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Y U NO LET ME SHARE MEMES?! – HOW MEME CULTURE NEEDS A DEFINITIVE TEST FOR NONCOMMERCIAL SPEECH

I. INTRODUCTION

It is well accepted that today's society is heavily dependent on social media. Today roughly seven in ten Americans use social media to connect with one another.¹ More specifically, memes in recent years, have become an exceedingly popular form of communication. The Oxford English Dictionary defines a meme as: “[a]n image, video, piece of text, etc., typically humorous in nature, that is copied and spread rapidly by Internet users, often with slight variations.”² As memes become a standard form of communication, we are presented with the question of what are the legal implications, i.e. copyright and trademark infringement and violating an individual's right of publicity, of meme sharing? More specifically, what are the legal implications of meme sharing when the sharer is a business entity? Memes have become such a large part of society that research studies are being conducted over the course of several years.³ Researchers at the Indiana University Center for Complex Networks and Systems Research, with nearly \$1 million in grant funding by the National Science Foundation, have spent six years researching memes.⁴

¹ *Social Media Fact Sheet*, PEW RESEARCH CENTER: INTERNET, SCIENCE & TECH (2017), <http://www.pewinternet.org/fact-sheet/social-media/> (last visited Nov. 14, 2017).

² Meme, Oxford Dictionaries, <https://en.oxforddictionaries.com/definition/meme> (last visited Sep. 20, 2017).

³ Gabe Bergado, *This is what \$1 million in meme research looks like*, THE DAILY DOT (May 12, 2016), <https://www.dailydot.com/unclick/indiana-university-million-dollars-meme-research-nsf/>.

Researchers study any kind of information that gets communicated from a person to a person. The focus is to find how memes or ideas go from person to person on social media.

⁴ *Id.*

Social media platforms make it increasingly easier for individuals to directly communicate with businesses. People can follow their favorite artist, musicians, clothing companies, television stations and even the President of the United States. Some social media accounts are managed by employees, while others are managed by the celebrity themselves.

This Comment proposes that with the increase of popularity of memes and its establishment as a form of communication and the possibility of infringement, that meme sharing has increased the need for a clear definition of commercial and non-commercial commercial speech. Commercial speech enjoys somewhat less First Amendment protection, and if a meme share is classified as commercial in nature it thereby increases the liability of businesses when they share a meme that was intended with a non-commercial purpose.⁵ Classifying a meme share as commercial eliminates the possibility of the Fair Use doctrine as a defense.

Part II of this Comment will summarize the defenses available for claims of copyright, right of publicity and trademark violations. Part III will address why the Fair Use defense is not enough for memes shares when there is no definitive test distinguishing commercial from noncommercial speech. Finally, this comment will address why meme sharing on social media has created a need for a definitive test to distinguish between commercial and noncommercial speech.

II. BACKGROUND

A. Fair Use Doctrine

A possible defense to meme sharing exists under the Fair Use Doctrine.⁶ However, if applicable, this defense only protects against copyright infringement, and a meme can be comprised of elements that possess several legal protections. Fair Use doesn't apply if the meme shared is determined to be commercial. Unfortunately, it is unclear when actions will be considered

⁵ See *Jordan v. Jewel Food Stores, Inc.*, 83 F. Supp. 3d 761 (N.D. Ill. 2015).

⁶ 17 U.S.C. § 107 (2012).

commercial versus mere social commentary. Does the Fair Use doctrine apply to humor by companies? The Fair Use Doctrine does not extend to actions that result in commercial gain. A business needs to worry about when their meme sharing will be considered commercial in nature.

What is defined as commercial speech is subject to jurisdictional interpretation. The issues that this jurisdictional definition has created for business entities was seen by Nike in the California courts.⁷ In *Kasky v. Nike, Inc.*, the California Supreme Court created a three-part test to determine when an action is commercial speech or noncommercial speech.⁸ The court determined that when categorizing a “particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.”⁹ Under the test established in California, meme sharing is high risk for business entities. The first two elements of the test for establishing commercial speech are automatically satisfied when a meme is shared by a business entity, as the recipient is likely a consumer or potential consumer and the sharer is the business.¹⁰ The Supreme Court dismissed its writ of certiorari of the Nike case in 2003 leaving the definition of commercial speech unclear.¹¹

Financial Times considers memes as big business by reporting, “[a] raft of internet celebrities, such as Josh “The Fat Jew” Ostrovsky, have built mini-empires on finding and sharing the best [memes].”¹² With the increased use of memes in our culture the need to clearly define permissible use is growing.

⁷ See *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002).

⁸ *Id.* at 960.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Linda Greenhouse, *The Supreme Court: Advertising; Nike Free Speech Case Is Unexpectedly Returned to California*, NEW YORK TIMES (June 27, 2003), <http://www.nytimes.com/2003/06/27/us/supreme-court-advertising-nike-free-speech-case-unexpectedly-returned-california.html>.

¹² Helen Lewis, *Memes are a cultural issue not to be ducked*, FINANCIAL TIMES (Sept. 20, 2015), <https://www.ft.com/content/21ee07a6-5e16-11e5-9846-de406ccb37f2>.

III. ANALYSIS

The inherent purpose of memes is communication – to be shared and re-shared by users around the world.¹³ Memes as a form of communication are quickly created and spread.¹⁴ There seems to be a new trending meme every month.¹⁵ For companies to participate in this cultural norm creates a risk of litigation.¹⁶ Defenses to infringement are likely to fail if the speech is determined to be commercial in nature instead of noncommercial.¹⁷ When the test of what is commercial is left unclear, companies are left exposed when they engage in meme sharing.¹⁸

A. Fair Use Doctrine is Not Enough for Memes

An alleged infringer may argue its alleged copyright

¹³ Phillip, *Getty Demands License Payments for Awkward Penguin*, GETDIGITAL:DE (SEPT. 2, 2015) (English Translation) <https://www.getdigital.de/blog/getty-images-wants-license-fees-for-the-awkward-penguin-meme/>

A blog site received a letter from Getty images requiring the site to pay for use of the awkward penguin meme which it had posted on its blog site. The creators of this website, mocking Getty images for becoming angry when the site shared the letter it received from Getty requesting payment for the use of this meme, then created a derivative meme of the awkward penguin and noted that it was published for in the public domain and was free for all to use. The response of Getty images seeking payment in private and becoming angry that the blog site shared this letter requesting payment, would seem to suggest that it is taboo for creators of memes to request payment.

¹⁴ Nicola Brown, *What is a Meme and What does This Obsession Say About the Future of Communication?*, SKYWARD (June 6, 2017), <https://www.skyword.com/contentstandard/creativity/meme-obsession-say-future-communication/>.

¹⁵ *Id.*

¹⁶ Chris Warren, *3 Rules for Brands Sharing Memes*, ANA Mag. (Jan. 24, 2017) <http://www.ana.net/magazines/show/id/ana-2017-january-legal-challenge-of-memes>.

¹⁷ *Id.*

¹⁸ *Id.*

infringement is permitted by fair use.¹⁹ When applicable, the Fair Use doctrine permits individuals to use copyrighted material that might otherwise be considered infringement.²⁰ Section 107 of the Copyright Act of 1976 provides:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²¹

Articles addressing meme sharing and infringement issues, such as *A Critical Analysis of Memes and Fair Use*, Fair Use has been mentioned as a defense to meme sharing.²² A transformative work will generally be permissible under the Fair Use doctrine.²³ However, a factor that is likely to prohibit fair use as a defense to copyright infringement is when the use is commercial.²⁴ Memes can be transformative but usually the meme culture on the internet is

¹⁹ 17 U.S.C. § 107 (2012).

²⁰ *Id.*

²¹ *Id.*

²² Aishwaria S. Iyez, Wbnujs, Kolkata and Raghav Mehrotra, *A Critical Analysis of Memes and Fair Use*, ROSTRUMLEGAL (2017), <https://rostrumlegal.com/critical-analysis-memes-fair-use/> (last visited Nov. 14, 2017).

²³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²⁴ 17 U.S.C. § 107.

just the sharing of one image.²⁵ Memes are not necessarily created to be commercial, they are usually created as a form of communication, social commentary or just humor.²⁶

There are four factors to consider when applying the fair use defense. While the Fair Use defense is a balancing test, commercial use will generally weigh against an alleged infringer.²⁷

The first factor to consider in determining if the fair use defense applies is an analysis of the purpose and character of the alleged infringing work.²⁸ Generally, memes are not meant to be commercial, they are humorous images or comments that are shared and re-shared.²⁹ Memes can be shared with variations that may amount to being transformative.³⁰ Transformative use of a copyrighted work, that satisfies the promotion of science and the arts, is generally permissible under the Copyright Act.³¹

The second factor to examine for a fair use defense is an analysis of the nature of the copyrighted work used.³² The nature of the work copied in memes is usually fictitious not based on fact and “[t]he law generally recognizes a greater need to disseminate factual

²⁵ Caitlin Dewery, *The hidden biases of Internet memes*, THE WASHINGTON POST (Apr. 6, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/04/06/the-hidden-biases-of-internet-memes/?utm_term=.15360ebe38b8 (last visited Nov. 14, 2017).

An example of how memes transform is the evolution of the female “Are You Serious” meme. This meme began as a blonde-haired version of the male and ended with a stick figure cartoon whose full torso with an upset face.

²⁶ Brown, *supra* Note 14.

²⁷ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 499 (1984) (discussing a need for a balancing of interest.)

²⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²⁹ *The Power of Internet Memes And A Lot Of Fun Along The Way*, 1stWebDesigner (2017), <https://1stwebdesigner.com/power-internet-memes/> (last visited Nov. 8, 2017).

³⁰ Brown, *supra* note 14.

³¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

³² *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

works than works of fiction or fantasy.”³³

The third factor of the fair use defense analyzes the amount and substantiality of the copyrighted used by the alleged infringer. This factor can weigh against an alleged infringer since memes are often shared without making any change to the meme.³⁴ However, this is not true of all memes as some memes are popular for their ability to be shared with small variations while keeping the humorous theme of the meme.³⁵ Memes can be shared without any changes made to them or can have variations to the text, such as the “Y U No” Guy meme.³⁶ Courts are to examine this factor on a case-by-case basis.³⁷ When it comes to the amount of the original content used, “[t]he less you take, the more likely that your copying will be excused as a fair use.”³⁸

The fourth factor of the fair use defense is an analysis of the effect on the market for the original work. This factor, depending how the court chooses to view a market for memes, may be in favor of the plaintiff.³⁹ Memes are shared and re-shared quickly and if the court determines that a meme re-share has negatively affected the copyright holders.⁴⁰ If a copyright holder can show that, due to the small window of popularity for memes, the ability to profit from a copyright is negatively affected by an unauthorized share, this factor

³³ *Id.*

³⁴ Brown, *Supra* note 14.

³⁵ Agnes Oblige, “Y U NO” Guy, Know Your Meme (2010), <http://knowyourmeme.com/memes/y-u-no-guy> (The meme features an image of caricature that looks frustrated and phrases beginning with “Y U No” is alerted to create a new humorous image.).

³⁶ *Id.*

³⁷ *Campbell*, 510 U.S. at 581.

³⁸ See Rich Stim, Measuring Fair Use: The Four Factors, STAN. U. LIB.: COPYRIGHT & FAIR USE, (Oct. 2010), http://fairuse.stanford.edu/overview/fair-use/fourfactors/#the_amount_and_substantiality_of_the_portion_taken.

³⁹ Christopher Mims, Quartz, *Why You’ll Share This Story: The New Science of Memes* (June 28, 2013), <https://qz.com/98677/why-youll-share-this-story-the-new-science-of-memes/>.

⁴⁰ *Id.*

may weigh heavily against an alleged infringer.⁴¹

Therefore, companies should not engage in meme sharing under this ill-conceived notion that their meme share will be protected by fair use.⁴² Fair use protection will likely hinge on whether this action is considered commercial, under the circumstances of its sharing.⁴³ Unfortunately, the determination of what it means to be commercial is subjective and thus creates a high risk of litigation for companies who engage in meme sharing.⁴⁴

i. What is Commercial Speech?

As seen in *Jordan v. Jewel Food Stores, Inc.*, courts must ultimately decide what is considered commercial and noncommercial use.⁴⁵ The court in *Jordan*, declined to find Jewel's congratulatory ad noncommercial speech, despite Jewel's assertion that it was purely congratulatory salute to the famous Chicago basketball player.⁴⁶ As noted by the Seventh Circuit, there is no judicial consensus establishing how to resolve conflicts between intellectual-property rights and free-speech rights.⁴⁷ Courts must instead rely on "a buffet of various legal approaches."⁴⁸ The Supreme Court has not addressed this question, and the lower courts offer balancing tests and frameworks borrowed from other areas of the free speech doctrine.⁴⁹ This inconsistency makes meme sharing risky for companies. Meme sharing by businesses and celebrities

⁴¹ *Id.*

⁴² Aishwaria S. Iyez, Wbnujs, Kolkata and Raghav Mehrotra, *A Critical Analysis of Memes and Fair Use*, ROSTRUMLEGAL (2017), <https://rostrumlegal.com/critical-analysis-memes-fair-use/> (last visited Nov. 14, 2017).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

⁴⁶ *Id.* at 517.

⁴⁷ *Id.* at 514.

⁴⁸ J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 31.139 (4th ed. 2013).

⁴⁹ *Jordan*, 743 F.3d at 514.

increases the likelihood of being faced with possible litigation.⁵⁰ This is because of the number of views a post by a celebrity or company may have, or because a celebrity or a company that is the defendant in a suit, is likely to have asset to payout to a plaintiff if an infringement suit is won.⁵¹

B. Is Brand Management Automatically a Commercial Activity?

i. Humor

Wendy's, a fast food chain, is an example of how social media has allowed corporations to interact with individuals.⁵² Wendy's has used Twitter, a social media platform, to have humorous exchanges with consumers.⁵³ After one follower Tweeted to Wendy's "got any memes?," Wendy's responded by posting a meme of Pepe the Frog.⁵⁴ Pepe the Frog is a popular meme that has been adopted by white supremacist and has become a symbol of hate.⁵⁵

In *Hoffman v. Capital Cities/ABC, Inc.*, the Ninth Circuit noted, "[a]lthough the boundary between commercial and noncommercial speech has yet to be clearly delineated, the "core notion of commercial speech" is that it "does no more than propose a commercial transaction."⁵⁶ This interaction is a clear

⁵⁰ Warren, *supra* Note 16 (Discussing how individual meme sharing is not the same as meme sharing by a brand).

⁵¹ *Id.*

⁵² Kate Taylor, *Wendy's won and lost an epic Twitter Troll war in just 24 hours*, Bus. Insider (January 4, 2017), <http://www.businessinsider.com/wendys-won-and-lost-a-twitter-troll-war-2017-1>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Jessica Roy, *How Pepe the Frog went From Harmless to Hate Symbol*, LOS ANGELES TIMES (Oct. 11, 2016, 6:00 AM), <http://www.latimes.com/politics/la-na-pol-pepe-the-frog-hate-symbol-20161011-snap-htlstory.html>.

⁵⁶ *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001).

Actor Dustin Hoffman filed suit against L.A. magazine and its publisher alleging violation of his right of publicity, unfair competition, and violation of

demonstration of how memes have become a daily part of society and are not pure advertising schemes.⁵⁷ Neither statute nor judicial precedent has laid out a definitive test for determining what is commercial in nature.⁵⁸ To use a meme may affect the brand's image, but that does not necessarily mean that the activity was intended for a commercial purpose.⁵⁹ As illustrated by the Wendy's Twitter account, an action, by a primarily commercial entity, may be solely intended as a humorous exchange.⁶⁰ It is highly doubtful, considering the hate symbol that Pepe the Frog has become, that Wendy's intended this for this act to be commercial.⁶¹ Wendy's shared a meme of Pepe the Frog but quickly deleted the image because it was brought to the companies attention that Pepe the Frog is a symbol of white supremacy and may have negatively impacted their brand.⁶² Wendy's removal of this meme was no doubt in response the realization that this meme share would have a negative impact on their brand.⁶³

Companies such as LexisNexis also engage in meme

the Lanham Act. This claim was brought based on the alleged unauthorized use, by the magazine, of a still photograph of the actor from a motion picture to create a computer-generated image depicting him wearing designers' women's clothes. The Court of Appeals, held that: (1) magazine was not pure commercial speech, and thus was entitled to full protection under the First Amendment, and (2) magazine did not publish article with actual malice.

⁵⁷ *The Power of Internet Memes And A Lot Of Fun Along The Way*, 1stWebDesigner (2017), <https://1stwebdesigner.com/power-internet-memes/> (last visited Nov. 8, 2017).

⁵⁸ Brown, *supra* note 13.

⁵⁹ *Id.*

⁶⁰ Kate Taylor, *Wendy's won and lost an epic Twitter Troll war in just 24 hours*, Bus. Insider (January 4, 2017), <http://www.businessinsider.com/wendys-won-and-lost-a-twitter-troll-war-2017-1>.

⁶¹ Jessica Roy, *How 'Pepe the Frog' went from harmless to hate symbol*, LOS ANGELES TIMES, (Oct. 11, 2016), <http://www.latimes.com/politics/la-na-pol-pepe-the-frog-hate-symbol-20161011-snap-htmlstory.html> (last visited Oct. 10, 2017).

⁶² Taylor, *supra* note 57.

⁶³ *Id.*

sharing. Some of the memes shared are clearly commercial in nature, such as the meme post on the LexisNexis at Berkeley Law Facebook page, of a meme depicting the character Dwight Schrute, played by Rainn Wilson, from the television series “The Office.”⁶⁴ The meme is a screen still of Wilson’s character with the caption, “What’s faster than a bear? Shepardizing[.]”⁶⁵ This meme references Sheperadizing, which is the legal citation service provided by LexisNexis for a fee.⁶⁶ The LexisNexis for Drexel Law Students Facebook page also depicts a meme about this service.⁶⁷ LexisNexis Drexel shared a meme with a screen still of the television series “Dawson’s Creek,” featuring the character Dawson Leery, played by James Van Der Beek, crying with the caption, “Forgot to Shepardize? Don’t let it happen to you[.]”⁶⁸

Meme’s are so popular in our culture that individuals have gained celebrity status from sharing the most popular memes.⁶⁹ These celebrities have shared some of the most popular memes and have gained a huge internet following.⁷⁰ One of the most famous internet celebrities is Josh Ostrovsky, better known as “The Fat Jew”, with roughly 5.5 million follows on Instagram.⁷¹ Ostrovsky has created a brand for himself using social media platforms such as

⁶⁴ LexisNexis at Berkeley Law, Facebook (2017), <https://www.facebook.com/LexisAtBerkeley/photos/a.623394824348693.1073741825.140281925993321/1582495895105243/?type=3&theater> (last visited Nov. 4, 2017) [Hereinafter Berkeley]; *The Office* (NBC television broadcast 2005 – 2013).

⁶⁵ Berkeley, *supra* Note 64.

⁶⁶ Berkeley, *supra* Note 64; <https://www.lexisnexis.com/en-us/products/lexis-advance/shepards.page>

⁶⁷ LexisNexis for Drexel Law Students, Facebook (2017), <https://www.facebook.com/LexisforDrexelLaw/photos/rpp.197566286969203/1568013003257851/?type=3&theater> [Hereinafter Drexel] (last visited Nov. 4, 2017).

⁶⁸ *Id.*

⁶⁹ Jason Newman, ‘The Fat Jew’ Joke Theft Victims Speak Out, *Rolling Stone* (Aug. 20, 2015), <http://www.rollingstone.com/culture/news/the-fat-jew-joke-theft-victims-speak-out-20150820>.

⁷⁰ *Id.*

⁷¹ *Id.*

Instagram and Twitter, where he shares some of the most popular jokes and memes.⁷² Ostrovsky has been accused of theft as he shares social media posts and has allegedly not credited the original creator.⁷³

Forbes Magazine notes there may be more than one way to define a company's brand.⁷⁴ One definition of brand is the name given to a product or service from a specific source.⁷⁵ Used in this sense, brand is similar to the current meaning of the word trademark.⁷⁶ Put simply, your brand is what your consumer thinks of when he or she hears your brand name.⁷⁷ In this context, a brand exists only in someone's mind.⁷⁸ If meme sharing creates celebrities and develops a brand, that would indicate that brands are commercial.

ii. Goodwill

This idea of brand management as being commercial was advanced by *Jordan*.⁷⁹ To celebrate Michael Jordan's induction into the Basketball Hall of Fame, Time, the publisher of *Sports Illustrated*, produced a special edition of *Sports Illustrated Presents*.⁸⁰ The issue was titled "Jordan: Celebrating a Hall of Fame Career."⁸¹ Prior to publication, a Time sales representative contacted Jewel to offer free advertising space in the commemorative issue in return for a promise to stock and sell the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Jerry McLaughlin, *What is a Brand, Anyway?*, Forbes Magazine (Dec. 21, 2011, 12:05 PM), <https://www.forbes.com/sites/jerrymclaughlin/2011/12/21/what-is-a-brand-anyway/#2136fa4c2a1b>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 518 (7th Cir. 2014).

⁸⁰ *Id.* at 512.

⁸¹ *Id.*

magazines in its stores.⁸² Jewel agreed to the deal and had its marketing department design a full-page color ad.⁸³ The ad combined textual, photographic, and graphic elements, and includes the Jewel–Osco logo and its marketing slogan, “Good things are just around the corner.”⁸⁴ In the photo, the logo and slogan—both registered trademarks—are displayed above a pair of basketball shoes with the number “23.”⁸⁵ The text of the ad read:

A Shoe In!

After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel–Osco salutes # 23 on his many accomplishments as we honor a fellow Chicagoan who was “just around the corner” for so many years.⁸⁶

Despite claims by Jewel–Osco that the ad was noncommercial speech, the court believed the ad was simply aimed at fostering goodwill for the Jewel brand among the targeted consumer group – “fellow Chicagoans” and fans of Michael Jordan – to increase patronage at Jewel–Osco stores.⁸⁷ The Supreme Court noted “failure to reference a specific product is a relevant consideration in the commercial-speech determination. But it is far from dispositive, especially where ‘image’ or brand advertising rather than product advertising is concerned.”⁸⁸ In *Jordan* the court reasoned that a promotion of brand loyalty, rather than a promotion of a specific product doesn't mean the ad is “noncommercial.”⁸⁹

If courts follow the idea that brand loyalty does not

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Jordan*, 743 F.3d at 512.

⁸⁶ *Id.*

⁸⁷ *Id.* at 518.

⁸⁸ *Id.* at 519.

⁸⁹ *Id.*

necessarily mean that an action is noncommercial, meme sharing on social media may be risky for a company or public figure. Companies may be vulnerable to liability for copyright infringement, trademark infringement or right of publicity violations if it is argued that their meme share is a form of brand advertising. The Twitter exchange between Wendy's and consumers could be considered as a form of brand management.⁹⁰ This humorous interaction with its followers was to create a positive image of the fast-food restaurant and is therefore commercial.⁹¹ A lack of definitive case law dealing with commercialization of interactions with companies and its consumers has been left up to the courts to determine the line.⁹² A clear way to determine what is commercial and what is noncommercial is needed because the internet and the development of meme culture as a form of communication is becoming a more prominent aspect in society.

iii. Right of Publicity

The right of publicity is a state law protection that guards an individual's right to control the commercial use of his or her identity.⁹³ This intellectual property right, when infringed, is a commercial tort of unfair competition.⁹⁴ With the popularity of memes, there may be an increase of violations of this right.

Recently, professional dancer, Valentin Chmerkovskiy, from the TV Show "Dancing with the Stars" and CBS Corporation, found themselves faced with legal troubles after sharing a meme online.⁹⁵ Chmerkovskiy shared on his Facebook page a meme

⁹⁰ Kate Taylor, *Wendy's won and lost an epic Twitter Troll war in just 24 hours*, BUS. INSIDER (January 4, 2017), <http://www.businessinsider.com/wendys-won-and-lost-a-twitter-troll-war-2017-1>.

⁹¹ *Id.*

⁹² McCarthy, *supra* Note 48.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Complaint S.E. v. Chmerkovskiy, (M.D. Tenn. 2016).No. 3:16-cv-00095; Venkat Balasubramani, Technology & Market Law Blog, *Adding Derogatory Caption to Photo Meme Can Be False Light- S.E. v. Chmerkovskiy* (Nov. 26,

containing a photo of the plaintiff, an overweight child with down syndrome, with the caption, “[l]etting your kid become obese should be considered child abuse.”⁹⁶ CBS shared on their website the same meme with the caption “[b]usted.”⁹⁷ One count of the complaint was misappropriation of likeness, in other words violating the plaintiff’s right of publicity.⁹⁸ While it is unclear what CBS’s intent was with sharing the meme, it was likely a poorly thought out attempt at humor and the suit against CBS was voluntarily dismissed.⁹⁹

Tasteless as this might have been, Chmerkovskiy asserted that his meme share was a comment on childhood obesity, what he considers a social issue and the Tennessee Personal Rights Protection Act (TPRPA) claim against him could not proceed because the posting to his social media account was not made for advertising purposes.¹⁰⁰ This was not enough for the court, as Chmerkovskiy’s motion to dismiss was denied, this case is still pending.¹⁰¹

There is a clear distinction between memes that are meant to be commercial and memes that are meant to be humorous. This meme shared by Chmerkovskiy clearly did not have a commercial

2016), <http://blog.ericgoldman.org/archives/2016/11/adding-derogatory-caption-to-photo-meme-can-be-false-light-s-e-v-chmerkovskiy.htm>.

⁹⁶ Complaint *S.E. v. Chmerkovskiy*, (M.D. Tenn. 2016).No. 3:16-cv-00095; Balasubramani *supra* note 95.

⁹⁷ *Chmerkovskiy*, 221 F. Supp. 3d at 982.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Protection of Personal Rights Act of 1984 –

a) Every individual has a property right in the use of that person’s name, photograph, or likeness in any medium in any manner.

(b) The individual rights provided for in subsection (a) constitute property rights and are freely assignable and licensable, and do not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual’s lifetime, but shall be descendible to the executors, assigns, heirs, or devisees of the individual so protected by this part.

TN Code § 47-25-1103 (2014).

¹⁰¹ *Id.*

intention.¹⁰² This meme, unlike the Jewel ad in *Jordan*, lacked the elements noted by the courts that are present in commercial advertisements, there is no logo, slogan, or advertisement.¹⁰³ If the intellectual property right of publicity is a commercial tort of unfair competition, it would seem that as long as it is established that the meme share was not for a commercial purpose, the meme share would be permissible.¹⁰⁴

In one instance the parents of a boy with Down syndrome decided to take action against the website Meme Army, a website dedicated to memes.¹⁰⁵ A picture of their son became the subject of a viral meme.¹⁰⁶ The parents sued claiming their son experienced mocking that was ruthless and unrelenting.¹⁰⁷ The parents sued of the alleged harm their son experienced as a result of this meme.¹⁰⁸ The article states that it was believed that this lawsuit would just be tossed out, likely because this kind of lawsuit was relatively unheard of.¹⁰⁹ To the surprise of many, a judge and jury sided with the boy in the amount of \$150,000.¹¹⁰ The boy's father explained, "[w]e are in favor of the First Amendment. [But] [t]his is just mean. This is just people being mean."¹¹¹

These instances seem to be less about whether something is commercial or whether they have the right to use the person's image, but instead focus on whether the activity is "mean" or harmful to an individual.¹¹² Both the Meme Army and the Chmerkovskiy suit deal with a person with Down syndrome,

¹⁰² *Id.*

¹⁰³ See *Chmerkovskiy*, 221 F. Supp. 3d 980 (M.D. Tenn. 2016); *Jordan*, 743 F.3d at 519;

¹⁰⁴ 31 Causes of Action 2d 121 (Originally published in 2006) (McCarthy, The Rights of Publicity and Privacy 2d § 3:1.)

¹⁰⁵ Aaron Kelly, *Can You Successfully Sue Over a Meme?*, KELLYWARNER (Jan. 11, 2016), <http://www.aaronkellylaw.com/sue-over-a-meme/>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Kelly *supra* Note 105.

¹¹² *Id.*

perhaps this was the key difference.¹¹³

C. Trademark Infringement

Meme shares can also create a risk for trademark infringement. Internet memes may be based on separate pieces of work that can incorporate copyrights, trademarks, or rights of publicity of third parties.¹¹⁴ The article titled, *I Can Haz Copyright Infringement? Internet Memes and Intellectual Property Risks*, gives the following example of how multiple intellectual property infringement risks can exist in one meme:

[I]magine that your company has obtained a license from an author to use a meme consisting of a humorous caption superimposed over an image of George Costanza, a character from the television show *Seinfeld*. Although you may have a license to use the meme, it is unwise to assume that the meme author is authorized to use the image of Costanza or authorized to license its use to your company. In using this meme, you risk violating the right of publicity of the actor playing Costanza, Jason Alexander, as well as Jerry Seinfeld and Larry David's copyrights as scriptwriters for the show, and possibly Castle Rock Entertainment's rights to the *Seinfeld* trademark, because your use could

¹¹³ Aaron Kelly, *Can You Successfully Sue Over a Meme?*, KellyWarner (Jan. 11, 2016), <http://www.aaronkellylaw.com/sue-over-a-meme/>; *S.E. v. Chmerkovskiy*, 221 F. Supp. 3d 980 (M.D. Tenn. 2016).

¹¹⁴ Scott J. Slavick, *I Can Haz Copyright Infringement? Internet Memes And Intellectual Property Risks*, MONDAQ (Nov. 28, 2012), <http://www.mondaq.com/unitedstates/x/208786/Copyright/I+Can+Haz+Copyrig ht+Infringement+Internet+Memes+and+Intellectual+Property+Risks>.

arguably suggest that your company is endorsed by, authorized by, or sponsored by these parties, when that is not the case.¹¹⁵

Currently, there exists no statutory defense when trademark and free speech rights conflict.¹¹⁶ Without a bright-line affirmative defense, those who should be allowed to use a meme as noncommercial speech are likely faced with having to argue that they are exercising permissible use.¹¹⁷ When being faced with the decision of whether or not to remove a meme, it seems apparent that most would cease to use the meme, as litigation can be lengthy and expensive.¹¹⁸ This ambiguity and unpredictability of a balancing of trademark claims against asserted rights of free speech is why there is a need for the creation of affirmative defenses regarding trademark law.¹¹⁹

IV. CONCLUSION

Memes are relatively new and lawsuits dealing with memes seem to settle out of court or are sealed, leaving the question of permissibility of meme use relatively unclear.¹²⁰ Cases such as the *Chmerkovskiy* case are likely to settle out of court.¹²¹ The reason for CBS' voluntary dismissal can only be speculated.¹²² Although, it was likely due to a settlement to avoid litigation cost and spare itself any negative publicity.¹²³ If defining commercial speech is left to

¹¹⁵ *Id.*

¹¹⁶ McCarthy, *supra* Note 48. Memes, as a new form of communication, is increasing the need for clear statutory defense when trademark violations and free speech rights conflict. Although, this is worthy of an article itself, this comment will not discuss that.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *S.E. v. Chmerkovskiy*, 221 F. Supp. 3d 980, 983 (M.D. Tenn. 2016).

¹²² *Id.*

¹²³ *Id.*

the courts, there will continue to be a risk of litigation for companies who engage in meme sharing.¹²⁴ It is absurd to suggest that because of the high risk associated with meme sharing that companies just sit out this new form of communication; instead this new form of communication furthers the reason why there needs to be a definitive test between commercial and noncommercial speech.

Companies could take the safe route and seek a license for the use of memes, but what about some companies that are smaller and should be entitled to use of these memes without cost? Or companies that may inevitably fall victim to claims of infringement and may be required to pay for licenses or settlements for meme shares, that perhaps they should not have had to pay just because it is cheaper to settle rather than litigate. As social media changes the way we communicate, the law must be changed to reflect the new social norms that have been created. A clear definitive statutory test between commercial and noncommercial speech is needs to be established.

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¹²⁴ *Id.*

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