

A New Zealand Copyright Analysis of Memes

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With the recent introduction and subsequent approval by the European Parliament of the Directive on Copyright in the Digital Single Market (specifically what is now art 17, or the “upload filter”), the issue of copyright in relation to memes has become an unexpected point of discussion in the realm of intellectual property law. This article examines the question in the context of New Zealand copyright law and argues that, under the current legislation and in the absence of a fair use defence, a large portion of memes would be in violation of copyright. It concludes that major reassessment of the balance struck in the Copyright Act 1994 must be carried out in the review of the Act currently being undertaken if the legislation is to remain relevant today.

I INTRODUCTION

It is no exaggeration to say that anyone who uses social media will have seen a meme (pronounced “meem” as in “cream”,¹ not “mem” as in “them”, and certainly not “meeme”). The popularity of Internet memes has seen their use recognised as a “standard form of communication”² and increasingly incorporated into online marketing. However, rather than use material they have created themselves, meme makers will usually take a phrase, picture or clip from an existing work, giving rise to copyright issues. The Internet meme database, Know Your Meme, for example, has modified several meme entries and removed images in response to cease and desist letters from alleged copyright owners.³ Indeed, before the European Parliament passed its most recent copyright directive on 26 March 2019,⁴ one of the questions at the

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- 1 Richard Dawkins *The Selfish Gene* (40th anniversary ed, Oxford University Press, Oxford, 2016) at 249.
- 2 Elizabeth Rocha “Y U No Let Me Share Memes?! – How Meme Culture Needs a Definitive Test for Noncommercial Speech” (2017) 28 DePaul J Art Tech & Intell Prop L 37 at 37.
- 3 Brad and others “KYM Office of Cease & Desist Records” (9 May 2012) Know Your Meme <<https://knowyourmeme.com>>.
- 4 Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.

forefront of the Internet’s collective mind was whether art 13 (now art 17) — which requires social media platforms to remove infringing content — would spell the death of memes.

Yet despite the prevalence of Internet memes and the takedown notices that have accompanied them, authority and literature on their legal implications are surprisingly scant. Of the small handful of meme-related cases (all from the United States), none directly addresses whether the general making and sharing of memes by ordinary Internet users would constitute copyright infringement. While there has been some discussion in the United States as to whether memes would fall under the defence of fair use,⁵ no such defence exists in New Zealand, and to my knowledge there is no discussion as to what might happen if a copyright infringement case were brought over a meme in this jurisdiction under the Copyright Act 1994 (the Act).

The purpose of this article is to examine this question. Part II explains what a meme is and lays out a method of categorisation to support the legal analysis to follow. Part III identifies the relevant works usually implicated by memes and briefly comments on the originality requirement. Part IV looks at infringement by copying, focusing particularly on the substantiality test in relation to each category of meme. Part V considers the defences of implied licence and fair dealing. At each step, the aim is to eliminate any categories of memes unlikely to meet the requirements for infringement. The ones remaining, if any, are therefore those most likely to result in liability. Finally, Part VI considers the disconnect between copyright law and reality.

II MEMES

Definitions

Carlos Mauricio Castaño Díaz has proposed a comprehensive definition of a meme in his article “Defining and characterizing the concept of Internet Meme”.⁶ The definition aptly captures the immense flexibility of memes and the various forms they may take. Díaz describes a meme as follows:⁷

... a unit of information (idea, concept or belief), which replicates by passing on via Internet (e-mail, chat, forum, social networks, etc.) in the shape of a hyper-link, video, image, or phrase. It can be passed on as an exact copy or can change and evolve. The mutation on the replication can be by meaning, keeping the structure of the meme or vice versa. The

5 See for example Aaron Schwabach “Reclaiming Copyright from the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody” (2012) 8 *Buff Intell Prop LJ* 1; and Ronak Patel “First World Problems: A Fair Use Analysis of Internet Memes” (2013) 20 *UCLA Ent L Rev* 235.

6 Carlos Mauricio Castaño Díaz “Defining and characterizing the concept of Internet Meme” (2013) 6 *Revista CES Psicología* 82.

7 At 97 (emphasis omitted).

mutation occurs by ... addition or parody, and its form is not relevant. ...
It spreads horizontally as a virus at a fast and accelerating speed.

To visualise this definition more concretely, let us look at how two memes would compare using Díaz's definition: the Left Exit 12 Off Ramp (Left Exit 12) meme⁸ and the Big Enough meme.⁹

The Left Exit 12 meme consists of an image of a car swerving into a motorway exit below a motorway sign. To create this meme, existing text on the sign is edited out and replaced with two options, one represented by the main road and one represented by the exit. The car represents a person who is making the choice between the two options. The meme is humorous because the option represented by the main road is ordinarily the expected option, while the one represented by the exit is unexpected or unwise but nevertheless the one chosen. In this way, the meme is used to ridicule or complain about a decision. An example of this meme features "Carlill" superimposed on the car swerving away from "Rest and proper medical treatment" in favour of "Smoke Ball".¹⁰ This is a reference to the facts of *Carlill v Carbolic Smoke Ball Co*, a famous English contract law case in which Carlill sued the Carbolic Smoke Ball Company for not paying her the advertised £100 when their Carbolic Smoke Ball did not prevent her from catching the flu.¹¹

The Big Enough meme, on the other hand, centres on a clip from the music video for the song "Big Enough" by Kirin J Callinan. The relevant clip features a semi-transparent screaming cowboy superimposed into the sky above various landscapes. A Big Enough meme is created by editing this clip together with clips from other media in order to make fun of the song. One variant, for example, involves an edit of a well-known scene from the 1993 film *Jurassic Park*, where the protagonists are shocked to see a live Brachiosaurus for the first time.¹² As the shot builds up to the reveal of the dinosaur, music from "Big Enough" can be heard fading in. Then, instead of cutting to the dinosaur as in the original film, the screaming cowboy clip is played, implying he is the cause of the protagonists' awe.

Using Díaz's definition, we would say that Left Exit 12 replicates in the form of an image while the Big Enough meme replicates in the form of video clips. Both replicate as exact copies when users share a particular variant of the meme. Left Exit 12, however, changes when users edit new captions into the template, while Big Enough changes when users create different video remixes using the original clip. In Left Exit 12, the meaning changes while the structure of an edited motorway sign is kept; in Big Enough, it is the structure that changes (different remixes and parodies) while the meaning (to make fun of the original clip) stays the same. Both, however, are memes because they are edited and shared widely on the Internet in a humorous manner.

8 Matt "Left Exit 12 Off Ramp" (4 January 2018) Know Your Meme <<https://knowyourmeme.com>>.

9 Don "Big Enough" (10 October 2017) Know Your Meme <<https://knowyourmeme.com>>.

10 This was posted on the Facebook page "Ultra Vires Memes for Constitutionally Inclined Teens": <www.facebook.com>.

11 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA).

12 r0wd3 "Welcome to Jimmy Park" (24 September 2017) YouTube <www.youtube.com>.

Strictly speaking, then, it is incorrect to ask whether a *meme* infringes copyright. Instead, it should be asked whether *particular variants* of the meme do, since “meme” refers to the idea as opposed to the expression. Nevertheless, the word “meme” is commonly used to refer to both idea and expression interchangeably, and I hope that context will make it obvious which I mean in the rest of this article.

Categorisation

In order to deal with memes in the abstract in a way that is suitable for copyright analysis, it is useful to categorise them according to the following three dimensions:

- (a) the form of the meme;
- (b) the source of material used in the meme; and
- (c) the way the meme is used.

The way the meme is used is relevant when considering whether any defences might apply and is addressed in more detail in Part V.

The form of the meme and the material a meme borrows are relevant to establish what copyright work is involved and whether there is infringement. They tell us two important things: what has been taken and where it was taken from. These dimensions can be placed together to form the following table.

Source of borrowed material	Format of the meme			
	Text only	Still image	GIF ¹³	Video
Movie				
TV show				
Video game				
Song or music video				
Photo				
Drawing or comic				
Internet video				
Real life event				

Table 1

13 GIF stands for Graphics Interchange Format. In this context, it refers to a moving image that is not a video file format and therefore does not support audio.

The categories included in this table are not exhaustive. There is no tidy way of cataloguing all the different kinds of memes for quick analysis, as one might expect with Díaz's broad definition. I have tried to formulate the categories along both dimensions to capture most types of memes. Some will, of course, be more common than others and I have blocked out those about which we need not be concerned,¹⁴ but I hope this will be a useful starting point.

III COPYRIGHT

Works

To establish copyright infringement, there must first be a work in which copyright can and does subsist.¹⁵ The possible works are listed in s 14(1) of the Act. Therefore, the question is which works will be implicated by which sorts of memes.¹⁶ A movie will, for example, be a film as defined in s 2.¹⁷ It will also contain musical works¹⁸ for the soundtrack as well as sound recording¹⁹ in respect of the actual audio of the movie. Words said by characters in the movie will be a dramatic work²⁰ if they are part of the film script, or otherwise a literary work.²¹ If broadcast to an audience, that transmission of the movie will also probably be a communication work.²² TV shows are in a similar situation. Precisely which work will be at issue for the specific meme will depend on the format of the meme.

By populating Table 1 with works that may be implicated for each meme format and type of source material, we arrive at the following table.

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- 14 I have excluded these from the outset because, while possible, they are too uncommon to be significant.
- 15 *P S Johnson & Associates Ltd v Bucko Enterprises Ltd* [1975] 1 NZLR 311 (SC) at 315. The plaintiff must also own the copyright but for these purposes I will assume this requirement will be met.
- 16 If we were being strictly logical, the first question should be whether any of the sources of material fall outside s 14(1) of the Copyright Act 1994, but it is safe to assume they do not. This is because even real life events require recording of some sort before they can be used as memes.
- 17 Section 2(1) definition of "film".
- 18 Section 2(1) definition of "musical work".
- 19 Section 2(1) definition of "sound recording".
- 20 Section 2(1) definition of "dramatic work", para (b).
- 21 Section 2(1) definition of "literary work".
- 22 Section 2(1) definition of "communication work".

Source of borrowed material	Format of the meme			
	Text only	Still image	GIF	Video
Movie	<ul style="list-style-type: none"> • Dramatic work 	<ul style="list-style-type: none"> • Film • Comm work 	<ul style="list-style-type: none"> • Film • Comm work 	<ul style="list-style-type: none"> • Musical work • Sound recording • Film • Comm work
TV show	<ul style="list-style-type: none"> • Dramatic work 	<ul style="list-style-type: none"> • Film • Comm work 	<ul style="list-style-type: none"> • Film • Comm work 	<ul style="list-style-type: none"> • Musical work • Sound recording • Film • Comm work
Video game	<ul style="list-style-type: none"> • Dramatic work 	<ul style="list-style-type: none"> • Artistic work • Film 	<ul style="list-style-type: none"> • Artistic work • Film 	<ul style="list-style-type: none"> • Musical work • Sound recording • Film
Song or music video	<ul style="list-style-type: none"> • Literary work 	<ul style="list-style-type: none"> • Film 	<ul style="list-style-type: none"> • Film 	<ul style="list-style-type: none"> • Musical work • Sound recording • Film • Comm work
Photo		<ul style="list-style-type: none"> • Artistic work (photo) 		
Drawing or comic	<ul style="list-style-type: none"> • Literary work 	<ul style="list-style-type: none"> • Artistic work (graphic work) 		
Internet video	<ul style="list-style-type: none"> • Literary work 	<ul style="list-style-type: none"> • Film • Comm work 	<ul style="list-style-type: none"> • Film • Comm work 	<ul style="list-style-type: none"> • Musical work • Sound recording • Film • Comm work
Real life event	<ul style="list-style-type: none"> • Literary work 	<ul style="list-style-type: none"> • Artistic work • Film • Comm work 	<ul style="list-style-type: none"> • Film • Comm work 	<ul style="list-style-type: none"> • Sound recording • Film • Comm work

Table 2

The next question is whether copyright is likely to subsist in the works identified.

Originality

For copyright to subsist in a work, the work must be original.²³ While the originality of the work will also be relevant later when deciding whether any copying amounts to infringement, the standard at this early stage is low.²⁴ Only “more than minimal skill and labour” is required,²⁵ as long as the work is not itself a copy and does not infringe another work.²⁶ I will therefore take for granted that all of the source material categories except real life events will meet this test. Originality will also probably not be an issue where the source of the meme is an event. The work at issue will generally be a recording of some sort, which itself will take some small amount of skill and labour to produce.

The most problematic situation, however, is where a meme relates to a real life event and is purely in the form of text. An example is the Rent is Too Damn High meme (High Rent meme), which, while usually accompanied by an image, is recognisable purely as text generally in the template, “the X is too damn high”.²⁷ The meme originated from a speech delivered in 2010 by Jimmy McMillan, founder of the Rent Is Too Damn High Party, in which he repeated the Party’s slogan, “the rent is too damn high”, several times.²⁸ In such cases, it is crucial to the analysis how the work in which copyright is alleged to subsist is framed. If the work is framed as the slogan itself (or whatever the short phrase may be), then it is unlikely that it qualifies as an original literary work at all, for reason of being too insubstantial. Titles, for example, have been held generally not to qualify for copyright protection.²⁹ The alleged copyright owner would therefore be better off framing the work as the larger text of which the slogan is merely a part.

In the case of the High Rent meme, copyright would probably not subsist in the slogan itself as “the rent is too damn high” is a very commonplace complaint and not the result of any meaningful skill, labour or judgement. The original work would therefore have to be framed as McMillan’s entire speech, which would almost certainly qualify as an original literary work. Of course, the trade-off is that the slogan may not be a substantial enough part of the work to establish infringement by copying (this is discussed further in Part IV). The point here is that all the works identified in Table 2 will likely satisfy the originality test in some way.

For completeness, I also note that jurisdiction will not be an issue for a claim in New Zealand where the material originates overseas, as a work will qualify for copyright if it is first published in, or its author belongs to, a

23 Copyright Act 1994, s 14(1).

24 *Henkel KGaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577 at [38].

25 At [37].

26 Copyright Act 1994, s 14(2).

27 Brad “The Rent is Too Damn High / Jimmy McMillan” (11 August 2015) Know Your Meme <<https://knowyourmeme.com>>.

28 Brad, above n 27.

29 *Francis Day and Hunter Ltd v Twentieth Century Fox Corp Ltd* [1940] AC 112 (PC) at 123. For an exception, see *Sunlec International Pty Ltd v Electropar Ltd* (2008) 79 IPR 411 (HC) at [62].

prescribed foreign country.³⁰ This will cover all members of the World Trade Organisation by virtue of art 1.3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.³¹

The next question is which types of meme, if any, can amount to infringement.

IV INFRINGEMENT

Memes generally implicate two types of parties: the meme maker and the meme sharer. The meme sharer simply shares the meme. The meme maker usually performs three actions: saving a copy of the part of the relevant work, editing the saved copy to make the meme, and uploading the meme. While these actions technically implicate two restricted acts — copying and communicating to the public — the main concern here is with copying, as the nature of how memes are shared on the Internet means any communication will also amount to copying. I therefore confine my discussion to copying and make no distinction between meme makers and meme sharers.

Objective Similarity and Causal Connection

There are three requirements to establish copying.³²

- (a) there must be an objective similarity between the copy and the original work;
- (b) there must be a causal connection between the existence of the original work and the copy; and
- (c) the copy must take a substantial part of the original work.

Most memes will satisfy the first two requirements as they usually take literal copies from parts of the work. The most contentious element will usually be substantiality, which I discuss in the next section.

It is worth noting, however, the effect that the mutation of a meme can have on similarity. Mutation is a hallmark of memes. The more widely a meme is shared, the more likely it will be edited and shared again. Depending on how developed the meme becomes, variants may mutate so far that they bear no objective similarity to the original work despite being recognisable as that particular meme.

The Loss meme, for example, began as a series of parodies of a webcomic strip titled “Loss”, where the original strip was ridiculed for its poor

30 Copyright Act 1994, ss 18–19.

31 Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 3 (opened for signature 15 April 1994, entered into force 1 January 1995), annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights), art 1.3.

32 *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641 (CA) at 666. See also Paul Sumpter *Intellectual Property Law: Principles in Practice* (3rd ed, CCH, Auckland, 2017) at 78.

visual execution of a serious subject matter (miscarriage).³³ The parodies retained the same four-panel format, the same character roles, and sometimes even the same art style, retelling the same story with different characters in place of the original ones.³⁴ They therefore bore clear objective similarity to the original work. Subsequently, however, the strip was reduced to a minimalist interpretation of the layout of its four panels, taking the rough form of | || || _ , where each line represents the position of a character in each panel — upright (|) or lying down (_).³⁵ As a result, any similar visual arrangement — regardless of what made up that arrangement — subsequently became recognisable as a Loss meme despite bearing no resemblance whatsoever to the original strip.

Therefore, the simple fact that an image is a variant of a particular meme does not entail that copying can be established. Instead, we should think of meme variants in terms of layers around the original work, with each layer representing one step of mutation. Variants on the innermost layer make direct edits to the original work; variants on the second layer make edits based on variants on the first layer; variants on the third based on the second; and so on. The more layers of editing, the less likely the meme variant will be objectively similar to the original work.

The Loss meme is an extreme case for visual memes but the impact of mutation on similarity will generally be greater for purely text-based memes. This is because visual memes can retain roughly the same amount of content from the original work despite being varied, such as in the case of the Left Exit 12 meme. With text-based memes, however, it is often impossible to vary the part of the work taken *without* changing the entire part because many text-based memes are only short phrases. Therefore, any variation will necessarily be of key words and the only aspect that remains constant may be as abstract as a certain rhythm or grammatical structure. For example, some High Rent meme variants include “the number of snakes on this plane is too damn high”, “the amount of soccer supporters in Europe is too damn high” and, somewhat absurdly, “6.28318 is two damn pi”.³⁶ While there is no doubt a causal connection between the original speech and these variants, there is no objective similarity between a complaint about the number of football supporters in Europe and a political speech bemoaning the rate of rent. The likelihood of a successful copyright claim regarding a text-based meme will therefore be limited from the outset.

Substantiality

If the copy is objectively similar and causally connected to the original work, the next question is whether the copy is of a “substantial part” of the original work.³⁷ While most memes take very little quantitatively from the work, this

33 oddguy “Loss” (2 July 2011) Know Your Meme <<https://knowyourmeme.com>>.

34 See for example Joel Watson “Cmd-Opt-Z” (1 April 2009) Hijinks Ensue <www.hijinksensue.com>.

35 oddguy, above n 33.

36 Brad, above n 27.

37 Copyright Act 1994, s 29(2)(a).

will not be determinative. This is because the question of substantiality also depends on the “substantial significance” of the part taken,³⁸ or whether the “essence” of the work was copied.³⁹ The format of the meme and the type of work from which it is taken are therefore highly relevant. For this purpose, it is useful to reformulate the rows in Table 2 so that they represent the sort of works implicated by the different source materials.

Type of work	Format of the meme			
	Text only	Still image	GIF	Video
Dramatic work				
Literary work				
Artistic work (photo)				
Artistic work (graphic work)				
Film				
Musical work or sound recording				

Table 3

Once again, inapplicable categories have been blocked out. The lighter shade for text-only memes reflects the limitation resulting from mutation. I have grouped musical works and sound recordings together as the analysis for substantiality purposes will be the same for both. I have also omitted communication works because there is no underlying content that is protected by this work and it is easier to talk about substantiality in respect of the other works. I now look at substantiality in relation to each type of meme.

1 Text-Based Memes

In addition to issues with objective similarity, text-based memes also pose the most problems for establishing substantiality. This is because, quantitatively, they will usually take a very small amount of the original work, unless it can

38 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) at 283.

39 *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 (CA) at 678.

be proved that the slogan or catchphrase itself is an original work — something we have seen is usually difficult to do.

One might, however, argue that the catchphrase is nevertheless the essence of the larger literary work and taking this phrase therefore constitutes taking a substantial part. But this argument seems to give rise to a contradiction. If the work claimed is the larger literary work, that must mean copyright could not subsist in the phrase itself. But if copyright could not subsist in the phrase itself, it should be equally difficult for it to be considered a substantial part of the larger work that is pleaded, for there cannot be very much skill or labour, or originality, that has been taken. As a result, it would make little difference whether the work is framed as a larger text or the slogan itself. If the phrase is not original enough, it will likely fail at either step.

Admittedly, Lord Reid cautioned against this sort of “short cut” reasoning in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*, but it is not clear what it is an unacceptable shortcut to.⁴⁰ The discussion begins in the context of the correct test for substantiality but morphs into a warning about reaching the wrong result when looking at originality and subsistence of copyright. While it is true that a lack of originality in fragments of a work does not entail a lack of originality in the whole work, this is a separate question from substantiality. As long as the questions are in fact separated, there is no reason why the inquiry into substantiality should not be informed by whether copyright could have subsisted in the fragment alone.

The High Court of Australia seemed to be split on this issue in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*, with half of the judges (French CJ and Crennan and Kiefel JJ) looking at substantiality in terms of originality,⁴¹ and the other half (Gummow, Hayne and Heydon JJ) being of the opinion that doing so is “apt to mislead”.⁴² Both judgments, however, ultimately arrived at the same conclusion.⁴³ To reconcile this difference, we should recognise that originality might be a necessary but insufficient condition of meeting the substantiality test. Therefore, while the *presence* of originality should not be conclusive for *establishing* substantiality, the *lack* of originality should usually be conclusive for *failing* to do so. Gummow, Hayne and Heydon JJ should be understood as making the former point, and French CJ and Crennan and Kiefel JJ as relying on the latter.

To return to the High Rent meme, we decided earlier that “the rent is too damn high” is not original and that the copyright work must therefore be the speech in which the phrase was said. But considering the phrase is a common complaint, it would be hard to see how taking this phrase would amount to taking a substantial part of the speech. There are only so many ways one can express the idea that rent is in fact “too damn high”. However the work is framed, therefore, infringement would be unlikely.

40 *Ladbroke*, above n 38, at 277.

41 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, [2009] 239 CLR 458 at [38]–[42].

42 At [156].

43 At [44] and [185].

This outcome, in combination with the limitation at the objective similarity stage, means it is unlikely that purely text-based memes will amount to infringement.

2 *Still Image Memes*

Still image memes in relation to artistic works sit on the other end of this spectrum. Memes that use photographs usually take the entire work, unaltered, and simply add text over it. The Guess I'll Die meme, for example, takes the entire stock photo of an old man in a red jumper shrugging his shoulders, and merely adds the caption "guess I'll die".⁴⁴ Occasionally, the word "die" is replaced with a different verb suitable for the context in which the meme is used. Where memes use graphic works like drawings, comics are usually used as templates to which new dialogue is added to create a different scenario. For example, the Boardroom Suggestion meme uses a comic depicting a Nintendo board meeting, where a man who suggests adding "DVD playback" to the company's next gaming console is promptly thrown out the window.⁴⁵ In variants, the dialogue and occasionally characters' faces are edited to ridicule the unwillingness of various corporate entities to give consumers what they really want. In both these cases, most, if not all, of the original work is taken.

The answer is not so obvious, however, when memes take a still image from a work of film. Could a single frame amount to a substantial part of an entire movie? Susy Frankel has suggested this would be difficult but not impossible to prove, citing the English Court of Appeal case *Spelling Goldberg Productions Inc v BPC Publishing Ltd*.⁴⁶ There, the Court held that the defendant infringed the plaintiff's copyright in a series of films by publishing magazines with individual still frames from those films.⁴⁷

Spelling Goldberg does not, however, actually stand for the proposition that a single frame can be a substantial part of an entire film. The Court held instead that a frame is a *part of* a substantial part of a film and that was enough to constitute infringement under the then Copyright Act 1956.⁴⁸ Although the 1956 Act has since been replaced by the Copyright, Designs and Patents Act 1988, there is disagreement as to whether the *Spelling Goldberg* approach has been preserved by the statutory definition of "copying", which now includes "making a photograph of the whole or *any substantial part of any image forming part of the film*".⁴⁹ The corresponding section in

44 Adam "Guess I'll Die" (15 August 2017) Know Your Meme <<https://knowyourmeme.com>>.

45 GamerGuy09 "Boardroom Suggestion" (11 January 2013) Know Your Meme <<https://knowyourmeme.com>>.

46 Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at 263–264; and *Spelling Goldberg Productions Inc v BPC Publishing Ltd* [1981] RPC 283 (CA).

47 *Spelling Goldberg*, above n 46, at 297, 299 and 301.

48 At 296–297; and Copyright Act 1956 (UK).

49 Copyright, Designs and Patents Act 1988 (UK), s 17(4) (emphasis added). See generally Gillian Davies, Nicholas Caddick and Gwilym Harbottle (eds) *Copinger and Skone James on Copyright* (17th ed, Sweet & Maxwell, London, 2016) at [7-120]; and HIL Laddie, Peter Prescott and Mary Vitoria *The Modern Law of Copyright and Designs* (4th ed, LexisNexis, London, 2011) at [7.63] and [7.65].

New Zealand is worded in the same way.⁵⁰ It could therefore be a live issue as to which is the correct approach: the *Spelling Goldberg* approach or the traditional approach that requires the single frame to *be* a substantial part of the film rather than just *part of* a substantial part. The difference is important because it dramatically affects the infringement analysis.

Although there is no New Zealand precedent on this precise issue, the traditional approach is preferable for two reasons. First, the logic by which the Court in *Spelling Goldberg* arrived at its conclusion is questionable. It took the extended definition of copying and simply added the phrase “whole or substantial part”.⁵¹ It was therefore an infringement to reproduce *any part* of a substantial part of a film. As it found that a frame is a part of a film,⁵² whether the frame is a part of the whole or substantial part of the film was irrelevant — taking a single frame would always amount to infringement. Not only does this reasoning make the substantiality test redundant, it is also too mechanical and misses the purpose of a substantiality test. When the Act refers to restricted acts as being in relation to the whole or any substantial part of a work in s 29(2)(a), this is simply an efficient way of imposing a substantiality test on every restricted act to prevent trivial acts from amounting to infringement, without needing to list all the restricted acts. It is not an invitation literally to read “whole or substantial part” into the exact phrasing of each restricted act without regard to the outcome the sentence would produce.

Secondly, the *Spelling Goldberg* approach can lead to absurd results. Taking a frame consisting of a massive blur, for example, would amount to infringement. So would a black screen taken from a fade-out transition. Neither scenario accords with common sense. It might well be that due to the statutory emphasis that a single frame of a film is also a copy, we would have reason to take a somewhat lenient approach when considering whether a single frame is a substantial part of the film, but the test should not be non-existent.

Returning to the traditional substantiality test, the English High Court held in *Football Association Premier League Ltd v QC Leisure (No 2)* that a clip of a few seconds from a 90-minute film of a football match amounts to a substantial part where it reproduces an “incident of particular interest” such as the scoring of goals or demonstrations of particular skill.⁵³ Therefore, by analogy, if a single frame depicts a scene of particular interest from a film, that frame may amount to a substantial part.

An example might be the Evil Kermit meme, which features a frame from the movie *Muppets Most Wanted*. The frame depicts Kermit the Frog being confronted by his evil lookalike for the first time.⁵⁴ One might say that this frame, being a key moment of the film, amounts to a substantial part. It might be difficult to show, however, that a single frame alone could allow the

50 Copyright Act 1994, s 2 definition of “copying”, para (d).

51 *Spelling Goldberg*, above n 46, at 296.

52 At 296–297.

53 *Football Association Premier League Ltd v QC Leisure (No 2)* [2008] EWHC 1411 (Ch), [2008] FSR 789 at [209].

54 Don “Evil Kermit” (15 November 2016) Know Your Meme <<https://knowyourmeme.com>>.

viewer to “appreciate” the incident.⁵⁵ There is a difference between simply understanding a general idea conveyed by a frame and understanding the frame in the context of the film as a whole. A few seconds were enough in *Football Association* only because the nature of the film’s content was such that events happened very quickly. In the case of the Evil Kermit meme, however, while the frame depicts a moment of a key scene, it is not enough for the viewer to appreciate the scene itself.

A more lenient approach, and one that better fits with New Zealand law, is to ask whether a substantial part of the “skill and labour” that went into the film has been appropriated, rather than looking at the substantive content of the part taken.⁵⁶ This approach has been criticised in the English context because under the Copyright, Designs and Patents Act there is no requirement for “skill and labour” for copyright to subsist in a film.⁵⁷ In New Zealand, however, all copyright works must be original⁵⁸ — that is, contain some element of skill and labour — and so a test centred on skill and labour would be more appropriate. For a movie such as *Muppets*, the amount of skill and labour captured in a single frame may be considerable because factors such as framing, costuming, lighting and so on will always be present regardless of whether we see a clip or a single frame. To take one frame is to misappropriate the result of this combined skill and labour. Therefore, a New Zealand court might generally be more prepared to find a single frame to be a substantial part. This difference between the approaches would also be consistent with the general rule that the greater the originality of the work, the greater the copyright protection.⁵⁹

It would therefore be possible for a single frame to be a substantial part of a work of film, although not for the reason Frankel suggests.

3 GIFs

GIFs are images that support animation. They are usually a few seconds long, repeating on an infinite loop. As a meme in the form of a GIF will necessarily take more quantitatively than a still image meme, one might think they will also be more likely to amount to a substantial part, all other things being equal. Whether this reasoning holds true, however, depends on which of the above two approaches to substantiality is taken. If a skill and labour approach is followed, the fact the image is moving may not make much difference at all for the reason mentioned above: there is roughly the same amount of skill and labour needed to shoot one frame as is needed to shoot 48 frames of the same scene. If the *Football Association* approach is taken, however, the addition of 47 more frames may make a big difference, as movement can convey considerably more information even within a small period of time.

55 *Football Association*, above n 53, at [209].

56 *Henkel*, above n 24, at [52].

57 Laddie, Prescott and Vitoria, above n 49, at [7.66].

58 Copyright Act 1994, s 14(1).

59 *Land Transport Safety Authority of New Zealand v Glogau* [1999] 1 NZLR 261 (CA) at 271.

I suggested earlier that the skill and labour approach better accords with New Zealand law because, unlike in England, the Act requires films to be original. The leading New Zealand authorities have so far also favoured this approach.⁶⁰ It is likely, therefore, that in New Zealand the question of whether a meme is a still image or a GIF will make little difference.

The Confused Travolta meme illustrates this point.⁶¹ It usually features a GIF of actor John Travolta looking confused in a scene from the 1994 film *Pulp Fiction*, but can also be in the form of a still image. The frame usually used in still image versions of the meme shows Travolta with his hand outstretched. The entire clip, on the other hand, depicts him looking to his right, pausing, before turning back and gesturing with his hand.⁶²

Using the skill and labour analysis, we might say that the relevant skill and labour involved in the clip are the costuming, makeup, lighting and, of course, acting. But no less of any of these were required to produce the single frame than the entire clip. The frame would not look the same way if any one of those elements was removed. One might object and say that less acting was needed for the one frame than for the entire clip, but this argument ignores the reality that the frame was not a result of Travolta standing still — it captures one 24th of a second of an entire movement and would not exist but for that movement. Therefore, this clip can be said to involve the same amount of skill and labour as the one frame. Thus, if the still image does not infringe, the GIF version of the same meme is unlikely to either.

For these reasons, GIFs and still image memes that take from films can be grouped together under the same likelihood of infringement.

4 Video Remixes

Finally, there are two major types of video remix memes. Their characteristics mean that both will tend to take enough from the original work or works to satisfy the substantiality test.

In one type, some part of one original work is ridiculed by combining it with a part of another original work. For this combination to make sense, one of the clips taken must speak for itself, since there is usually no added text to set the context. In other words, the video must take enough from a scene of an original work for the narrative of that scene to be evident. The Big Enough meme described in Part II is an example of this technique, where in one variant a clip from the film *Jurassic Park* is combined with the clip from the “Big Enough” music video. For the meme to be effective, it must exploit the viewer’s expectation that a dinosaur will appear by either disrupting it or drawing a satirical analogy between the dinosaur and the screaming cowboy. To set up this expectation, it must first reproduce enough of the scene to make it obvious what should have been coming but for the edit. Therefore, a

60 See *Henkel*, above n 24, at [52]; and *Bleiman*, above n 39, at 679.

61 Don “Confused Travolta” (16 November 2015) Know Your Meme <<https://knowyourmeme.com>>.

62 See CJ_Productions “Confused Travolta with optimized transparency” (26 November 2015) Reddit <www.reddit.com>.

substantial part of the work or works will usually be taken, even by *Football Association* standards.

The other major category of video remixing also involves ridiculing some part of an original work, but it does so by altering the video and audio of the original work to the extent that it becomes nonsensical. A large part of the original work, if not the entire thing, is usually taken this time because the original work is the only substantive content used in the meme. Any edits are *applied to* that content in the form of video and sound filtering, as opposed to introducing additional content. An example is the Werther’s Original meme, which features the Japanese dubbed version of a Werther’s Original advertisement from the 1990s.⁶³ Numerous remixes were made of the advertisement by repeating soundbites and filtering the video to distort the colour of and shapes in the frames.

In light of the above it is likely that, whichever approach is applied, video remix memes will take enough from a work (or multiple works) to meet the substantiality test.

Summary

Given the above, the probability of each type of meme’s amounting to infringement can be summarised as follows.

Type of work	Format of the meme			
	Text only	Still image	GIF	Video
Dramatic work	Unlikely to infringe			
Literary work				
Artistic work (photo)		Will usually infringe, subject to extent of mutation		
Artistic work (graphic work)				
Film		Could amount to infringement		Will usually infringe
Musical work/sound recording				

Table 4

63 mona_jpn “Werther’s Original” (28 August 2011) Know Your Meme <<https://knowyourmeme.com>>.

Video memes and still image memes that take from artistic works are the types that are most likely to infringe. Still image memes that take from films may also infringe, depending on the frame that is taken. Text-based memes, however, are unlikely to infringe.

Part V now looks at whether any defences may be available for infringing types of memes.

V DEFENCES

Implied Licence

Section 29 of the Act provides that copyright is infringed only if the restricted act is done “other than pursuant to a copyright licence”. There is generally no requirement for licences to be in a particular form, and so they can be implied or inferred.⁶⁴ One could therefore argue that some material used in memes is subject to an implied licence to be freely copied, edited and re-uploaded.

There will, of course, be no question of an implied licence in relation to movies, TV shows, video games and songs. These are usually placed on the Internet without authorisation, and even where there is authorisation, the authorised use of the content will be clearly licensed. The song behind the Big Enough meme, for example, is licensed to YouTube by several different companies.⁶⁵ The same often applies to photos such as that behind the Guess I’ll Die meme, which is licensed to various stock photo agencies such as Shutterstock. This thus rules out the defence of implied licence for most memes, as most are based on content taken from commercial content as opposed to user-generated content.

However, even where the source material is user-generated content, an argument based on implied licence is unlikely to succeed. The argument seems to be that, due to the open nature of the Internet and the ease with which one can copy content, anyone who uploads material without qualification impliedly consents to the editing and re-sharing of that material. While there might be merit to this argument theoretically, practically it is unlikely to have any effect on memes because actual instances of the uploading of source material to the Internet without any qualification whatsoever will be rare. Most non-commercial user-generated content will be uploaded to social media platforms, each of which will have its own terms of service, including terms around the licensing of content users upload.⁶⁶ YouTube, for example, seems to rule out any sort of implied licence by providing that licensors reserve all rights not expressly granted.⁶⁷ Similarly, Tumblr’s terms of service provide

64 Davies, Caddick and Harbottle, above n 49, at [5-203].

65 See Kirin J Callinan “Kirin J Callinan - Big Enough (Official Video) ft. Alex Cameron, Molly Lewis, Jimmy Barnes” (16 August 2017) YouTube <www.youtube.com>.

66 Those who have the resources to create their own websites, such as freelance photographers or illustrators, will likely be for-profit and will therefore probably reserve their rights.

67 YouTube “Terms of Service” (25 May 2018) <www.youtube.com>.

that users are licensed to use content “in strict accordance with the functionality and restrictions of the Services”.⁶⁸ I take this to mean that users are licensed to perform actions such as “liking” and “reblogging” content as provided for by the website.

What is not so clear is whether copying by right-clicking and saving an image would be permitted. On the one hand, this function is built into the browser itself as opposed to the website and must be accessed manually by the user; on the other hand, it is possible for websites to disable the right-click function for their images. One might therefore argue that a website’s failure to do so is conduct from which licence to use the function can be implied. Ultimately, however, this does not save memes, as any implied licence to download would certainly not cover the subsequent editing, communicating and second act of copying necessary to make and upload a meme as these actions are clearly not within the functionality of the site. An argument of implied licence is therefore unlikely to succeed.

Fair Dealing: Criticism and Review

Unlike the United States, New Zealand does not have a general fair use defence. Part 3 of the Act instead lists various specific permitted acts that would otherwise be infringements depending on how the work is used. The way a meme is used will therefore influence whether any defences apply. For our purposes, the only relevant section is s 42(1), which concerns fair dealing with a work for the purposes of criticism or review.

A survey of memes in the top five subcategories on Know Your Meme reveals roughly four different uses: as parody, such as the Drunk Jeff Goldblum meme;⁶⁹ as a reaction, such as the Guess I’ll Die meme; as satire, such as the Boardroom Suggestion meme; and simply as humour not otherwise fitting into the previous categories. To the extent that a coherent message can be found, memes that are parodies will say something about the work from which they borrow. This use can be contrasted with memes that are reactions or satire, which comment on events or situations unrelated to the work from which they are derived. The Guess I’ll Die meme serves as a good example of both the latter two categories: while often used as a response image to a situation (“When the solution to a problem is to call someone”), it can also double as satirical commentary on some aspect of society (“When you’re too poor to afford affordable healthcare”).⁷⁰

Such use, however, would not fall under the s 42(1) defence of fair dealing even if it amounted to criticism, because the section requires that the criticism be aimed at a particular work. Reaction and satire memes generally comment on some event, situation or behaviour in general that is not connected with a particular work.

68 Tumblr “Terms of Service” (15 May 2018) <www.tumblr.com>.

69 See Brad “Drunk Jeff Goldblum” (24 October 2012) Know Your Meme <<https://knowyourmeme.com>>.

70 Adam, above n 44.

But there may be an argument that some parody memes would fall under s 42(1). While this defence is usually applied in the context of journalism and the news media,⁷¹ the possibility that parody can act as criticism or review of the original work has been recognised in the United Kingdom.⁷² Whether the parody does in fact criticise, of course, will come down to the meme in question, but a potentially successful example is the Ancient Aliens meme.⁷³ This meme features a screenshot of Giorgio A Tsoukalos waving his hands while speaking in an episode of the American television series, *Ancient Aliens*.⁷⁴ The show focuses on the theory that aliens “have visited Earth for millions of years.”⁷⁵ Variants of the meme usually place captions on the screenshot to parody Tsoukalos’s resort to aliens to explain certain mysteries. Examples include “I don’t know, therefore aliens”; “If ancient aliens didn’t exist, then how did they build everything?”; and “I’m not saying it was aliens... but it was aliens”.⁷⁶ One could argue that these memes amount to a criticism of the show for making unfounded claims and being based on flawed logic (although I understand they also ridicule Tsoukalos’s fake tan and hairstyle).

An obvious objection here might be that these memes merely ridicule and do not amount to any *proper* criticism. This objection, however, is misguided because it incorrectly assumes either that ridicule and criticism are mutually exclusive, or that criticism must meet some *seriousness* condition in order to be protected.

The first assumption, that ridicule and criticism are mutually exclusive, is incorrect because while ridicule and criticism are not the same, there is much overlap. The Oxford English Dictionary defines “criticise” as meaning “to pass judgement upon something with respect to its merits or faults.”⁷⁷ To ridicule is “to make fun of, laugh at, [or] deride.”⁷⁸ But there must be something about a work that is the subject of such derision. So, in deriding, the person necessarily passes judgement on that aspect of the work. Therefore, ridicule can be understood as a subclass of criticism. The only difference is that “ridicule” implies a particular method of criticism involving the use of humour.

The second assumption, that criticism must meet a *seriousness* condition to be protected, is also incorrect because nothing in the Act indicates that this subset of criticism is to be ruled out. Furthermore, “criticism” has been held to be of “wide and indefinite scope”⁷⁹ and does not need to be balanced.⁸⁰ The fact that the criticism comes in the form of ridicule is therefore

71 See for example *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 (CA); and *Fraser-Woodward Ltd v British Broadcasting Corp* [2005] EWHC 472 (Ch), [2005] FSR 36.

72 *Williamson Music Ltd v The Pearson Partnership Ltd* [1987] FSR 97 (Ch) at 103.

73 This is not to say the Ancient Aliens meme would itself amount to infringement.

74 JacobSk “Ancient Aliens” (15 May 2011) Know Your Meme <<https://knowyourmeme.com>>.

75 History “About Ancient Aliens” <www.history.com>.

76 JacobSK, above n 74.

77 *Oxford English Dictionary* (2019, online ed) at [criticize, v].

78 At [ridicule, v].

79 *Pro Sieben*, above n 71, at 620.

80 At 619.

irrelevant. Indeed, it would be a most pretentious position if something that in substance amounts to criticism was not afforded the same protection simply because it is not written out in coherent sentences.

That a copy might be capable of being considered criticism, however, is not the end of the defence. The use of the original work must also, on an objective assessment,⁸¹ be for the *purposes* of criticism or review.⁸² In other words, one must ask whether the use was actually “in the context of” or “as part of an exercise in” criticism or review.⁸³ It is here that many memes will fail to meet the defence, even if they do criticise the original work in some form. This is because most memes are simply not made for the purpose of criticism; they are made for the purpose of entertainment. That is, it would not matter to the meme maker if their meme did not in fact criticise, so long as it was funny.

In fact, criticism tends only to be part of the form in which the meme first emerges because initial variants of a meme must relate relatively closely to the source material to be understood. Once the meme acquires certain connotations, however, creativity takes off and the meme will no longer be bound to reference the original work. Any critical element to a meme is thus incidental. The vast majority of the Ancient Aliens meme’s variants, for example, do not actually directly comment on Tsoukalos or the show. They instead take advantage of some meaning already associated with the image of Tsoukalos to comment on something else.

Therefore, even if a meme is capable of being considered criticism, it would be unusual for it to fall under fair dealing for the purpose of that criticism.

Summary

We have seen that there are no defences likely to apply to memes. All the remaining categories in Table 4 therefore remain intact. Still image memes that take from other still image works and video remixes will be the sorts of memes most likely to infringe. Even where a meme takes a single frame from a work of film, there is still a reasonably arguable case for infringement. Purely text-based memes are unlikely to infringe copyright, but these memes are uncommon, with catchphrases usually accompanied by images taken from copyright works. Visual memes are by far the most common types of memes. Chances are, then, if someone has shared a meme, they have strictly infringed someone else’s copyright.

81 *Media Works NZ Ltd v Sky Television Network Ltd* (2007) 74 IPR 205 (HC) at [45].

82 Copyright Act 1994, s 42(1).

83 *Pro Sieben*, above n 71, at 620.

VI SO WHAT'S THE POINT?

The obvious question now is, who cares? Why does it matter if memes amount to infringement? Nobody sues anyway. Cease and desists have been issued but no case has actually been to court, not even in the United States, much less in New Zealand. People will continue to make memes. The sun will rise. This article has been a pointless theoretical exercise on a trivial part of life.

This status quo is, however, precisely the problem. If the law provides for a right, why is it not more readily taken advantage of? Why *do* people continue to make memes? There is in this respect a serious disconnect between the law and reality in terms of enforcement, behaviour and moral attitudes. Not only are memes rife on the Internet but there also does not appear to be any moral stigma surrounding their making as there might be around, say, the pirating of a movie, even if Internet users engage in both in equal frequency. This disconnect is problematic because a law that does not reflect popular attitudes is likely to lose the respect of those it is intended to regulate. This is not to say that all law must bend to the attitudes of those who oppose it. It does mean, however, that one of two courses of action should be taken: we should either insist on the law and make an attempt to change attitudes and behaviour, or change the law. Ignoring the disparity will only render the law redundant.

So in one sense, the objection above is right. Memes, while semiotically interesting, are not really the point. Memes are merely the result of a combination of three factors:

- (a) a desire for humorous and creative expression;
- (b) an abundance of accessible content; and
- (c) the extreme ease of reproduction, creation and dissemination of works.

The first has always existed. The latter two, especially the last, are recent developments, and have together normalised both copying and content creation such that the traditional significance of both likely no longer cross the meme maker's mind. This may be the reason why there is no moral stigma around memes: the copying is facilitated by features that are part of all computers as a matter of course, and the resulting content is not motivated by profit but seen as just another way of online expression and communication.

The real point, therefore, is that the balance that copyright law attempts to strike should be reassessed in light of these factors — and particularly in light of this resulting attitude shift — if the law is to remain relevant in the eyes of a population with an ever-increasing proportion of content creators. Introducing a fair use defence, for example, would be one way to resolve this problem. A review into the Act is currently under way, an issues paper's having been released late last year by the Ministry of Business,

Innovation and Employment.⁸⁴ The direction that New Zealand ought to take is not the subject of this article, but it is hoped that the review leads to more than an attempt to transplant existing rights into the digital era, for an argument based on existing rights can only be circular if it is the very justification for those rights that is at issue.

84 Ministry of Business, Innovation and Employment *Review of the Copyright Act 1994: Issues Paper* (21 November 2018).