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Memos and Their Protection under Copyright Law

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Memos are ubiquitous and are a new way of communicating with netizens humorously. An average Indian spends 30 minutes per day on meme consumption. A meme is a piece of text, image, or video borrowed from an external resource. When a member creates a meme using clips and images from popular movies and television shows he must be cautious that the user does not amount to infringement of copyright. This is where Copyright Protection comes into action and protects the meme under fair use. The Indian Judiciary also prescribes a four-factor test to determine whether a work created comes under the ambit of fair use. A meme created using one's Labour, skill and judgment can get copyright protection and when someone shares or reproduces that meme without prior approval may amount to copyright infringement. The article discusses the issues involved in sharing a meme online and the defences available in Indian law under fair use and circumstances where fair use becomes unaccepted.

Keywords: *memos, fair use, copyright, infringement.*

INTRODUCTION

In today's digital era, memos have become ubiquitous. Any information conveyed in the form of memos will easily reach the audience, which is a new way of communicating and influencing netizens as they find them humorous and relatable. Initially, memos were created for amusement but are now used as a tool by social media platforms for Brand promotion,

advertising, and creating awareness of public issues among users. Memes are an integral part of a netizen's life as an average Indian spends 30 minutes per day in meme consumption says a consulting firm Redseer¹. A meme is a piece of text, image, or video, most commonly taken from popular tv shows or movies, which is remixed and presented in humorous nature, and fastly spread by internet users. Memes being known for their virality makes them the favourite of digital marketing agencies, for which they have a dedicated meme marketing team to attract clients. But a memer should be cautious as they use someone else's work which may involve copyright issues and be aware of available defences in copyright which is discussed in the article.

ARE MEMES PROTECTED UNDER COPYRIGHT?

A memer usually creates a meme by taking stills or videos from a famous movie or Tv show which is presented with a humorous undertone in-order to increase reach among the audience. The copyright act itself allows making a copy of a picture or image from a cinematograph film². However, sharing or reproducing the original content may amount to copyright infringement if a meme creator doesn't get prior approval or consent from the producer (mostly the owner of the movie or a TV show) who vests all forms of copyright. The authors also have some moral rights in their work although they are not entitled to ownership of their creation which is defined in section 57 of the Indian copyright act that prevents from mutilation or distortion of their creation which is considered prejudicial to the honour of the author³.

The copyright act provides exclusive rights to the owner to reproduce the work, in any form and a third party who is not an authorized licensee or assignee of the owner, reproducing the work by the former will amount to copyright infringement⁴. If an essential part of an original artistic work is copied then the person copying it is said to have committed copyright infringement⁵.

¹ Manvee, 'Protecting Memes vis-a-vis Copyright' (*The Times of India*, 26 October 2022)

<<https://timesofindia.indiatimes.com/readersblog/oped-by-manvee/protecting-memes-vis-a-vis-copyright-a-way-forward-46001/>> accessed 17 November 2022

² Indian Copyright Act 1957, s 14(d)

³ Indian Copyright Act 1957, s 57

⁴ Indian Copyright Act 1957, s 14(c)

⁵ *Hindustan Pencil Pvt Ltd b Universal Trading Company* (1999) 19 P.T.C. 379

Also, when a meme is created from an already existing original meme then resharing such memes without giving credit to the original creator might also result in infringement.

Or if the meme creator desires to be the sole owner of the memes created, then the images used in the meme have to be original and not to be copied from any other source, and sharing of such memes shall not be a problem. Any content (meme) that is created by the author (memer) can be protected under the ambit of an artistic work prescribed in the Indian Copyright Act. Copyright shall persist in all original artistic works⁶. The definition of Artistic work applies to non-cited examples as well as cited examples like photographs, paintings, sculptures, cartoons, logos, engravings, diagrams, and models of buildings. A meme is a modified version of artistic work displayed humorously.

Copyright is granted to all original works. The extent of originality is not defined in the statute but is globally presumed as that, it is the originality of expression which is important and not the idea. A new expression can be based on an existing idea, which is copyrightable, but the expression should not be based on existing work. Copyright only protects the expression and not the idea⁷. If a person has copied the expression from the original work he is liable for infringement of copyright. A meme can be considered original only if there is any creativity and skill involved, the mere addition of a text to the pre-existing image cannot be considered original. A meme claiming copyright must meet the standards of originality⁸. One must register soon after the original work comes into existence before a third party infringes on it. But registering a copyright is a time-consuming process.

HOW THE DOCTRINE OF FAIR USE COMES TO THE RESCUE

As we all know a meme is a kind of derivative work and only the owner of the copyright is entitled to make a derivative work. But the owner's right is not absolute says the Indian

⁶ Indian Copyright Act 1957, s 13(1)(a)

⁷ *Barbara Taylor Bradford v Sahara Media Entertainment Ltd* (2004) (1) CHN 448

⁸ *EBC v DB Modak* (2008) 1 SCC 1

copyright act⁹. A meme creator can use the defence of fair use against copyright infringement. There are four parameters to determine fair use¹⁰:

i. Commercial purpose

The purpose of creating memes is for fun and as long as the creator does not use them for gaining monetary benefits it is considered fair use. But if it is created for gaining profit without taking permission from the owner of the copyrighted work then it can be an infringement of copyright and such a meme used for commercial exploitation cannot claim defence under fair use. An infringement suit was filed by Nyan Cat against Warner Bros for commercially exploiting their creation in a video game without prior consent.

ii. Nature of copyrighted work

A meme is derived or made from pre-existing copyrighted work and can claim defence under the fair use doctrine. But when a meme is made out of a work that is not published then it may amount to infringement.

iii. Amount of work used

If a meme is created based on a single comedy or a still from a film then it constitutes fair use. But if a meme is created out of a single-frame visual artwork then it amounts to infringement.

iv. Effect on the market or market substitution test

When a meme is made out of original work and adversely affects the market or viewership of the original work then it cannot be considered fair use. All these four factors should not be considered independently but collectively to determine fair use. Further, the market substitution test should not be limited to assessing the damage caused to the copyright holder in the market but should be extended to evaluate the negative impact caused in the potential markets as well.

⁹ Indian Copyright Act 1957, s 52(1)

¹⁰ *India Tv Independent News Service Pvt. Ltd. & Ors v Yashraj Films Pvt. Ltd.* (2013) (53) PTC 586 (Del)

Fair dealing doctrine is discussed in Section 52 of the Indian copyright act 1957 which lays down the following actions that are considered fair use and do not amount to infringement:

- Private or individual use, including research; criticism or critique, whether of the work in question or another work;
- the reporting of current affairs and events, especially the reporting of a public lecture¹¹.

The scope of section 52(1)(a) has been widened which suggests that memes must be categorized into four types namely rage comic memes, cinematographic stills, personal photographs, and original works. Section 52(1)(a) and (b) deals with fair dealing and not a reproduction of a work. Reproduction of small extracts from the work will alone be considered fair dealing. Reproduction of whole or substantial portions will not be considered an infringement. In such cases, the court will observe:

- The value and quantum of the matter taken about the comments or criticism;
- The purpose of reproduction;
- Likelihood between two works¹².

Circumstances when fair use becomes unaccepted

Memes are not considered illegitimate as long as it is portrayed in the form of comedy or criticism though it is copied from the original work. But if a meme is created to harm the sentiments of society or defame a person it is said to have violated the Right to Privacy of an individual which is mentioned in Article 21 of the Indian Constitution. Indian Judiciary has decided on this matter where a BJP Youth Wing Leader Priyanka Sharma (Defendant) was asked to apologize to West Bengal Chief Minister Ms. Mamatha Banerjee for defaming by sharing a meme with a morphed face of her in it. Defendant's argument was not accepted by the Court even though the meme was not created by her and only shared it. The court held that Freedom of Speech and Expression cannot be denied unless it does not violate other individuals' rights.

¹¹ Indian Copyright Act 1957, s 52

¹² *Civic Chandran v Ammini Amma* (1996) PTC 670 (Ker)

INTERMEDIARIES AND MEMES

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 Rule 4(2) states that if a meme is against the integrity and sovereignty of India, or if it is against the security of India or friendly relations with foreign countries, then a court of competent jurisdiction may pass an order to other intermediaries like Facebook, Instagram, etc to find out the origin or creator of the meme.

Intermediaries are social platforms where people interact with each other. A meme creator will communicate the memes to the viewers through these platforms. The liability of intermediaries in copyright infringement is discussed in various cases. Some blamed intermediaries for infringement of copyright as the infringed work is communicated to the audience through their platform. But to fix the liabilities Digital Millennium Copyright act 1998 was introduced which provides certain conditions to intermediaries:

- Intermediaries should not involve in the communication of infringed information or store it.
- The intermediaries are not supposed to alter any information passed through it.
- Intermediaries must not have known of any infringing activity.
- Intermediaries should not have received any monetary consideration for infringing activity.
- Intermediaries should keep track of infringed information and delete it as soon as it is identified.

Under Section 51 (a)(ii) of the Trademark Act 1999, the intermediaries will be liable along with the meme creator when the above conditions are applied¹³.

THE PERSPECTIVE OF THE INDIAN JUDICIARY

Delhi High Court held that Section 52 of the Copyrights Act, 1957 purpose is to protect freedom of expression under Article 19(1) of the Indian Constitution and not intended to negatively

¹³ *Super Cassettes Industries Ltd. v Myspace Inc.* (2008) DLT 487

prescribe what infringement is by the Parliament¹⁴. Fair Use doctrine varies in every jurisdiction. In Australian Jurisdiction Section 41 of the copyright, the act provides for Fair Use for satire but is restricted to dramatic, literary, or musical work. But in Indian Copyrights Act Section 52(1) allows Fair Use of any work for personal or private use, review or criticisms, etc. To constitute Fair Use there should not be any intention to compete with the copyright holder by the infringer and to derive profits from such competition¹⁵.

A meme is a transformative work, where the original work has been transformed into a new work by adding new expressions or ideas, or creatives in it. The main aim of the Fair Use doctrine is to allow freedom of Expression as it allows one to use a particular work that has been protected by copyright without actually procuring a license to use such work¹⁶. Hence, the Fair Use doctrine exempts transformative work from the liability of copyright infringement.

CONCLUSION

Memes are meant for entertainment purpose and meme creators should be responsible enough to see to it that their meme does not violate others' rights. Lack of awareness is also another reason for copyright infringement cases. It is advised for young creators that before sharing a meme if it is copied from any pre-existing work prior consent has to be obtained from the copyright holder. If a meme is used for business or advertising purposes, also requires a license from the concerned copyright holder. IP rights regarding memes is a grey area and the legislature should come up with necessary provisions that will regulate copyright infringement activity.

¹⁴ *Wiley Eastern Ltd. v Indian Institute of Management* (1995) PTC (15) (Del) (DB)

¹⁵ *Blackwood & Sons Ltd. v A.N Parasuraman* (1959) Mad 410

¹⁶ *Cariou v Prince* [2013] 714 f.3d 694