

# Mememes are here to stay, and so is your risk of being sued for copyright infringement

By Ross Kowalski, Esq., and Steven Lauridsen, Esq., Tucker Ellis LLP

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Mememes have become a significant part of internet pop culture. Popular mememes such as “Disaster Girl,” “Distracted Boyfriend,” and “Success Kid” have been shared rampantly throughout the internet and social media both in their original forms and in countless derivatives.

Mememe sharers do so for a variety of reasons, including social or political commentary or simply for comedic purposes. Mememes generally incorporate images or photographs created by another creator, and based on the facts of each specific case, may infringe on the original creator’s copyright.

On the other hand, Creators such as photographers and artists currently have only one option for enforcing their copyright — filing suit in federal court.

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Traditional copyright litigation in federal court is very time consuming and costly. These disadvantages to copyright owners have chilled prosecution of claims for alleged infringements such as this.

The Copyright Alternative in Small-Claims Enforcement Act of 2019 (the “CASE Act”) was passed as part of the Consolidated Appropriations Act, 2021,<sup>1</sup> which was signed into law on December 27, 2020.

The CASE Act establishes a small claims court system called the Copyright Claims Board (“CCB”) as part of the United States Copyright Office for copyright owners to seek damages totaling less than \$30,000 for their copyright claims.

Proponents of the CASE Act point out that the newly established small claims court would allow copyright holders to more easily bring their own smaller claims in front of the CCB without the

prohibitive costs and other burdens associated with filing a claim in federal court.

Further, registration requirements as a prerequisite for filing a claim are somewhat relaxed at the CCB. In federal court, a plaintiff must have a copyright registration in order to bring a case. At the CCB, a plaintiff may rely on a registration, but a plaintiff may also rely on a copyright application that has been filed prior to, or simultaneously with, filing the claim.

Opponents of the CASE Act and the forthcoming CCB have argued that the CCB could provide yet another venue for “copyright trolls.” Some fear that everyday actions such as sharing an unlicensed photograph on social media or sharing a mememe could land a person in this new court.

For example, famous copyright attorney Richard Liebowitz recently filed suit in United States district court seeking hundreds of thousands of dollars in damages on behalf of a client and against Jennifer Hudson for posting a photograph of herself taken by Liebowitz’s client on her website.<sup>2</sup>

The case ultimately settled on undisclosed terms. Mr. Liebowitz also filed suit on behalf of another photographer client against singer Jennifer Lopez.

The suit accuses Ms. Lopez of posting a copyrighted photograph to her Instagram account and again sought hundreds of thousands of dollars in statutory damages.<sup>3</sup> This case also settled on undisclosed terms.

Many readers may be asking whether making or sharing a mememe can even constitute copyright infringement. In short, it can. “Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression.”<sup>4</sup>

This, of course, includes photographs, which are specifically included under Section 102 of the Copyright Act, 17 U.S.C.A. § 102(a)(5). When a person creates a mememe, they generally alter the underlying image in some respect. A popular example is adding block text superimposed over the photo to make some kind of statement.

As such, a typical meme can be considered a derivative work, which is defined in Section 101 of the Copyright Act, 17 U.S.C.A. § 101, as, “a work based upon one or more preexisting works ... A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”

Under Section 106 of the Copyright Act, 17 U.S.C.A. § 106, the owner of a copyright has the exclusive rights to reproduce the work and prepare derivative works based upon the copyrighted work.

Accordingly, both the creation of a meme (preparing a derivative work based off another’s image) and sharing a meme or copyrighted photo online (reproducing and publishing the copyrighted work) could possibly amount to copyright infringement.

## *Whether the reproduction of a meme falls under the fair use exception is heavily fact-dependent.*

Many defendants who have posted copyrighted photographs — whether as a meme or otherwise — to social media sites have argued that the posting constitutes fair use, which is a defense to copyright infringement. Section 107 of the Copyright Act, 17 U.S.C.A. § 107, sets forth four factors that are weighed in determining whether a work falls under the fair use exception.

### **These factors 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.

Whether the reproduction of a meme falls under the fair use exception is heavily fact-dependent with the outcome varying on a case-by-case basis.

The question of fair use for these types of cases often plays out in litigation as raising the question of whether the meme is being used for commercial gain by the person sharing the meme, how transformative of the original work the meme is — meaning whether it adds something new with a further purpose or different character such that it does not substitute for the original use of the copyrighted work, — and whether the meme is parodying the underlying image.

One real-life example is *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 971 (C.D. Cal. 2019), where artist Matt Furie brought a copyright infringement action against Infowars LLC for using Furie’s Pepe the Frog character as part of a “Make America Great Again” poster sold online.

Furie created a comic called “Play Time,” featuring Pepe the Frog in 2003. Furie subsequently included Pepe in another comic book series called *Boy’s Club* that was published beginning in 2006.

By 2008, Pepe the Frog became the subject of a wildly popular internet meme. Pepe was commonly depicted along with his catchphrase “feels good man.”

Beginning in 2015, white nationalists and members of the “alt-right” began associating Pepe the Frog with white supremacist language and symbols. Pepe eventually became known as a white nationalist symbol.

In January 2017, non-party Jon Allen created a “Make America Great Again” poster that included a depiction of Pepe the Frog along with Donald Trump and various other conservative political figures.

This poster was sold online at Infowars’s website and was promoted on *The Alex Jones Show*. Gross revenues from the sales of this poster totaled \$31,407.44. Furie sued Infowars for copyright infringement based on the sales of the poster containing Pepe the Frog.

Both parties filed a motion for summary judgment. Specifically, Infowars filed a motion for summary judgment on fair use, which the court denied.

Among other holdings, the court rejected Infowars’s argument that the “meme-ification” of Pepe the Frog destroyed or diminished Furie’s copyright interest in the character, noting that no matter how popular a character may become, its copyright owner is still entitled to guard against unauthorized uses.

Thus, according to the holding in *Furie*, even if a photo or a character is the subject of a meme shared far and wide, the original copyright owner’s rights are not diminished.

Because there were various issues of disputed facts, the court resolved a number of issues on summary judgment but ultimately left the issues of infringement and fair use for trial.

Ultimately, Infowars settled with Furie, paying him \$15,000 and agreeing to destroy any remaining posters and not to sell anything with Pepe’s image again.

As the above case examples show, a copyright holder of an image used in a meme may currently only bring suit in United States district court.

However, in many instances, the limited damages available, especially related to a single infringer, are not likely to make the high cost of federal litigation worthwhile, even though plaintiffs can be awarded between \$750 and \$30,000 in statutory damages for each work infringed, with the statutory damages award increasing up to \$150,000 per infringed work subject to willful infringement.

According to an American Intellectual Property Law Association report, the average cost of litigating a copyright infringement case in federal court from pre-trial through appeal is \$278,000.<sup>5</sup>

Accordingly, it oftentimes does not make economic sense for a copyright owner to bring a copyright infringement suit. This is especially true for individual creators such as photographers, designers, independent musicians, and independent authors.

As a point of comparison, according to the U.S. Bureau of Labor Statistics, in 2020, the median annual salary for writers and authors was \$67,120.<sup>6</sup>

This is just one example of how enforcement of copyrights by independent and small creators is often not economically feasible even with enhanced statutory damages for willful infringement.

And while attorneys' fees are available to successful copyright plaintiffs,<sup>7</sup> many potential plaintiffs are not willing to risk the high costs of litigation by banking on an attorneys' fees award that the court may not grant.

As an attempt to fix this problem and to provide more options for copyright owners, Congress passed the CASE Act. The CASE Act directed the Copyright Office to establish the CCB, which will be a three-member tribunal of CCB officers appointed by the Librarian of Congress.

The CASE Act envisions that the CCB will be available to litigants by December 27, 2021. The CCB will have jurisdiction to hear certain copyright disputes, including infringement claims, declaratory judgments of non-infringement, and challenges to DMCA notices where the party alleges misrepresentation relating to the alleged infringing activity.

The CCB may award either actual damages or statutory damages, though the statutory damages available at the CCB differ from those that may be awarded in district court litigation.

CCB damages are limited to:

- \$15,000 in statutory damages for each work infringed that is timely registered under 17 U.S.C.A. § 412;
- \$7,500 in statutory damages for each work infringed that is not timely registered under 17 U.S.C.A. § 412, up to a total of \$15,000 in any one proceeding;
- a total damage cap of \$30,000 per single proceeding.<sup>8</sup>

Despite these limited damages, the CCB carries the possibility of various positive outcomes for copyright owners. Foremost, the CCB provides a streamlined process for copyright owners to assert their rights. The new CCB reduces the time and expense as compared to filing suit in federal court, which allows independent copyright owners and those with fewer resources to enforce their rights without the process being cost prohibitive.

It is important to note, however, that proceedings in front of the CCB are completely voluntary on behalf of the respondent. The respondent has a sixty-day period from the date of proper service of the case-initiating documents for the infringement claim to opt out of a CCB proceeding.<sup>9</sup>

So why wouldn't a respondent opt out? Proceeding in front of the CCB limits damages to a total of \$30,000 and opting out carries the risk of the claim being filed in federal court, which carries with it the possibility of much higher damages, attorneys' fees awards, and more protracted and expensive litigation overall.

While critics of the forthcoming CCB caution that the new court may increase the risk of abuse and copyright trolling, the CASE Act has imposed various safeguards. One such safeguard includes awarding costs and attorneys' fees of up to \$5,000 against a party that brings a claim, counterclaim, or defense in bad faith.<sup>10</sup>

Further, a party may be barred from initiating a claim before the CCB for twelve months and may have any additional pending claims dismissed without prejudice if the CCB finds that the party has pursued a claim, counterclaim, or defense in bad faith on more than one occasion within a twelve-month period.<sup>11</sup>

The legislation also authorizes the Copyright Office to limit "the permitted number of proceedings each year by the same claimant" as a protection against abusive conduct.<sup>12</sup>

Regardless of these safeguards, copyright trolls are more likely to threaten suit in federal court where the potential damages are larger and provide greater leverage for settlement.

Thus, even if copyright trolls are discouraged from abusing the CCB, some fear that the more accessible litigation forum the CCB provides may put everyday people at risk of being sued for seemingly "innocent" activities such as sharing memes.

However, because anyone may opt out of the CCB proceedings, a copyright owner who brings a claim before the CCB may be no more likely to pursue a claim against a sharer of a meme if the image was not shared for commercial gain and may possibly fall under the fair use exception, especially if the defendant opts out of the more accessible CCB litigation.

In such situations where the potential respondent simply opts out, the copyright owner is left in the same situation as if the CCB did not exist, leaving only more costly district court litigation for pursuing the claim. As discussed above, district court litigation may not be practical for many copyright owners.

There is one circumstance where the CCB might have an effect on the manner in which copyright owners assert their rights in photos against people infringing on such rights by sharing the photos or incorporating them into memes.

A copyright owner with a legitimate claim will be more empowered and financially capable of bringing suit in front of the CCB. For such legitimate claims brought before the CCB, it may possibly even be in the respondent's best interests not to opt out and instead to continue to proceed before the CCB to limit the respondent's possible damages, especially in the case of willful infringement.

For example, the photographer of a photo used by a business on its website without permission may prefer the CCB over federal court, and the respondent may also prefer that venue as a way to limit its potential risk.

As a result, a copyright owner without extensive financial means may even have some success in enforcing their copyright that wasn't available prior to the CASE Act.

All of this leads to the question: Should your everyday meme creator be worried about the forthcoming CCB?

While difficult to say at this time, given the possibility that the CCB may incentivize copyright owners with fewer resources to pursue claims, it is safe to say that it is always preferable to consider copyright implications before posting a meme, especially for a commercial purpose.

This article is for general information purposes and is not intended to be and should not be taken as legal advice.

## Notes

<sup>1</sup> *Consolidated Appropriations Act*, 2021, PL 116-260, December 27, 2020, 134 Stat 1182.

<sup>2</sup> *Ramales v. JHud Productions Inc.*, No. 1:20-cv-03927-LLS, *complaint filed* (S.D.N.Y. May 20, 2020).

<sup>3</sup> *Sands v. Lopez*, No. 1:20-cv-03126-PGG, *complaint filed*, 2020 WL 1915678 (S.D.N.Y. April 20, 2020).

<sup>4</sup> 17 U.S.C.A. § 102(a).

<sup>5</sup> <https://bit.ly/3pWPfQz>

<sup>6</sup> Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, Writers and Authors, at <https://bit.ly/3gzAyig>.

<sup>7</sup> 17 U.S.C.A. § 505.

<sup>8</sup> 17 U.S.C.A. § 1504(e)(1).

<sup>9</sup> 17 U.S.C.A. § 1506(i).

<sup>10</sup> 17 U.S.C.A. § 1506(y)(2).

<sup>11</sup> 17 U.S.C.A. § 1506(y)(3).

<sup>12</sup> 17 U.S.C.A. § 1504(g).

## About the authors



**Ross Kowalski (L)**, an associate at **Tucker Ellis LLP** in Cleveland, assists clients with all aspects of intellectual property, including patent preparation and prosecution, trademark prosecution and copyright registration. He also counsels clients on intellectual property enforcement strategy. He can be reached at [ross.kowalski@tuckerellis.com](mailto:ross.kowalski@tuckerellis.com). **Steven Lauridsen (R)**, counsel at the firm's Los Angeles office, has diverse patent and trademark prosecution and counseling experience. He represents companies of all sizes in patent, trademark, copyright, trade secret and domain name litigation at both the trial and appellate levels, in Section 337 investigations before the U.S. International Trade Commission, and before the Trademark Trial and Appeal Board. He can be reached at [steven.lauridsen@tuckerellis.com](mailto:steven.lauridsen@tuckerellis.com).

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