humour, and their personal expression.⁵² This is partially reflected in the behaviour of online communities, as memes creators often protest at not being acknowledged as such,⁵³ in these cases talking about ‘meme theft’⁵⁴ (which has itself also become a topic for some memes).⁵⁵

When seeking originality within memes, it may be useful to compare them to a similar phenomenon, that is appropriation art. In fact, some jurisdictions have clearly stated the need to modify the pre-existing content for a piece of appropriation art to be protected under copyright law. This is the case in the UK, where case law requires that for derivative works ‘There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work.’⁵⁶ which implies in the artistic field the ‘visual significance’ of the alteration.⁵⁷ In the US, appropriation art has been treated unpredictably by courts notably depending on the transformative use⁵⁸ of the appropriated work.⁵⁹ In Italy, the law expressly requires for the protection of derivative works ‘additions constituting a substantial recasting of the original work’.⁶⁰ Nevertheless, interestingly, in the *Giacometti Variations* case,⁶¹ the Court highlighted the importance of the *detournement* of the meaning of the appropriated work for the creation of a parody as an *autonomous* work, thus not derivative. Hence, is – for instance – the mere addition of some words to an image enough to ‘own a meme’? Starting from these considerations, this is not clear, because despite the *detournement*, this may depend on the ‘transformative use’ of the specific case, and on the jurisdiction. Yet, a proprietary approach to memes could lead to paradoxical consequences that deny their replicability and thus their very nature.

⁵⁰ Bonetto (n 30).

⁵¹ Case C-604/10 *Football Dataco v. Yahoo!* [2012] ECLI:EU:C:2012:115 para 38.

⁵² As is discussed in Section 2.1.

⁵³ E.g., Taylor Lorenz, ‘Elon Musk: Memelord or Meme Lifter?’ *The New York Times* (7 May 2021) <<https://www.nytimes.com/2021/05/07/style/elon-musk-memes.html>> accessed 5 July 2022.

⁵⁴ ‘Meme Theft’ (*Urban Dictionary*) <<https://www.urbandictionary.com/define.php?term=Meme%20theft>> accessed 5 July 2022.

⁵⁵ ‘Meme Stealing’ (*Know Your Meme*) <<https://knowyourmeme.com/memes/meme-stealing>> accessed 5 July 2022.

⁵⁶ *Interlego v. Tyco Industries* [1989] AC 217 referring to *Macmillan v. Cooper* [1924] 40 TLR 186.

⁵⁷ Stokes (n 22) 167.

⁵⁸ *Campbell v. Acuff-Rose Music* 520 U.S. 569 578–79 (1994).

⁵⁹ Marina P. Markellou, ‘Appropriation Art under Copyright Protection: Recreation or Speculation?’ (2013) 35(7) E.I.P.R. 369 371–372.

⁶⁰ Article 4 Italian Copyright Law.

⁶¹ Trib. Milano, 13 luglio 2011 (ord.), *Foundation Alberto et Annette Giacometti, Stitchin Fondazione Prada c. Prada S.p.A., John Baldessari*, Riv. dir. ind. 2011 VI 353.

1.3. Memes as commons

The practice of online communities cannot be ignored, as even memes that are possibly infringing copyright keep circulating. The communities' perception of the lawfulness of memes is not easily investigable, but there are some indications of them being treated as if they were in the public domain. This is confirmable when assessing the reactions of the communities when there is a threat to memes. An early example was their attitude towards article 17 (former article 13) CDSM Directive as a 'Memes Ban' which caused protests of users,⁶² arguably because they never seriously questioned the lawfulness of memes even before this Directive. Another example of that is one of the few cases of copyright dispute over a meme. This concerned a 'Socially Awkward Penguin'⁶³ meme published by a German blog, that had to pay for a licence finally, but the issue generated the bewilderment of users.⁶⁴ Arguably, another element that could foster the perception of memes as lawful elements is the near impossibility to effectively enforce copyright given their global spread. This might also suggest that memes could belong to the 'negative spaces of IP',⁶⁵ meaning 'Areas in which creation and innovation thrive without significant protection from intellectual property law'.⁶⁶ However, it is arguable that *rebus sic stantibus* IP might potentially be enforced, but in a less predictable way, as in the already mentioned case of the 'Socially Awkward Penguin'.

⁶² Zoe Kleinman, 'Article 13: Memes Exempt as EU Backs Controversial Copyright Law' *BBC News* (26 March 2019) <<https://www.bbc.com/news/technology-47708144>> accessed 14 June 2022.

⁶³ 'Socially Awkward Penguin' (*Know Your Meme*) <<https://knowyourmeme.com/memes/socially-awkward-penguin>> accessed 12 July 2022.

⁶⁴ Caitlin Dewey, 'How Copyright Is Killing Your Favorite Memes' *Washington Post* <<https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/>> accessed 12 July 2022.

⁶⁵ Kal Raustiala and Christopher Jon Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 *Virginia Law Review* 1687.

⁶⁶ Elizabeth Rosenblatt, 'A Theory of IP's Negative Space' (2011) 34(3) *Columbia Journal of Law & the Arts* 317.



Fig.6 Caitlin Dewey, 'How Copyright Is Killing Your Favorite Memes' Washington Post <<https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/>> accessed 12 July 2022.

The functioning of memes within online communities suggests that they can be treated as 'commons', meaning that they should be excluded from the scope of copyright law, because the latter 'should not be used to grab what belongs to the Internet as a whole'.⁶⁷ Indeed, a different approach to authorship that focuses on creative contribution, which is 'crowd-sourced'⁶⁸ in the case of memes, would make them *de facto* commons.⁶⁹ This might be the main difference when comparing memes to appropriation art, as the meme creator is arguably less important than an appropriation artist, because the meme is somehow created as such by the community itself. Subsequently, it might be possible to identify a new dichotomy between the use of the pre-existing work and the use of it *as a meme*,⁷⁰ which might be interpreted as a sort of idea/expression dichotomy. Hence, some memes could be seen as *scènes à faire*, as such

⁶⁷ Stacey M. Lantagne, 'Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges' (2018) 17 Va Sports & Ent LJ 221 240

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid. 241. Nevertheless, Lantagne excludes 'commercial advertisement and merchandising' from the concept of *use as meme*, while in the opinion of the author they still maintain their different nature *as memes*, and they can create new economic value that should be assessed.

meaning 'an expression that has become more like an idea'.⁷¹ Memes could even be interpreted as a language that cannot be owned,⁷² and this is perfectly consistent with their importance for self-expression, which is treated in the next Chapter.

In sum, the wide concept of internet memes seems to correspond to an unclear legal definition. They can be infringements where no E&L applies but interpreting memes as derivative works and/or underlying their transformative use could also lead to their copyrightability. Nonetheless, the communities' perception and practice of memes is rather more comparable to the notion of 'commons'. If this suggests the desirability for memes to be more clearly lawful under copyright law, when considering the values behind them the desirability becomes a real need.

Chapter II: The value(s) behind memes

Despite their hilarious and apparently irrelevant appearance, memes are an extremely interesting example of the importance that contents may acquire in the digital environment. This chapter investigates the inherent or attributed value of memes, which is a necessary element to assess the efficiency and validity of the legal framework, and to advocate for their lawfulness. In this context, the term 'value' is used with different meanings, which are addressed separately. Section 1 will analyse the value that memes have in relation to fundamental rights. Section 2 will focus on the creation of economic value that memes may entail. Section 3 will deepen the cultural relevance of memes.

2.1. Memes and fundamental rights

The production and sharing of memes are bounded to human rights, notably to freedom of expression which is largely recognised, and is taken into consideration for E&Ls, as is discussed in the next chapter. Memes deliver a message, and they are therefore 'speech acts',⁷³ consequently, they are strictly connected to the freedom of expression of creators in the first place. This was put under the spotlight when the threat of the EU 'Memes Ban' was feared.⁷⁴ This freedom is legally recognised at a national level by constitutional provisions,⁷⁵ but also regionally and internationally. More specifically, it is protected by the Universal Declaration of Human

⁷¹ Lantagne, 'Famous on the Internet' (n 42), referring to Oracle Am., Inc. v. Google Inc., 750 F.3d 1339 1359 (Fed. Cir. 2014).

⁷² Ibid. 407.

⁷³ Lezandra Grundlingh, 'Memes as Speech Acts' (2018) 28 Social Semiotics 147.

⁷⁴ n 62.

⁷⁵ E.g., 'Déclaration des droits de l'homme et du citoyen de 1789' Article 11 (France); Italian Constitution (1948) Article 21; Basic Law for the Federal Republic of Germany (1949) Article 5; Spanish Constitution (1978) Article 20.

Rights (UDHR)⁷⁶ and by the International Covenant on Civil and Political Rights (ICCPR),⁷⁷ but the favourite route for its enforcement is the one of the European Convention on Human Rights (ECHR)⁷⁸ both because of the possibility for individuals to bring cases to the European Court and for the consensus⁷⁹ in the application of this international instrument.⁸⁰ Moreover, the same freedom has more recently been implemented in the EU, at article 11 of the European Union Charter of Fundamental Rights (EUCFR).⁸¹

Memes, therefore also have a role in current democracies. In fact, the protection of freedom of expression is mainly considered as 'one of the essential foundations of a democratic society, and one of the basic conditions for its progress and for each individual's self-fulfilment'.⁸² This is particularly valid for political memes. Indeed, empirical studies have demonstrated the influence that such memes may have in relation to elections.⁸³ In fact, online censorship and limitation to access are indeed common among authoritarian regimes,⁸⁴ and it is no coincidence that countries which are considered to be less democratic have been limiting or banning some memes, as is the case in China.⁸⁵ Reasoning *a contrario*, it is arguable that the freedom to create and share memes is indicative of the fact that the country in which memes are allowed is democratic.

In addition to the creators' freedom of expression, memes may also involve the other users' right to receive and seek information. This right is expressly stated in the ECHR and in the EUCFR, which also imposes the freedom and pluralism of media.⁸⁶ Indeed, memes deliver information in a peculiar way, and the contents used offer the non-verbal or the background information that is needed to interpret it.⁸⁷ Interestingly, considering an empirical study about credibility and

⁷⁶ Adopted 10 December 1948 UNGA Res 217 A(III) Article 19.

⁷⁷ Adopted 16 December 1966 UNGA Res 2200 A(XXI) Article 19.

⁷⁸ Convention for the Protection of Human Rights and Fundamental Freedoms as amended Article 10.

⁷⁹ Laurence R. Helfer 'Consensus, Coherence and the European Convention of Human Rights' [1993] Cornell International Law Journal 133.

⁸⁰ Patricia Akester, 'The Political Dimension of the Digital Challenge - Copyright and Free Speech Restrictions in the Digital Age' [2006] 1 IPQ 16 21.

⁸¹ 2000.

⁸² *Palomo Sánchez and Others v Spain* [2011] ECtHR [GC] 28955/06, 28957/06, 28959/06, 28964/06 para 53.

⁸³ David M Beskow, Sumeet Kumar and Kathleen M Carley, 'The Evolution of Political Memes: Detecting and Characterizing Internet Memes with Multi-Modal Deep Learning' (2020) 57 Information Processing & Management 102170.

⁸⁴ Akester (n 80).

⁸⁵ Stephen McDonnell, 'Why China Censors Banned Winnie the Pooh' *BBC News* (17 July 2017) <<https://www.bbc.com/news/blogs-china-blog-40627855>> accessed 14 June 2022.

⁸⁶ Article 11(2).

⁸⁷ Grundlingh (n 2) 154.

persuasiveness of COVID-19 related memes,⁸⁸ it can be easily compared to any more traditional research on the sources of information. These characteristics of memes should therefore be taken into consideration to maintain the pluralism of media, although they may also be dangerous as their visual narrative may spread 'fake news' and be 'weaponised' against specific groups.⁸⁹

In truth, these fundamental freedoms are not absolute, as they may in some cases be subject to restrictions, for instance for the protection of 'rights of others'.⁹⁰ In this regard, the 'positive value' of memes in relation to fundamental rights might be counterbalanced by a 'negative value' when considering the intellectual property of the original content's rightsholder. In fact, intellectual property is sometimes recognised as a fundamental right,⁹¹ but its relationship with the freedom of expression is controversial. Restrictions to memes through copyright law, such as the 'Memes Ban' have been deemed dangerous for freedom of expression,⁹² nevertheless, the role of copyright is ambiguous, as it is also intended to promote freedom of speech, although it can restrict it, thus constituting the 'Copyright Paradox'.⁹³ However, from the praxis of online communities it seems that the need for the majority to express themselves using memes, as well as the net externalities of the use of memes, are strong expression engines.

Other fundamental rights might be relevant in relation to memes. An example can be the freedom of association,⁹⁴ as it is arguable that they might contribute to the creation of online communities, especially considering that they are based on 'common grounds' for the communication.⁹⁵ Besides, the possible economic value generated by memes may recall the freedom to conduct business⁹⁶ of the ones benefitting from that. Nonetheless, the commercial context should not deceive interpreters into considering the freedom of expression excluded. Indeed, the use of the term 'everyone' in article 10 ECHR implies that it is also applicable to legal persons,⁹⁷ and the aim of profit does not exclude such freedom.⁹⁸ Arguably, this solution is

⁸⁸ Ben Wasike, 'Memes, Memes, Everywhere, nor Any Meme to Trust: Examining the Credibility and Persuasiveness of COVID-19-Related Memes' (2022) 27 *Journal of Computer-Mediated Communication* 1.

⁸⁹ Christopher A Smith, 'Weaponized Iconoclasm in Internet Memes Featuring the Expression "Fake News"' (2019) 13 *Discourse & Communication* 303.

⁹⁰ E.g., Article 10(2) ECHR.

⁹¹ E.g., Article 27(2) UDHR, Article 17(2) EUCFR, and national provisions as Article 42 of the Portuguese Constitution 1976 (revised 2005).

⁹² Joao Paulo Capelotti, 'The Dangers of Controlling Memes through Copyright Law' (2020) 8 *The European Journal of Humour Research* 115. Capelotti also treated a restriction to memes in Brazil.

⁹³ Neil Weinstock Netanel, *Copyright's Paradox* (Oxford University Press 2008).

⁹⁴ Article 11 ECHR.

⁹⁵ Grundlingh (n 2) 153.

⁹⁶ Article 16 EUCFR.

⁹⁷ William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, Incorporated 2015) 455.

⁹⁸ *Société de Conception de Presse et d'Édition and Ponson v France* [2009] ECtHR 26935/05 para 34.

inevitable also because of the sometimes-unpredictable indirect benefits that memes may entail. Further, it might be linked to the increasingly high number of companies stressing their values in a way that can sometimes be controversial, as in the case of the geographically differentiated use of the LGBTQI+ flag during Pride Month.⁹⁹ However, the consequence of this is that memes maintain their fundamental-rights-related value even in the commercial context, and it is therefore desirable to protect it (or at least assess it) in any circumstance.

2.2. The economic value of memes

2.2.1. Indirect benefits and 'meme marketing'

The dynamics of the digital environment indicate new indirect means to create economic value and profit. In this context memes only differ from other contents due to the fact that most of them have a humoristic nature, and this feature might be precisely their commercial strength. Notably, 'meme marketing' is a commercial phenomenon that seems not to be temporary, as many brands keep using memes as a form of advertisement.¹⁰⁰ Indeed, the effectiveness of this strategy relies on the borrowing of the memes effect to seek the engagement of consumers, especially younger people.¹⁰¹ Hence, memes can alter the perception of the brand, its social influence, and the behavioural intentions of consumers.¹⁰² Remarkably, there is no direct economic income for the brand, but rather indirect benefits through the enhancement of the brand's image and the modification of consumers' preferences. Another obscure aspect to consider is that personal data collection of users engaging with memes, as most data, may have an economic value that is often ignored.¹⁰³

2.2.2. New digital jobs

The line between brands and individuals on platforms has been blurring, as in the contemporary digital world, 'people are media companies'.¹⁰⁴ Memes can be tools for these new digital professions. Indeed, as there is an 'attention economy' in which consumers pay with their

⁹⁹ Stephen Daisley, 'When Will Companies End Their Embarrassing Pride Hypocrisy? | The Spectator' <<https://www.spectator.co.uk/article/when-will-companies-end-their-embarrassing-pride-hypocrisy>> accessed 14 June 2022.

¹⁰⁰ Aidan Cole, 'Council Post: More Than A Trend: Meme Marketing Is Here To Stay' (*Forbes*) <<https://www.forbes.com/sites/forbesagencycouncil/2018/07/19/more-than-a-trend-meme-marketing-is-here-to-stay/>> accessed 14 June 2022.

¹⁰¹ Sorina Vasile, Lebogang Mototo and Tinashe Chuchu, 'Using "Memes" as a Marketing Communication Tool in Connecting with Consumers within the Age of Digital Connectivity' (2021) 11 *International Review of Management and Marketing* 30.

¹⁰² *Ibid.*

¹⁰³ Sarah Spiekermann and Jana Korunovska, 'Towards a Value Theory for Personal Data' (2017) 32 *Journal of Information Technology* 62.

¹⁰⁴ Aron Levin, *Influencer Marketing for Brands* (Apress Berkeley 2020) Ch 2.

attention,¹⁰⁵ individuals on platforms can become influencers and earn incomes in several ways. Examples of that are the YouTube Partner programme,¹⁰⁶ and the possibility to be remunerated on Instagram, both directly from Instagram,¹⁰⁷ from users through badges,¹⁰⁸ subscriptions¹⁰⁹ or the purchase of merchandise¹¹⁰ or by negotiating partnerships with brands.¹¹¹ Thus, Instagram creators can be paid while brands can pursue Instagram's promise: 'Gain value today, set strong foundations for tomorrow',¹¹² and while the real value of each content is unknown, there are online calculators that create esteem from the engagement of a profile, as well as the number of its followers.¹¹³ This can also be applied to profiles that only share memes, and notably to people who 'accidentally became a meme', as most of them have created an occupation out of it.¹¹⁴

¹⁰⁵ Ibid. 144.

¹⁰⁶ 'YouTube Partner Programme Overview and Eligibility - Google AdSense Help' <<https://support.google.com/adsense/answer/72851?hl=en-GB>> accessed 15 June 2022.

¹⁰⁷ 'Instagram Bonuses: Learn How to Earn Money on Instagram with Bonuses' (*Instagram for Creators*) <<https://creators.instagram.com/earn-money/instagram-bonuses>> accessed 15 June 2022.

¹⁰⁸ 'Go Live and Earn Extra Income With Instagram Badges' (*Instagram for Creators*) <<https://creators.instagram.com/earn-money/badges>> accessed 15 June 2022.

¹⁰⁹ 'Subscriptions: Learn How To Use Instagram's Paid Subscriptions to Earn Monthly Income' (*Instagram for Creators*) <<https://creators.instagram.com/earn-money/subscriptions>> accessed 15 June 2022.

¹¹⁰ 'Reach More Customers With Instagram's Free Shopping Tools' (*Instagram for Creators*) <<https://creators.instagram.com/earn-money/shopping>> accessed 15 June 2022.

¹¹¹ 'Partner With Brands and Earn With Instagram's Branded Content' (*Instagram for Creators*) <<https://creators.instagram.com/earn-money/branded-content>> accessed 15 June 2022.

¹¹² 'Discover How Brands and Creators Are Collaborating on Instagram' (*Instagram for Business*) <<https://business.instagram.com/collaborate-with-creators>> accessed 15 June 2022.

¹¹³ E.g., 'Instagram Pricing Calculator: Estimate Influencer Rates and Earnings' (*inzpire.me*) <<https://inzpire.me/instagram-pricing-calculator>>, 'Free Instagram Money Calculator' (*HypeAuditor.com*) <<https://hypeauditor.com/free-tools/instagram-money/>> accessed 15 June 2022.

¹¹⁴ BuzzFeed interviewed some 'meme characters' and created a playlist on youtube that highlights their professional transformations. E.g., 'I Accidentally Became A Meme: Kombucha Girl' (BuzzFeedVideo, 2020) <<https://www.youtube.com/watch?v=rbyXWZVx5Hc>> accessed 8 August 2022.



Fig.7 @dudewithsign (Instagram) <<https://www.instagram.com/p/B6L6foUFv0JJ/>> accessed 15 June 2022.



Fig.8 @dudewithsign (Instagram) <<https://www.instagram.com/p/B7q-4KQF2Za/>> accessed 15 June 2022.

2.2.3. Memes as assets

Alongside this, there are other cases in which memes assume more directly economic value, becoming assets, where they can imply exchanges of money. In addition to the possibility to license memes,¹¹⁵ the newest and more expanding phenomenon in this sense is the one of NFTs. More and more memes have been sold as digital objects thanks to the blockchain technology,¹¹⁶ as the 'Disaster Girl' for \$500,000,¹¹⁷ and 'Side Eyeing Chloe' for \$74.000.¹¹⁸ Furthermore, despite their low and ironic exchange rate, the phenomenon of 'meme coins', which are a cryptocurrency created by using memes (such as the 'Dogecoin'), are indeed forms of investment that are popularising cryptocurrencies.¹¹⁹ Lastly, some meme-generating platforms, apart from benefitting from advertisement, can offer premium subscriptions,¹²⁰ thus being particularly critical for copyright.¹²¹ In sum, memes may acquire an economic value in many ways, and this creation of value should be promoted.

2.3. The cultural value of memes

Another underestimated aspect of memes is their cultural importance. Culture cannot easily be defined, as it is 'a fuzzy concept without fixed boundaries, meaning different things according to situations'.¹²² The complexity of this is also reflected in the different sources of law and policy, with national constitutional provisions protecting it,¹²³ International Organisations such as UNESCO, and in the EU even a supranational competence derived from the Treaties.¹²⁴ However, an attempt to legally define 'cultural heritage' can be found in article 2 of the Faro Convention¹²⁵ as 'a group of resources inherited from the past which people identify, independently of

¹¹⁵ Patel (n 13) 237.

¹¹⁶ Tim Marcin, 'Classic Memes That Have Sold as NFTs' (*Mashable*, 20 June 2021) <<https://mashable.com/article/classic-memes-sold-nft-prices>> accessed 15 June 2022.

¹¹⁷ Marie Fazio, 'The World Knows Her as "Disaster Girl." She Just Made \$500,000 Off the Meme.' *The New York Times* (29 April 2021) <<https://www.nytimes.com/2021/04/29/arts/disaster-girl-meme-nft.html>> accessed 15 June 2022.

¹¹⁸ Thomas Engrand, 'Le NFT du célèbre mème «Side Eyeing Chloe» vendu 74.000 dollars' *LEFIGARO* (25 September 2021) <<https://www.lefigaro.fr/secteur/high-tech/le-nft-du-celebre-meme-side-eyeing-chloe-vendu-74-000-dollars-20210925>> accessed 15 June 2022.

¹¹⁹ Kenneth Rapoza, 'Why Are Meme Coins Still A Thing, And Are They Worth The Gamble?' (*Forbes*) <<https://www.forbes.com/sites/kenrapoza/2022/04/24/why-are-meme-coins-still-a-thing-and-are-they-worth-the-gamble/>> accessed 15 June 2022.

¹²⁰ E.g., 'Imgflip Pro' <<https://imgflip.com/pro?from%C2%BCfooter>> accessed 13 June 2022.

¹²¹ Bonetto (n 30) 995.

¹²² José M Causadias, 'What Is Culture? Systems of People, Places, and Practices' (2020) 24 *Applied Developmental Science* 310.

¹²³ E.g., Italian Constitution Article 9, 'Préambule de la Constitution du 27 octobre 1946' Article 13 (France).

¹²⁴ Consolidated versions of the Treaty on European Union (TEU) Article 3, and the Treaty on the Functioning of the European Union (TFEU) Article 6 [2016] OJ C202/1. European Commission, 'EU Competences in the Field of Culture | Culture and Creativity' <<https://culture.ec.europa.eu/node/63>> accessed 11 June 2022.

¹²⁵ Convention on the Value of Cultural Heritage for Society 2005.

ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge, and traditions’.

Memes may promote cultural heritage. Notably, ‘art memes’ can actualise classical heritage by using works of fine arts for different purposes, and thus associate it with the mass culture.¹²⁶ This is the case of the many Medieval paintings brought to other contexts. These pieces of art are not usually well known, but users may become more familiar with them and be encouraged to know more about them. Moreover, nowadays technologies like Google Lens¹²⁷ can facilitate this process, as it permits the ability to search for online results from images. Therefore, there is no need for the meme creator to explicitly refer to the work for the user to find the name and the location – as well as further information – of it. Similar considerations may be made in relation to music within ‘video-memes’ and software such as Shazam,¹²⁸ which recognises audio tracks. However, a more critical point may be raised in relation to cultural appropriation. For instance, the ‘Coffin Dance meme’¹²⁹ originates from a Ghanaian tradition,¹³⁰ and this might be perceived as offensive. Nevertheless, apparently, even in that case, the virality of the meme was positively received by the local population, also due to the possibility for their tradition to be globally known.¹³¹

¹²⁶ OS Sapanzha and DE Ershova, ‘Verbal in Fine Arts: Use of Quotes, Words and Expressions in Modern Art Memes’ [2017] *Russian Linguistic Bulletin* 56.

¹²⁷ ‘Google Lens - Search What You See’ <<https://lens.google/>> accessed 11 June 2022.

¹²⁸ ‘Shazam - Music Discovery, Charts & Song Lyrics’ (*Shazam*) <<https://www.shazam.com>> accessed 11 June 2022.

¹²⁹ Kaitagon, *Coffin Dance Original Video [1080HD]*(2020) <<https://www.youtube.com/watch?v=LV6AHWLIsqo>> accessed 11 June 2022.

¹³⁰ ‘Coffin Dance / Dancing Pallbearers | Know Your Meme’ <<https://knowyourmeme.com/memes/coffin-dance-dancing-pallbearers>> accessed 12 June 2022.

¹³¹ Marko Zoric, ‘The Dancing Pallbearers Who Became a Morbid Meme’ *BBC News* <<https://www.bbc.com/news/av/world-africa-52503049>> accessed 12 June 2022.

That friend that always say they're fine even when they clearly aren't



Fig.9 @ancient_memez (Instagram) <https://www.instagram.com/p/Cgy_jkKvqZH/> accessed 7 August 2022.



Fig.10 Coffin Dance Original Video [1080HD] <<https://www.youtube.com/watch?v=LV6AHWLsqo>> accessed 15 June 2022.

In other cases, memes can be learning and expressive tools that can contribute to progress. In social media there are many examples of highly specific memes about law (e.g., Fig.11), philosophy, science, etc. Patel argues that memes entail 'cultural interchange', as they advance culture by 'provid[ing] more avenues of expression, thus increasing the chance that a message can be transmitted to someone in an effective way'.¹³² Consequently, memes can be useful to criticise, comment, report and teach by making subjects easier.¹³³ This is also confirmed by

¹³² Patel (n 13) 252.

¹³³ Ibid.

empirical research highlighting the potentialities of the use of memes in education and teaching.¹³⁴



Fig.11 Dank Law Memes / Via Facebook (BuzzFeed) <https://www.buzzfeed.com/aishwaryasatpathy2/no-objection-to-these-jokes-my-lord?utm_source=dynamic&utm_campaign=bfsharecopy&sub=0_120302396#120302396> Accessed 17 June 2022.

However, it is also to be pointed out that memes *per se* are a form of contemporary culture, and as such they should be preserved. Indeed, the Faro Convention stresses the importance for law and policy to promote 'contemporary creativity'¹³⁵ as this would probably fall in the future within the definition of Article 2. This is the case with memes, as they have also been defined as 'cultural

¹³⁴ Aniela Mendez-Reguera and Mildred Vanessa Lopez Cabrera, 'Engaging My Gen Z Class: Teaching with Memes' (2020) 30 Medical Science Educator 1357; Rishabh Reddy and others, 'Joy of Learning Through Internet Memes' (2020) 10 International Journal of Engineering Pedagogy (iJEP) 116.

¹³⁵ Article 5(e).

unit[s]'.¹³⁶ In fact, it has been pointed out¹³⁷ that memes belong to Lessig's 'Remix culture',¹³⁸ which is highly beneficial for society and should not be restricted.¹³⁹

Further, memes contribute to the creation of online subcultures by creating a sense of identity,¹⁴⁰ and these usually challenge the mainstream discourse.¹⁴¹ The 'meme trading' phenomenon on Reddit's r/MemeEconomy¹⁴² is an extremely interesting example of how cultural value is created and assessed by online communities, depending on the distance of the mainstream, the versatility of the content, its topicality and its quality.¹⁴³ Such contemporary cultural value should be preserved, as in the future it may increase exponentially, as with the ancient vases that are now exposed in museums.

Chapter III: Assessing and rethinking EU copyright law for memes

This chapter assesses the status of the challenge of memes in EU copyright. Section A discusses the suitability of EU copyright exceptions, while Section B analyses the alleged 'Memes ban' of Article 17 of the CDSM Directive. Section C concludes by proposing possible solutions to give more clarity to memes under EU law.

3.1. Seeking exceptions for memes

3.1.1. The balancing in specific exceptions

The rationales of the EU system of exceptions rely on the importance of finding a balance in copyright.¹⁴⁴ Notably, this tries to balance the interests of authors, publishers (or other exploiters), and users (the 'golden triangle').¹⁴⁵ Specific exceptions such as the EU ones also maintain their own specific justifications.¹⁴⁶ Indeed, when comparing the EU exceptions to the

¹³⁶ Noel Murray, Ajay Manrai and Lalita Manrai, 'Memes, Memetics and Marketing: A State of the Art Review and a Lifecycle Model of Meme Management in Advertising' [2013] *Routledge Companion on the Future of Marketing* 331.

¹³⁷ Bonetto (n 30).

¹³⁸ Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Bloomsbury Publishing 2009).

¹³⁹ *Ibid.* 77.

¹⁴⁰ Ioana Literat and Sarah van den Berg, 'Buy Memes Low, Sell Memes High: Vernacular Criticism and Collective Negotiations of Value on Reddit's MemeEconomy' (2019) 22 *Information, Communication & Society* 232 244.

¹⁴¹ Ryan M Milner, *The World Made Meme: Public Conversations and Participatory Media* (The MIT Press 2016).

¹⁴² 'r/MemeEconomy is a place where individuals can buy, sell, share, make, and invest in templates freely.' <<https://www.reddit.com/r/MemeEconomy/>> Accessed 19 June 2022.

¹⁴³ Literat (n 140) 232.

¹⁴⁴ InfoSoc Directive, Recital 31.

¹⁴⁵ Barbara Ringer, 'Le droit d'auteur et l'avenir de la création intellectuelle' [1976] *Le Droit d'Auteur* 158.

¹⁴⁶ Pamela Samuelson, 'Justifications for Copyright Limitations and Exceptions' in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (1st ed, Cambridge University Press 2017).

American Fair Use,¹⁴⁷ they both attempt to find this equilibrium, but while the latter evaluates the specificities of the potential infringement on a case-by-case open-ended basis,¹⁴⁸ the former adopts an assessment in legislation, as do most Civil law countries.¹⁴⁹ This approach aims at legal certainty, but there are tensions with flexibility especially because of technological change and 'borderline cases'.¹⁵⁰ Arguably, as memes are not expressly regulated by EU copyright law, they constitute a challenge for it, because they fall into the flexibility-certainty debate. Indeed, they entail possible conflicts between internet users and the rightsholders of the pre-existing contents. Hence, the three values of memes can be the 'the weights' that determine the suitability of the general framework's balancing to memes.

Hypothetically, some exceptions are likely to apply to memes, but this depends on the case. Arguably, some narrow exceptions might adequately deal with some specific uses of them, but this varies depending on the peculiarities of each case, and on the Member State jurisdiction. For instance, when memes are used for the purpose of teaching,¹⁵¹ an exception¹⁵² may apply, but there are still differences between Member States, and even with the new digital teaching exception¹⁵³ some criticalities persist.¹⁵⁴ An application of these exceptions would recognise the cultural value of memes and protect the freedom to impart and receive information through this means. Furthermore, although the digital teaching exception requires the indication of the source, it also excludes this obligation where this is impossible,¹⁵⁵ which is often precisely the case of memes. However, as exceptions like these are narrowly constructed, it is worth seeking a defence that could cover memes more generally. A candidate for this is notably the one for parody, caricature, and pastiche,¹⁵⁶ given the main humoristic intent of most memes.

3.1.2. Memes and parodies

The parody exception may be adapted to memes because they may comply with its requirements, and it addresses the issue of freedom of expression. In *Deckmyn*¹⁵⁷ the CJEU

¹⁴⁷ Title 17 United States Code (USC) §107 1947 (revised 1976) as amended.

¹⁴⁸ Samuelson (n 146).

¹⁴⁹ Samuelson (n 146) 45.

¹⁵⁰ Tito Rendas, *Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty* (Wolters Kluwer Law International 2021) Ch 3.

¹⁵¹ See Section 2.3.

¹⁵² Article 5(3)(a) InfoSoc Directive.

¹⁵³ Article 5 CDSM Directive.

¹⁵⁴ Giulia Priora, Bernd Justin Jütte and Péter Mezei, 'Copyright and Digital Teaching Exceptions in the EU: Legislative Developments and Implementation Models of Art. 5 CDSM Directive' (2022) 53 IIC - International Review of Intellectual Property and Competition Law 543.

¹⁵⁵ Article 5(2)(b) CDSM Directive.

¹⁵⁶ Article 5(3)(k) InfoSoc Directive.

¹⁵⁷ Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* (2014) ECLI:EU:C:2014:2132.

clarified that the concept of parody is autonomous of EU law, and it is to be interpreted uniformly.¹⁵⁸ Furthermore, the Court highlighted the two essential features of parodies, which have 'to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery'.¹⁵⁹ This might be the case of many memes created for humoristic purposes, and while they might not be 'noticeably different' from the existing work, it is to be pointed out that the evaluation must also take into account the context.¹⁶⁰ Therefore, it may be argued that members of online communities can recognise the difference between pre-existing works and their uses *as memes*. Moreover, there is no requirement of acknowledging the source,¹⁶¹ hence the practice is compatible with the EU parody. Considering the values of memes, as the CJEU explicitly stated the importance of finding a balance between the interests of rightsholders and the freedom of expression of parodists,¹⁶² this value seems to be part of the legal reasoning in this context. Cultural relevance is not mentioned by the Court, nevertheless, there might be room for that by including it into the public interest that is part of the balancing.¹⁶³

Despite the apparent suitability of parody to memes, this is a complicated legal creation, which entails several problems that result in uncertainty, especially when applied to memes. In fact, the concept of parody is still nebulous, and it is used as an 'umbrella term' for different meanings.¹⁶⁴ With regard to the requirement of 'humour or mockery' it is not clear whether a humoristic intent is sufficient or if it is necessarily a humoristic effect,¹⁶⁵ in any case, as not all memes have humoristic nature, they may not benefit from this exception. Furthermore, concerning the other requirement of the parody being 'noticeably different' from the pre-existing work, a different interpretation may deny it for most memes by adopting an objective visual comparison between the two, rather than considering the perception of average internet users. The uncertainty of this exception is exacerbated by the fact that it was not mandatory,¹⁶⁶ and some countries may have different approaches to parodies. This was the case of the 'free use' in Germany before the recent reform,¹⁶⁷ and it is still the case in Italy, where the parody

¹⁵⁸ *Ibid.* paras 14-17

¹⁵⁹ *Ibid.* para 20.

¹⁶⁰ *Ibid.* para 19.

¹⁶¹ *Ibid.* para 21.

¹⁶² *Ibid.* para 25.

¹⁶³ *Ibid.* para 25 and Recital 3 InfoSoc Directive.

¹⁶⁴ Sabine Jacques, *The Parody Exception in Copyright Law* (Oxford University Press 2019) 1.

¹⁶⁵ Eleonora Rosati, 'Just a Laughing Matter? Why the Decision in Deckmyn Is Broader than Parody' (2015) 52 *Common Market Law Review* 511.

¹⁶⁶ Article 5 InfoSoc Directive.

¹⁶⁷ Former Section 24 German Copyright Act, examined by the CJEU in C-476/17 *Pelham GmbH and others v Ralf Hütter and Florian Schneider-Esleben* (2019) ECLI:EU:C:2019:624.

exception was not implemented,¹⁶⁸ and courts refer to constitutional norms.¹⁶⁹ Moreover, the imposition of a 'fair balance'¹⁷⁰ might have increased the ambiguities of the exceptions. Indeed, the interferences of the author's moral rights as in *Deckmyn* may lead to private censorship,¹⁷¹ and there are doubts about the commercial uses of parodies. For instance, in France profit has been considered compatible with this exception where there is humour and there is no harm to the author or unfair competition.¹⁷² It has been deemed that UGCs are likely to be 'fair', while this is not the case for commercial advertising.¹⁷³ This is critical for memes as they usually belong to the first category, but they may acquire economic value, as argued in the previous chapter, thus further blurring the lines of fairness. Therefore, the current parody exception is not undoubtedly applicable to memes, or – at least – it might not be applicable to some memes.

3.1.3. Memes and quotations

An alternative exception apparently generally applicable to memes is the one for quotation.¹⁷⁴ In fact, Scholars have been discussing the extension of this exception starting from Article 10(1) of the Berne Convention. Ricketson and Ginsburg argue that it 'comes closest to embodying a 'user right' to make quotations',¹⁷⁵ while Aplin and Bently suggest its broadening to a 'global mandatory fair use' that should not be limited by precise purposes.¹⁷⁶ In *Painer*¹⁷⁷ the CJEU found a fair balance of rights on the side of the freedom of expression of users.¹⁷⁸ This may play in favour of applying this exception to UGCs such as memes, *a fortiori* because although the quotation exception was notably applied to literary works, it 'may also apply to other categories of work, in particular musical and cinematographic works, as well as works of visual art'.¹⁷⁹ In particular, the Advocate General's opinion for the *Painer* decision considered that full quotations of whole photos might be covered by this exception although traditionally they should be only partial for

¹⁶⁸ Except for the newly introduced Article 102-nonies of the Italian Copyright Law implementing Article 17 CDSM Directive.

¹⁶⁹ E.g., Trib. Milano, 29 gennaio 1996 (ord.) Tamaro c. Luttazzi Il Foro Italiano 1996 119 4.

¹⁷⁰ *Deckmyn* (n 157) para 32.

¹⁷¹ Daniël Jongsma, 'Parody After *Deckmyn* – A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and The Netherlands' (2017) 48 IIC – International Review of Intellectual Property and Competition Law 652.

¹⁷² Dinusha Mendis and Martin Kretschmer, 'The Treatment of Parodies under Copyright Law in Seven Jurisdictions. A Comparative Review of the Underlying Principles' (2013) 18.

¹⁷³ Bently and others (n 34) 252.

¹⁷⁴ Article 5(3)(d) InfoSoc Directive.

¹⁷⁵ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (3rd edn, Oxford University Press 2022) 772.

¹⁷⁶ Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press 2020).

¹⁷⁷ Case C-145/10 *Eva-Maria Painer v. Standard Verlags GmbH and Others* (2011) ECLI:EU:C:2011:798.

¹⁷⁸ *Ibid.* para 135.

¹⁷⁹ Case C-516/17 *Spiegel Online GmbH v. Volker Beck*, Opinion of AG Szpunar (2019) EU:C:2019:16 paras 41-42.

texts.¹⁸⁰ Furthermore, despite the obligation to mention the source of the quotation of Article 5(3)(d), for memes this is often impossible and accordingly not necessary. It might even be arguable that the current already mentioned¹⁸¹ ease to search for the source of contents may – or, better, should – be taken into consideration to make such explicit acknowledgments superfluous.

However, *de iure condito* there are several arguments against the application of quotations to memes. The quotation exception was not mandatory in the InfoSoc Directive,¹⁸² and the CJEU expressly negated its full harmonisation,¹⁸³ therefore there can still be differences in its application depending on the Member State. Parkin highlights the narrower scope of this exception, which is not ‘fair use by another name’.¹⁸⁴ She argues that it is not sufficient for a quotation to be identifiable as such by its audience, but rather it is to be ‘intentionally identified’ as such.¹⁸⁵ Accordingly, this exception would definitively not be applicable to memes. Conversely, following the approach of the ‘identifiable form’¹⁸⁶ the very nature of memes could be interpreted as a peculiar form of quotation that is comprehended as such by online communities. Nevertheless, Parkin remarkably argues that the purposes of the quotation are limited to criticism, review, or analogous purposes, hence most memes may not benefit from this defence.¹⁸⁷ Thus, there is no certain general exception for memes in the EU, only specific, questionable, and not completely harmonised defences, which may not maximise their values.

3.2. Article 17 of the CDSM Directive and the ‘Memes Ban’

Memes were under the spotlight in EU copyright law during the discussion of article 17 (former 13) of the CDSM Directive, which was perceived as a ‘Memes Ban’. The process of harmonisation of EU copyright law has been strictly connected to EU’s economic policies.¹⁸⁸ In fact, the (economic) ‘value gap’ – meaning the difference between the earning of rightsholders and those of the players of the online value chain¹⁸⁹ – was the basis and the justification for the questionable

¹⁸⁰ Painer (n 177) Opinion of AG Trstenjak para 212. This differentiation is explicit in Article 32(1) of the Spanish Intellectual Property Law.

¹⁸¹ Text to n 127-128.

¹⁸² Article 5(3).

¹⁸³ Case C-516/17 Spiegel Online GmbH v. Volker Beck (2019) EU:C:2019:16 paras 16-39.

¹⁸⁴ Jane Parkin, ‘The Copyright Quotation Exception: Not Fair Use by Another Name’ (2019) 19 Oxford University Commonwealth Law Journal 55.

¹⁸⁵ *Ibid.* 75.

¹⁸⁶ Painer AG Opinion (n 180) 210.

¹⁸⁷ Parkin (n 184) 78.

¹⁸⁸ Benjamin Farrand, ‘From a ‘Digital Agenda for Europe’, to a ‘Digital Single Market’, to a ‘Europe Fit for the Digital Age’, a Decade of European Union Copyright Policy in the Shadow of Crises’. in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law A Commentary* (Edward Elgar 2021) 968.

¹⁸⁹ Christina Angelopoulos, ‘EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence’ (*Kluwer Copyright Blog*, 6 October 2016)

Article 17 CDSM Directive, concerning the liability of online content-sharing service providers' (OCSSPs).¹⁹⁰ Indeed, according to the *topos* of the 'value gap,' platforms are dangerous parasites for authors.¹⁹¹ The debates were mainly linked to the risks of filtering technologies for users' freedom of expression.¹⁹² However, the cultural significance of memes should have been better understood from the mobilisation of online communities. Furthermore, the argument of the alleged 'value gap' should lose most of its relevance for memes as new economic value can be created, and it has no reason to be limited merely because the one who benefits from it is not the rightsholder of the pre-existing work.



Fig.12 LAXNUT90 (Vice) <<https://www.vice.com/en/article/qvny8v/some-genius-memers-are-creatively-fighting-the-eus-possible-meme-ban>> Accessed 9 August 2022

The EU has tried to negate the existence of a 'Memes Ban' by stressing the safeguards of article 17. Indeed, the Directive imposes to find a balance with the freedoms of users,¹⁹³ and this is something that was also recommended by Scholars for the national implementations,¹⁹⁴ as well

<<http://copyrightblog.kluweriplaw.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/>> accessed 23 July 2022.

¹⁹⁰ European Commission, 'Promoting a Fair, Efficient and Competitive European Copyright-based Economy in the Digital Single Market' (Communication) COM(2016) 592 final 4.

¹⁹¹ Ula Furgał, Martin Kretschmer and Amy Thomas, 'Memes and Parasites: A Discourse Analysis of the Copyright in the Digital Single Market Directive' (Zenodo 2020) 20 <<https://zenodo.org/record/4085050>> accessed 23 July 2022.

¹⁹² Giancarlo Frosio, 'Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy' (2017) 112 *Northwestern University Law Review* 19.

¹⁹³ Recital 70 CDSM Directive.

¹⁹⁴ João Pedro Quintais and others, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics' (2020) 10 *JIPITEC*.

as by the CJEU in the Polish challenge to article 17.¹⁹⁵ The Court stated the unavoidability of using automatic filtering,¹⁹⁶ and the proportionality of the safeguards in the article.¹⁹⁷ It is precisely on the basis of one of these, which is the mandatory observation of the quotation and parody exceptions,¹⁹⁸ that memes have been alleged to be safe. Accordingly, the EU Commission stressed the absence of a 'Memes Ban' (e.g., Fig.13), which was also specified in the guidance on article 17, which affirms that 'creating a 'meme', would generally not be manifestly infringing (this example may be covered by the parody exception).¹⁹⁹



Fig.13 European Commission [@EU_Commission] (Twitter)
<https://twitter.com/EU_Commission/status/1010066160128286721> accessed 2 August 2022.

However, memes are not out of danger, as there is no certainty about whether they can escape filtering. Indeed, as already argued, there are doubts about the application of the two exceptions to at least some memes. Hence, the guidance is not that helpful, as the reassurances about their exclusion from article 17 are precisely subject to the parody exception, which is not always applicable. Moreover, even for humorous memes to which the parody exception can be applied,

¹⁹⁵ Case C-401/19 *Republic of Poland v. European Parliament and Council of the European Union* (2022) ECLI:EU:C:2022:297.

¹⁹⁶ *Ibid.* para 54.

¹⁹⁷ *Ibid.* paras 85-91.

¹⁹⁸ Article 17(7).

¹⁹⁹ European Commission, 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' (Communication) COM (2021) 288 final VI.

automated filtering cannot be effective as it entails several problems, because it will always either over-filter or under-filter,²⁰⁰ it is unable to effectively detect E&Ls,²⁰¹ and notably algorithms are humourless.²⁰² Therefore, although the existence of a 'Memes Ban' as perceived at first is to exclude, article 17 is still a potential danger for some memes, due to the lack of clarity about E&Ls for memes and automated filtering. In addition to this, the proposed Digital Services Act²⁰³ may have an impact on memes, but this is something that might be investigated in the future.

3.3. *De iure condendo*: Seeking solutions from the communities' practice

The legal challenge of memes in EU copyright law suggests the need to rethink the current framework in the light of their values. IP theories can have a role in shaping solutions for memes. Notably, welfare and cultural theories better deal with 'peer-based mass creativity',²⁰⁴ as that of memes. In particular, the goal of utilitarian arguments is to maximise the net utility,²⁰⁵ therefore they may advocate for the creation of new economic value through memes. Furthermore, the cultural theory aims to 'foster and sustain a just and attractive culture'²⁰⁶ and in both these theories 'citizens' interests and fundamental rights take centre stage',²⁰⁷ therefore they may assess all three values of memes. The EU has also been dealing with culture in the digital environment, aiming at enhancing the 'access to and promotion of culture, and the access to cultural heritage'²⁰⁸ by means of Article 14 CDSM Directive. Arguably, following these theories such enhancement should not be limited to the public domain, but rather it should also include *mutatis mutandis* the cases of 'contemporary creativity' as memes.

There are several ways in which the discrepancy between copyright law and practice could be mitigated, and this is precisely what the EU should aim towards, although this is not an easy task.

²⁰⁰ Daphne Keller, 'Problems with Filters in the European Commission's Platforms Proposal' (The Center for Internet and Society, 5 October 2017) <<http://cyberlaw.stanford.edu/blog/2017/10/problems-filters-european-commissions-platforms-proposal>> accessed 3 August 2022.

²⁰¹ Sabine Jacques and others, 'Automated anti-piracy systems as copyright enforcement mechanism: a need to consider cultural diversity' (2018) 40(4) E.I.P.R. 218 225.

²⁰² Sabine Jacques, 'The EU Is Trying to Protect Your Memes - but It's a Battle against Humourless Algorithms' (*The Conversation*) <<http://theconversation.com/the-eu-is-trying-to-protect-your-memes-but-its-a-battle-against-humourless-algorithms-112573>> accessed 3 August 2022.

²⁰³ Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' (2020) COM(2020) 825 final.

²⁰⁴ Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity' (2020) 51 IIC - International Review of Intellectual Property and Competition Law 709 741.

²⁰⁵ Lior Zemer, 'On the Value of Copyright Theory' [2006] SSRN Electronic Journal <<http://www.ssrn.com/abstract=1657855>> 5 accessed 17 June 2022.

²⁰⁶ The Berkman Klein Center for Internet & Society, William Fisher, *CopyrightX: Lecture 10.1, Cultural Theory: Premises* (2015) <<https://www.youtube.com/watch?v=sFiKtoE9huA>> accessed 20 June 2022.

²⁰⁷ Frosio, 'Reforming the C-DSM Reform' (n 204) 713.

²⁰⁸ Recital 53 CDSM Directive.

To overcome the doubts over memes being infringing copyright, the EU lawmakers should focus on the values of memes to make them clearly generally lawful. Apart from shifting to a definition of memes as commons,²⁰⁹ the first option may be to adopt a sort of ‘right to meme’, either independently or as part of a ‘natural right to parody’,²¹⁰ of a ‘right to make quotations’²¹¹ or of a ‘right to remix’.²¹² Granting such a right would eliminate many legal paradoxes of the internet and fully recognise the values behind memes. In particular, in relation to parodies, Jacques points out the weaknesses of parody as a defence and advocates the shift to an actual *right* to parody which could better reflect human rights.²¹³ Furthermore, this could also be an inspiration for imagining a copyright system where the ‘meme’, the ‘remix’²¹⁴ are what is generally allowed, and infringements are the exceptions, for example in the case of a manifestly unfair advantage between competitors. Nevertheless, such a shift is currently practically unfeasible, although it can still be a long-term goal for lawmakers.

Another approach to allow memes would be to adopt a fair use limitation in the EU, by adapting that of the US. In fact, American Scholarships argued the availability of the fair use defence for memes.²¹⁵ The introduction of an open-ended general fair use limitation within EU countries alongside the already-existing specific ones is something that was already suggested by Scholars.²¹⁶ For example, this was also discussed in Ireland by the Copyright Review Committee.²¹⁷ Certainly, this would be very positive in terms of adaptability to new circumstances, but arguably this solution might not offer complete legal certainty to memes creators. Furthermore, there might be some difficulties considering the legal traditions of the dominant ‘author’s rights’ system in the EU.²¹⁸ Nonetheless it is still compatible to the EU – and maybe desirable – to adopt E&Ls with a ‘semi-open structure’.²¹⁹

A third and ‘softer’ option may be to extend the already existing exceptions to give more clarity to online communities and to reassure them about the lawfulness of memes. Hence, the EU

²⁰⁹ Section 1.3.

²¹⁰ Amy Lai, *The Right To Parody: Comparative Analysis of Copyright and Free Speech* (1st edn, Cambridge University Press 2019) Ch 2.

²¹¹ Ricketson and Ginsburg (n. 175).

²¹² Lessig (n 138).

²¹³ Jacques, *The Parody Exception in Copyright Law* (n 164) 226.

²¹⁴ Lessig (n 138).

²¹⁵ Patel (n 13); Mielczarek (n 37).

²¹⁶ E.g., Samuelson (n 146).

²¹⁷ Copyright Review Committee, ‘Modernising Copyright’ (2013) <<http://www.cearta.ie/wp-content/uploads/2013/10/CRC-Report.pdf>> accessed 5 August 2022.

²¹⁸ Peter Bernt Hugenholtz, ‘Flexible Copyright: Can the EU Author’s Rights Accommodate Fair Use?’ in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (1st ed, Cambridge University Press 2017).

²¹⁹ *Ibid.* 283.

lawmakers could directly intervene to create a new independent exception or – more realistically – to include memes in a non-exhaustive list of acts that are presumed to be lawful under the parody or quotation exceptions. Consistently, the scope of these exceptions should be expanded and the ‘fair balance’ clarified, hopefully maintaining as the sole external limit the one of the ‘absence of harm’ of the author, thus permitting to comply with the three-step test²²⁰ for E&Ls.²²¹ Otherwise, this could be more easily and gently achieved by issuing acts of soft law as *precise* guidelines to establish a better interpretation of the existing law – and notably the ‘fair balance’ – in this context. They may allow the adoption for judges of a Dworkinian interpretation²²² of the copyright framework, that can address this problem with a bottom-up approach by looking at reality and communities in the first place. This is, in conclusion, the most important thing, regardless of the means, phenomena such as the one of memes which are so widespread, and which encompass such value(s), should be clearly lawful.

Conclusion

Internet memes are a complex phenomenon that can manifest itself in different forms, which may disturb the legal framework in several ways. Notably, memes challenge copyright law for their ambiguous nature. Most memes use pre-existing contents that can have different copyright status, from contents in the public domain to others protected by copyright or neighbouring rights, and they can be allowed by licences or unauthorised, although in practice, communities seem to ignore the issue. Moreover, when memes use copyright protected contents, they entail acts that may infringe the rights of rightsholders. However, it is not clear whether memes are reproductions, derivative works, or transformative uses that may even potentially be independent works. Remarkably, originality may be found in memes, thus paradoxically causing their protection under copyright law. In this chaotic legal context, the practice of memes is widespread and free, and this suggests a different perspective of memes as commons that escape the subject matter of copyright, as languages or ideas.

Most memes make people laugh, but this does not exclude the fact that they are a *serious* thing. The need to preserve and promote their practice is enhanced by the analysis of three ‘values’ that are either inherent or attributed to them. The first one is their relevance for fundamental rights. Indeed, memes can especially be linked to the freedom of expression of their creators, as they are a peculiar form of communication, and they can also have a role in defending democracy and

²²⁰ RBC Article 9(2); Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) 1994 Article 13; WCT Article 10(2).

²²¹ Jacques, *The Parody Exception in Copyright Law* (n 164)100.

²²² Ronald Dworkin, *Law's Empire* (Belknap Press 1986).

media pluralism. Their second value is the economic one, whose creation is peculiar in the digital environment. Memes can generate profit in different manners, starting from the development of indirect benefits functioning as marketing tools. Furthermore, they can create new professions for people in the digital economy. In addition, they may even become real assets that can be sold, for example as NFTs. The last of these values is the cultural importance of memes. This is due not only to their capacity to promote cultural heritage and to contribute to progress. In fact, memes are *per se* culture, as they represent a form of 'contemporary creativity' that should be protected for future generations. All these factors suggest the need and the desirability to make memes clearly lawful.

The practice of memes, combined with their values, are necessary elements for the assessment of the copyright legal framework of the EU. Since there is no express exception applicable to memes, they can be victims of the tension between legal certainty and flexibility that is particularly visible when comparing the EU exceptions to the American fair use defence. As memes can have different functions, some specific exception might potentially apply. However, the search for a general exception for memes appears disappointing. Indeed, while the parody exception and the one for quotation address the issue of the freedom of expression of users, and they both can have affinities with this phenomenon, neither can be applied to all memes with confidence, especially because their limits are disputable. Even by adopting a flexible and extensive interpretation of the criteria set out by the CJEU in *Deckmyn*, the 'fair balance' cannot give certainty about the application of the parody exception to memes, while non-humorous internet memes are clearly excluded from this defence. Similarly, there are debates on the exception for quotation, criticism, and review, but a more rigorous approach to this highlights the inadequacy of this defence for memes. Another critical issue arose in relation to article 17 CDSM Directive and the alleged 'Memes Ban'. Although the creation of new economic value should exempt them from the 'value gap' rhetoric, and despite the reassurance of the EU Institutions about freedom of expression and the absurdity of the ban, memes seem not to be out of danger. The safeguards of Article 17 are not sufficient to 'save' memes, both because of the already treated problems related to the two exceptions and for the flaws of automated filtering.

The analysis of the suitability of the EU copyright legal framework to the phenomenon of memes reveals the need to find new effective ways to reconcile law and practice and enhance memes' values. A driver for hypothetical reforms in this sense should be found in the welfare and cultural theories. Furthermore, this adjustment can be done in several ways. Among these, there is the treatment of memes as commons, the introduction of a 'right to meme', or the adaptation of the

American fair use defence to the EU system. Other options include the creation of a specific new exception or an interpretative development of the current framework to make it more consistent with the reality of online communities.

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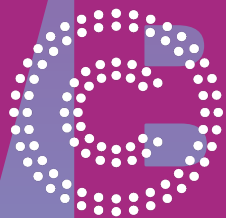
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