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Social media posts and memes: a South African perspective on the intersection of copyright law, internet use and privacy

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SOCIAL MEDIA POSTS AND MEMES: A SOUTH AFRICAN PERSPECTIVE ON THE INTERSECTION OF COPYRIGHT LAW, INTERNET USE AND PRIVACY

by

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ABSTRACT

This research report is a reflection on the intersection of social media, privacy, dignity, and copyright law. With a click of a button, social media platforms, and the Internet at large, reveal personal information belonging to millions of individuals around the world, the digital environment has changed life as we once knew it. Legal scholars and legal practitioners must now face the novel legal issues which have been brought about the digital age. Due to the law's reactive nature, privacy and data protection have been put at the forefront of new legislation.

The subject of this paper is not data protection, rather this paper analyses the common law protection of privacy and copyright law in South Africa within the context of social media. In light of the changes brought about by the digital age, the position that I put forward in this paper is: to effectively address the challenges created by the digital environment, we must strive to adopt innovative and creative ways to use existing law rather than create new law. The paper discusses how internet memes can be harmful to the privacy and dignity of the individuals whose works they are derived from. I also examine the common law protection of privacy within this context and whether it is appropriate for addressing related issues in the digital age. Lastly, I put forward remedies in copyright law, particularly the protection of moral rights of an author, as a possible recourse that can be used by authors whose works have been made into internet memes.

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I would like to begin by expressing my gratitude to my mother and father for always encouraging us to the ask the important questions, and to seek their answers. Thank you, Mama and Tata, for your unwavering belief in me and my potential. I owe all my success and blessings to you.

I am thankful to my little sister, Litha, and cousin, Odwa for their constant support throughout the year of me writing this research report. I thank you for all the mentally stimulating discussions we have every time we are together, as you know, some of those conversations inspired the topic of this paper.

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I INTRODUCTION

Recently, I was scrolling on Instagram, and I came across a picture of a little boy. Tshepi Vundla, the mother of the little boy, is a celebrity and influencer on Instagram. What was peculiar about this picture was that it was posted on a meme page, and it had been accompanied by a funny caption. The caption was linked to the boy's facial expression. This sparked an interest in me, I wondered what legal implications would arise from this picture posted by a proud mother being turned into a social media meme. Does the law provide recourse for a person who may find this conduct to be offensive to their dignity?

Social media has become a vital platform for socialisation and public participation, particularly for the Millennial Generation[1] and Generation Z[2]. As of the year 2022, there were 1.28 billion users on Instagram[3], 217 million users on Twitter,[4] and 2.9 billion users on Facebook[5]. These social media platforms garner a colossal number of users across the world. On these platforms, users share their artistic talents, their thoughts, ideas, and proud moments, much like the happy new mother above. Due to the large number of users and the kind of content which is posed on these on social media platforms this paper aims to examine the intersection of social media, copyright law, and privacy.

There is no consensus on the definition of social media yet, however, Obar and Wildman offer a set of commonalities between the different social media platforms. These commonalities set them apart from predecessor communication technologies, such as telephones.[6] The first commonality is that social media platforms are *Web 2.0* internet based.[7] This, according to Obar and Wildman, is what makes the internet an

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[1] Generation Y (people born after 1980 to 2000) – Carolyn Easton & Renier Steyn 'Milleniel Leaders and leadership styles displayed in the workplace' (2023) *South African Journal of Business Management* 54(1) at 2.
[2] People born between 1995 and 2012 - Karina Gabrielova & Aaron A. Buchko 'Here comes Generation Z: Millennials as managers' (2021) *Business Horizons* 64 at 490.
[3] 'Number of Instagram Users Worldwide from 2020 to 2025' available at *https://www.statista.com/statistics/183585/instagram-number-of-global-users/*
[4] 'Twitter by the Numbers: Stats, Demographics & Fun Facts' available at *https://www.omnicoreagency.com/twitter-statistics/*
[5] S. Dixon 'Leading countries based on Facebook audience size as of January 2022' available at *https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/*
[6] Jonathan A. Obar & Steve Wildman 'Social media definition and the governance challenge: An introduction to the special issue' (2015) Telecommunications Policy 39 at 746.
[7] Ibid at 147.

interactive platform.[8] *Web 2.0* based internet sites, as defined by O'Reilly, are 'sites and services that rely upon the generation of content by their users, as opposed to editors or dedicated content creators'.[9] Thus the concept of user-generated content was borne, unlike in the past when users were primarily consumers of internet based content, users are now active participants on the internet environment as generators of content.[10] The second commonality, as a result of *Web 2.0*, is that user-generated content has become the foundation of social media platforms. This can be seen in the social media platforms, namely; Twitter, Facebook, and Instagram, which allow their users to post images, videos, and text, that can then be shared and engaged with by those users in their social network and users all over the world.[11] The third commonality is that social media platforms allow users to identify each other by requiring a user to create a profile that includes identifying information about them such as their name and surname, for example. This feature enables other users to find and connect with those that they know.[12] The last commonality is that they enable users to create social networks on the social media platform.[13]

Social media platforms are easily downloaded into smartphones, 'cellular telephones with an integrated computer and other features not originally associated with telephones such as an operating system, web browsing, and the ability to run software applications'[14]. In addition to the ability to host social media platforms, smartphones have a built-in feature that enables one to screenshot what is displayed on their screen. A screenshot is a photo of what the user is currently viewing on their screen. Once a screenshot of a social media post has been taken, the photo is saved to the user's phone, and they can manipulate the screenshot photo.[15] This is how internet memes

[8] Ibid.
[9] Russell Newman, Victor Chang & Robert John Walters et al 'Web 2.0—The past and the future' (2016) *International Journal of Information Management* at 591.
[10] Jonathan A. Obar & Steve Wildman op cit at note 4 at 147.
[11] H. Bosher & S. Yeşiloğlu 'An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram' (2019) 33 International Review of Law, Computers & Technology at 165.
[12] Jonathan A. Obar & Steve Wildman op cit note 4 at 147.
[13] Ibid.
[14] Alyssa Provassa 'Definition smartphone' available at *https://www.techtarget.com/searchmobilecomputing/definition/smartphone*.
[15] H. Bosher & S. Yeşiloğlu 'An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram' (2019) *International Review of Law, Computers & Technology* at 175.

come into being. Smith and Copland describe internet memes to be the 'unifying of aesthetic and linguistic cues; this includes the font choice and the central image'.[16] As explained by Smith and Copland, memes result from the participatory nature of social media. Memes contain witticisms that comment on social culture.[17] The main characteristic of internet memes, as explained by Mielczarek and Hopkins, is the appropriation of a picture taken and posted online by another person.[18]

As explained above, user-generated content is an essential part of social media platforms. Social media users post content to share their creativity, thoughts, and emotions with people they connect with. In most cases, a person does not post a picture of themselves online for comedic effect, and if that is their intention, it is usually obvious to other users. When an individual generates a meme out of a social media user's photo, they often do not use the author's photo in the manner the author intended. The author may not intend that their social media post be distributed online as an internet meme. Therefore, it can be submitted that the nature of these social media platforms has created fertile ground for privacy infringement and therefore a violation of the dignity. I argue that the use of another's social media posts in creating an internet meme may result in an invasion of privacy and therefore impacts the dignity of the original poster.

Copyright law grants a copyright owner entitlement to control their copyright-protected works. The Copyright Act 98 of 1978 grants copyright owners a bundle of entitlements which include, but are not limited to, the right to distribute, perform, adapt, and broadcast their copyright-protected work. I submit that if a user's social media post satisfies the requirements for copyright protection, that user may rely on copyright law as a means to obtain recourse where there has been an infringement of their privacy. As I will show below the infringement of privacy may very well arise when a user's personal social media post is distributed online as a social media meme.

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[16] Naomi Smith & Simon Copland 'Memetic Moments: The Speed of Twitter Memes' (2022) 4 *Journal Digital Social Research* at 25.
[17] Ibid.
[18] Natalia Mielczarek & Wat W. Hopkins 'Copyright, Transformativeness, and Protection for Internet Memes' 2021 *Journalism & Mass Communication Quarterly* at 38.

This paper is divided into four major sections, excluding the introduction and conclusion. Part II is a discussion about internet memes as derivative works. Part III discusses the common law of privacy, with reference to the reasonable expectation of privacy. Part IV looks at the intersection of social media memes, dignity, and privacy. Part V is a discussion on social media posts and copyright law in South Africa.

II DERIVATIVE WORKS, INTERNET MEMES AND DISCOURSE SURROUNDING FAIR USE AND FAIR DEALING

This section of the paper will discuss whether an internet meme qualifies as a derivative work that is capable of being protected by copyright. To further the discussion, I will first give a historical account of the concept of the internet meme. This will inform the description the internet meme. Secondly, I will discuss the protection of derivative works by copyright law in the South African context.

The term ‘meme’ stems from ‘memetic, a term which was coined by Richard Dawkins to describe the ‘substantial evolutionary model of cultural development and change grounded in the replication of ideas, knowledge, and other cultural information through imitation and transfer’.[19] As explained by Patel, a meme begins as one item which mutates, and it is this mutation that results in the item spreading.[20] According to Matalon’s historical of the term memetics, the term was used as a noun to describe a 'unit of cultural transmission or unit of imitation'.[21] Dawkins maintained that culture is a consequence of the transmission of memes, which is comparable to ‘biological evolution through the transmissions of genes’[22] According to Dawkins' Memetics theory, a successful meme must show three qualities, namely, copy-fidelity, longevity, and fecundity.[23] Copy-fidelity refers to memorable memes which , as explained by Patel,

[19] Ronak Patel ‘First World Problems: A Fair Use Analysis of Internet Memes’ (2013) 20 UCLA Entertainment Law Review 248.
[20] Ibid.
[21] Lee J Matalon ‘Modern problems require modern solutions: internet memes and copyright’ (2019) 98 *Texas Law Review* 411.
[22] Ibid.
[23] Ibid at 412.

replicate with ease without losing their fundamental value.[24] According to Matalon, one may view memes as having low fidelity because their transmission must involve mutation and blending. However, Matalon clarifies that Dawkins argues that copy-fidelity depends on how the single unit meme is defined.[25] Longevity, as explained by Patel, refers to how long the meme is in existence. The chances of a meme being recognised are greater if the meme has been in existence for longer. Increased recognition leads to easier reproduction and mutation of the meme.[26] The 'fecundity' characteristic 'refers to the degree of reproduction and dissemination of a meme; successful memes must achieve a high degree of fecundity'.[27] This theory reveals how certain cultural aspects are shared, and how they spread, within and across communities.

The background related to the 'memetic' term has influenced the concept of the internet meme in the era of social media. Lantagne defines a visual internet memes as 'viral works that mutate a single visual base into a communicative shorthand that depends on the collaboration of millions of internet users'.[28] According to the Oxford Dictionary the word "viral" as a noun refers to 'an image, video, piece of information, etc. that is circulated rapidly and widely on the internet'.[29] The aspect of a 'viral' image is comparable to the characteristics of copy-fidelity and fecundity, mentioned above, in Dawkins' memetic theory. Imitation, mutation, and dissemination are characteristics of an internet meme, just as they are in a memetic cultural development, as argued by Dawkins. Internet memes are a tangible fragment of popular cultural references and the trending topics of the time, they are a true reflection of Dawkins Memetic Theory.

Patel defines an internet meme as 'a picture with juxtaposed text, which develops over time through derivative authors who slightly (or largely) mutate the original meme, usually retaining the image and general theme while altering the specific language'.[30] Patel further explains that internet memes usually contain a joke or comment on recent

[24] Ronak Patel op cit note 17 at 249.
[25] Lee J Matalon op cit note 19 at 412.
[26] Ronak Patel op cit note 17 at 249.
[27] Ibid.
[28] Stacey M. Lantagne "Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges (2018) 17 *Virginia Sports and Entertainment Law Journal* 222.
[29] Oxford dictionary
[30] Ronak Patel op cit note 17 at 237.

cultural matters and that profit is usually not sought by the creator of the meme.[31] Matalon also explains that internet memes are usually presented in the form of 'image macros', which means that it is presented as an image that is paired with a caption, usually a joke, catchphrase, or comment.[32]

I would describe an internet meme as a form of entertainment on social media. A good meme is a funny meme, and funny memes are popular. A good meme also be relevant to the events of contemporary times, or else it loses its essence. The picture in the meme drives home the caption that it carries. A caption referring to an unclear situation is best accompanied by picture taken of a person who has a confused expression on their face. Therefore, the most entertaining meme, is one where the picture and the caption are compatible, putting across a uniform message.

I now turn to the copyright aspect of internet memes. According to the Copyright Act, the infringement of a literary work occurs when a party performs any of the exclusive rights which are granted to copyright owners without the copyright owner's permission.[33] Derivative works are created from the use of an existing copyright-protected work in creating a new work.[34] When an author uses their work to create another original work, the derivative work falls under the author's copyright. This is one of the rights afforded to an author by virtue of copyright law. Where a third party uses the copyright owner's work to create a new work, without authorisation from the copyright owner, this may lead to copyright infringement. The question of whether internet memes are derivative works that can be protected by copyright law is a contentious matter. In the following paragraphs I will discuss the South African case law surrounding derivative works and their protection in copyright law.

The court in *Galago Publishers (Pty) Ltd v Erasmus* established a two-step test to determine whether an infringing reproduction of a copyright-protected work has occurred. According to this test, it must first be shown that there is 'sufficient objective

[31] Ibid.
[32] Lee J Matalon op cit note 19 at 414.
[33] Copyright Act 98 of 1978 at s 23.
[34] Sylia Papadopoulos & Sizwe Snail ka Mtuze *Cyberlaw@SA: the law of the internet in South Africa* (2022) 4 ed at para 8.3.5.1.

similarity between the alleged infringing work and the original work'.[35] The court states that it must be proven that the alleged infringing work reproduces a substantial part of the original work.[36] In this regard, the court focuses on the quality rather than the quantity of the alleged reproduction by the secondary work.[37] In addition, the substantial part of the original work must be eligible for copyright protection.[38] This is because copyright protection will only subsist in works that are in a material form and also eligible for copyright protection according to section 2 of the Copyright Act. In addition, the substantial part of the work must be original.

In the second step, the plaintiff must prove that there is 'a causal connection between the original work and the infringing work'.[39] The plaintiff must prove that the author of the infringing work did not independently create the infringing work because they drew from the original work.[40]

The *Galago Publishers* case shows how a copyright owner can be granted control over derivative works. The case also reveals that copyright protection will not be granted to the author of a primary work if the derivative work does not contain a substantial part of the primary work. Consequently, for an author to bring a copyright infringement claim, the primary work must be original, and the derivative work must reproduce a substantial part of the primary work. It is not enough that the derivative work has drawn inspiration from the primary work, because this is the cycle of creative work. To prevent authors from drawing inspiration from existing work would reduce incentive to create, this is counter-intuitive to the purpose of copyright law. The purpose of copyright law is to create incentive amongst authors to create original works, by granting them monopoly.[41] The aim of copyright is also to ensure that enough creative works remain in the Commons for authors to draw from.[42]

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[35] Galago Publishers (Pty) Ltd v Erasmus 1989 (1) SA 276 (A) at p 432.
[36] Ibid.
[37] Ibid at p 438.
[38] Owen Dean & Alison Dyer *Introduction to Intellectual Property Law* (2014) at p 35.
[39] Ibid at p 432.
[40] Ibid.
[41] Shuba Ghosh 'How to Build a Commons: Is Intellectual Property Constrictive, Facilitating or Irrelevant' in Charlotte Hess & Elinor Ostrom (eds) *Understanding Knowledge as a Commons: From Theory to Practice* (2007) 209.
[42] Ibid.

Copyright owners are entitled to exclusive rights which include the exclusive rights to control the reproduction, adaptation, distribution, and public performance of the work.[43] The creation of an internet meme infringes on the exclusive rights to reproduction and adaptation. The Copyright Act provides defences that a copyright infringer may rely on to escape liability in the form of exceptions. Section 12 of the Copyright Act provides exceptions that reproducers of copyright work may rely on. This paper will focus on section 12(1) of the Copyright Act, fair dealing.

Section 12(1) further restricts the scope of fair dealing in the reproduction of original work to the following purposes: (i) the work is reproduced for the purpose of private use or research, (ii) the work was reproduced for purposes of criticism or review, and (iii) the work is reproduced to report current events. The court in *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* was faced with deciding on whether a news article, posted by Media 24, which reproduced a news article posted by Moneyweb was fair dealing. The court examined the test for fair dealing which was put forward by the English courts: (i) does the work, alleged to be fair dealing, commercially compete with the exclusive rights of the copyright holder, (ii) has the copyright work already been made available to the public, and (iii) how much of the copyright protected work has been reproduced.[44] The court in *Moneyweb* explains that although relevant, the test put forward by the English courts cannot be simply imported into our law, the Constitution is the supreme law of the Republic of South Africa and consequently every law must be interpreted in light of the Constitution.[45] As I will explain below, the exclusive rights must be balanced against other constitutionally protected rights.[46] In effect, the court in *Moneyweb* suggests a non-exhaustive list of factors which the courts should consider when determining fair dealing. The first factor is the time of the dealing; it must be determined if the reproducer, at the time of the reproduction of the work, assessed the fairness of their conduct. The other factors to consider are: (i) the medium that the works have been published on, (ii) whether the original work is publicly available, (iii) the timeframe

[43] Ralph Van Niekerk 'Taking the Mickey' (2014) *Without Prejudice* at 83.
[44] Moneyweb (Pty) Limited v Media 24 Limited and Another 2016 (4) SA 591 (GJ) at para 105.
[45] Ibid at para 106.
[46] Ibid at para 108 – 109.

between the two works, (iii) the quality of the work that has been reproduced, and (iv) the extent of acknowledgement given to the author of the original work, if any.[47]

The defined scope of exceptions is referred to as the fair dealing approach. Fair dealing refers to statutorily defined exceptions and leaves little room for the interpretation of courts. Therefore, a copyright infringer must rely on the above statutorily defined exceptions for their infringing work to be exempt from copyright infringement.[48] The critics of this approach contend that the fair-dealing approach is too narrow, and they put forward the fair-use approach as a more suitable alternative. The fair-use doctrine, unlike fair dealing, is flexible. The application of fair-use is not limited to specific and permitted uses.[49] Fair use is also context-specific, and this in turn, allows the courts to look at the relevant facts of each case and the inter-relationship of the four factors of fair use.[50]

I put forward that the fair dealing approach is the more suitable approach for the South African context, primarily because the fair use approach was created within the American context.[51] As explained by the court in *Moneyweb*, exclusive copyrights are protected by section 25 of the Constitution. Section 25 protects copyright owners from the arbitrary deprivation of their exclusive copyrights. On the other hand, section 16(1) of the Constitution protects the right to freedom of expression.[52] Both rights are not absolute and must be balanced against each other, fair dealing is therefore a value judgment and must be dealt with on a case-by-case basis. In the American context, freedom of speech is of paramount importance, whereas in South Africa, no right is more important than the other. I submit that the approach which was taken by Sachs J in *Laugh It Off Promotions v South African Breweries*, although a matter dealing with trademarks instead of copyright, illustrates that an approach such like fair dealing does not negatively affect fundamental human rights such as freedom of expression. In the *Laugh It Off* case, the Court views intellectual property rights as human rights and

[47] Ibid at para 112 - 113.
[48] Coenraad Visser 'The location of the parody defence in copyright law: some comparative perspectives' (2005) 38 *The Comparative and International Law Journal of Southern Africa* at 336.
[49] RM Shay 'Fair Deuce: an uneasy fair dealing-fair use duality' (2016) *De Jure* at 106.
[50] Coenraad Visser op cit note 42 at 326
[51] RM Shay op cit note 43 at 107.
[52] Supra note 44 at para 108 – 109.

therefore conducts a balancing act between the two conflicting rights, intellectual property and freedom of expression.[53] Similar to the fair use approach, the Court's balancing exercise is 'context specific and fact sensitive'.[54] The approach followed by the Court reveals that although fair dealing is narrow in its application, one may rely on their constitutional rights for the protection of their work which has been derived from another pre-existing work. This approach will be successful if the court finds that the reproduced work is protected by the freedom of expression.

Lantagne argues that copyright law has the potential of stifling creative expression if applied without consideration of all the relevant factors.[55] Internet memes are a form of creative expression, and this is why Lantagne contends that internet memes should not be considered as derivative works.[56] She argues that the classification of internet memes as derivative works would lead to numerous claims of ownership and copyright infringement matters.[57] This could lead to a lack of incentive for creative expression.[58] According to Lantagne internet memes are valuable modes of communication and are used as a mode to express one's views on an ongoing debate in society.[59] Her argument is that a photographer of a work should not be able to claim ownership over a mutated version of an internet meme, which does not have their original work in it.[60] Lantagne states that 'it is the photograph *as a meme* that is derivative of the original *meme*'. Therefore, Lantagne's stance is that a meme that contains the original copyrighted work can be considered a derivative work, however, once the meme mutates, the copyright owner of the original work, should not be able to claim ownership over the muted meme. Lastly, she argues that where the work of the copyright owner is simply used as an internet meme, the copyright owner should not be able to sue those parties.[61]

[53] Coenraad Visser op cit note 42 at 340.
[54] Ibid.
[55] Stacey M. Lantagne op cit note 26 at 236
[56] Ibid at 226.
[57] Ibid at 236.
[58] Ibid.
[59] Ibid at 233.
[60] Ibid at 237.
[61] Ibid at 241.

According to Patel, the fair use defense may be used by a meme user who is facing a copyright infringement case.[62] Patel explains there are four factors that a court will consider when a fair use defence is raised. The first factor is the purpose of the infringing use of a copyright-protected work.[63] The second factor is the nature of the copyright-protected work.[64] The third factor is the amount and sustainability of the portion used by the infringing work.[65] Lastly, the court will examine the potential effect on the market for the work.[66] In the case of internet memes, Patel explains that the nature of the copyrighted work would weigh in favour of the copyright holder, especially in cases where the work holds commercial value.[67] With regards to the third factor, he holds that where the meme has only captured a frame of a series or movie, this factor would weigh in favour of the meme generator.[68] However, where the meme is comprised of a photograph or a 'single frame visual artwork', the factor may weigh in favour of the copyright holder.[69] The first factor is the most contentious since internet memes are viewed as drivers of cultural interchange. This view is maintained because internet memes provide more opportunities for expression because of their fast dissemination through the internet.[70] When considering the last factor, one must consider the accessibility of internet memes to consumers and their ability to spread much easier than the original work itself in many cases.[71] The market fails to offer legitimate ways of generating internet memes because the infringement of copyright work is a prerequisite in the creation of internet memes.[72] Patel's analysis of the fair use doctrine in the context of internet memes is a very helpful account of the difference between the South African fair dealing stance and the American fair use stance. As explained above the *Laugh It Off* case reveals that in the South African framework, the two of the affected rights, intellectual property, and freedom of expression, must be balanced. The negative effects of the narrow and defined nature of the fair dealing

[62] Ibid at 250.
[63] Ronak Patel op cit note 17 at 244.
[64] Ibid at 245.
[65] Ibid at 246.
[66] Ibid at 247.
[67] Ibid at 252.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid at 255.
[72] Ibid.

approach are countered against by the recognition of the equal level of importance of freedom of expression and property interests.

In response to the two scholars above, I argue that copyright cannot be successfully used to stifle freedom of expression in South Africa. The South African legal system places freedom of expression and the right to property on the same level. This ensures that the one right cannot be used to unreasonably trample upon the other. Another instrument that ensures that copyright is not used to unduly suppress freedom of expression is limit on the exercise of the moral rights of an author. The moral rights of an author may only be used by the author if they have elected to not enforce the protection of their economic rights in the copyright protected work. South African law does not protect the economic and moral rights of the author at the same time.[73] This ensures that the author is not unduly enriched. At a later section of this paper, I will further explain the concept of moral rights in copyright law.

Having regard to the nature of a social media meme, I argue that it will not be protected by the section 12 fair dealing provision of the Copyright Act. A social media meme creator may escape copyright infringement liability where the court has conducted a balancing exercise between the rights of the copyright holder and the meme creator's right to freedom of expression and finds that the meme is protected by section 16. Nevertheless, I argue that an internet meme will not be protected in cases where the internet meme is generated from a picture posted by a social media user for her social media following. This is because the right of the meme generator to freedom of expression must be balanced against the copyright holder's right to property, their right to privacy, and by implication, their right to dignity. In the following section, I will explain how privacy can be harmed by internet memes. I will also explain why I argue that the common law and Protection of Personal Information Act 14 of 2013, will not be of assistance to people who have been affected by internet memes.

[73] Coenraad Visser op cit note 42 at 338.

III REASONABLE PRIVACY IN THE SOCIAL MEDIA CONTEXT

a) The Protection of Personal Information Act 13 of 2014

Section 14 of the Constitution sets out the right to privacy and states that everyone within the borders of the Republic has the right not to be searched and not to have their home or property searched.[74] Furthermore, everyone has a right not to have their possessions seized or to have their communications intercepted.[75] Section 14 places a duty on the State and others to refrain from conducting activities that infringe on an individual's right to privacy.[76]

The Protection of Personal Information Act (POPIA) was enacted by the legislature to give effect to the right to privacy, particularly, the 'right to protection against the unlawful collection, retention, dissemination, and use of personal information'.[77] POPIA primarily addresses the concept of data protection, which should be differentiated from the right to privacy. Forde and Katzav both explain why data protection should not be classified as an extension of the right to privacy. Forde explains that the concept of autonomy is essential to both concepts of privacy and data protection, and privacy is instrumental in the existence of an environment that fosters the employment of informational autonomy.[78] In this way, the two concepts do overlap, however, their conflation has led to the lack of harmony in the adjudication of privacy matters.[79] Lee Bygrave maintains that because data protection addresses an array of interests that go beyond privacy, it is problematic to conclude that data protection primarily addresses privacy issues.[80] Where a data subject opposes the processing of their data by a responsible party, which is in most cases a huge corporation, data protection seeks to balance the power imbalances between the two parties.[81] Forde explains that although data protection gets

[74] The Constitution of the Republic of South Africa, 1996 at s 14.
[75] Ibid.
[76] Tommaso Edoardo Frosini 'Access to the Internet as a Fundament Right' (2013) Italian Journal of Public Law 227
[77] Protection of Personal Information Act 14 of 2013.
[78] Aidan Forde 'The Conceptual Relationship Between Privacy and Data Protection (2016) 1 *Cambridge Law Review* at 137
[79] Ibid at 138.
[80] Ibid at 144.
[81] Ibid at 145.

its foundation from privacy, the two concepts must be separated.[82] He further concludes that data protection offers a wider scope of protection than the right to privacy.[83]

Katzav raises two main points. First, that data protection should not be perceived as giving protection to privacy alone.[84] Secondly, that the perception of data protection as a specialised form of privacy protection dilutes the concept of the right to privacy, a concept which is already difficult to define. The danger in fusing the concept of data protection with the concept of privacy is that it will lead to the latter being diluted as a right. Privacy, as I will explain below, is a difficult concept to define, and Katzav maintains that if the right is not used in appropriate and relevant circumstances, it will lose its depth because of a lack of certainty.[85] As explained by Katzav, personal information is not always private information, and data protection applies to the processing of personal information.[86] Consequently, data protection will not always include a privacy component. According to Katzav the position that data subjects have unwavering control over their personal information is not accurate. Consent in not the only ground on which a responsible party may rely to collect the information of the data subject.[87] POPIA allows responsible parties to rely on other grounds, which do not require any input from the data subject, to process personal information.[88]

In agreement with Forde and Katzav, I too argue that data protection and privacy should not be used synonymously because they are different concepts which protect different interests. The two concepts share the same foundation, which is giving individuals autonomy over their identity in society. However, they operate to achieve ultimately different ends, ends which may conflict in certain circumstances. Accordingly, since I argue that the distribution of a picture of an individual as an internet meme is fundamentally an infringement of privacy, I will not be discussing POPIA.

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[82] Ibid at 147.
[83] Ibid at 149.
[84] Gilad Katzav 'Compartmentalised data protection in South Africa: The right to privacy in the Protection of Personal Information Act' (2022) 139 *Juta's South African Law Journal* at 432.
[85] Ibid at 449
[86] Ibid at 450.
[87] Ibid at 460.
[88] Ibid.

b) The right to privacy in the South African context

Many jurisdictions have found it difficult to define the right to privacy and its scope, this is no different in the South African context. The Constitutional Court (CC) in *Bernstein and Others v Bester NO and Others* held that in South Africa, the concept of privacy has proven to be a difficult concept to grasp and therefore, it is not clearly defined.[89] In an effort to explain its scope, the concept of privacy has been described with reference to the notion of identity. Privacy is necessary to allow an individual to create their own independent identity, and therefore the concepts of privacy and dignity are described as being intertwined.[90] The Court *in AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* explains the close link between the two concepts by stating that when an individual's privacy is infringed, their right to dignity is impacted, a right, which as the Court states, 'permeates virtually all other fundamental rights'.[91]

With regards to the scope of privacy, the court in *Berstein* explains it broadens and intensifies in circumstances that are related to one's 'personal realm'. Once an individual participates in public environments such as business and social interaction, the scope of privacy shrinks fittingly.[92] The Constitutional Court confirmed this notion in the recent case of *AmaBhungane Centre for Investigative Journalism NPC* and held that the right to privacy protects the right to be 'free from intrusions and interference by the state and others in one's personal life'.[93]

The Court in Bernstein provided a more nuanced interpretation of the right to privacy by recognising that although an individual has the right to privacy, the rights of the community surrounding the individual must still be considered, as the right to privacy is not absolute.[94] With this interpretation in mind, the Court recognised the appropriate test for determining whether an infringement of the right to privacy has occurred, in the

[89] *Bernstein and Others v Bester NO and Others 1996* (4) BCLR 449 (CC) at para 65.
[90] Ibid.
[91] *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* [2021] ZACC 3 at 28.
[92] Ibid at para 67.
[93] Ibid at para 2.
[94] *Bernstein supra* note 82 at para 67.

South African context, is the concept of reasonable expectation of privacy.[95] The reasonable expectation of privacy involves two questions. First, did the individual have a subjective expectation of privacy, and second, does society view the individual's subjective expectation of privacy as objectively reasonable.[96] This test ensures that the privacy interests of the individual are balanced with the interest of the public. This test is important in the balancing of the right to privacy and the right to freedom of expression which is upheld in section 16 of the Constitution. In South Africa, all the rights mentioned in the Bill of Rights are of equal importance and are granted equal recognition and protection by the Constitution.[97]

c) Reasonable expectation of privacy in the social media context

The discussion above shows that a vital part of the conception of privacy is control over one's personal information and the divide between the public sphere and the private sphere. However, the divide is no longer as clear cut due the changes in the way that we socialise, as a result of technological advancements. In this section, I will show that the divide between the personal and private spheres may no longer have a place in our current context, especially when it involves social media interaction. As alluded to at the beginning of this paper, social media are electronic platforms that facilitate the sharing of text messages, images, videos, and documents between users.[98] Social media and its usage is a clear example of how technological developments have blurred the line between the private and public spheres.[99]

Vandendriessche and Jütte indication that there are scholars who argue that the concept of the public sphere and private sphere divide is out of touch with the subjective understanding of individuals. One of the aforementioned scholars is Nissenbaum, who argues that the concept of the divide is against what people intuitively understand as

[95] Ibid at 79.
[96] Ibid at 75.
[97] *NM v Smith* 2007 (5) SA 250 (CC) at para 129.
[98] Ritvik Garg 'Privacy v Social Media' 12 (2019) *Supremo Amicus* 79
[99] Annelies Vandendriessche & Bernd Justin Jutte 'Responsible Information Sharing: Converging Boundaries between Private and Public Privacy and Copyright Law' (2019) 10 Journal of Intellectual Property, Information Technology and Electric Commerce Law at 311

private. The concept of the public and private divide is at odds with individuals' expectations of privacy.[100] Nissenbaum contends for an understanding of the right to privacy as 'context appropriate flows of information about oneself' rather than the absolute control over one's personal information.[101] The right to privacy needs to be developed in this way so that it can also protect the information which individuals may share, willingly or not, which could be 'stored analysed and manipulated increasingly frequently for other unforeseeable purposes, with impacts on private life in equally unforeseeable ways'.[102] When an individual posts an image on their social media profile, they do not foresee that the image will be morphed into a meme, with a different purpose from that which the original picture was posted. Vandendriessche and Jütte argue that the framework which Nissenbaum recommends assists in explaining why people have different privacy expectations in different social contexts, such as the workplace or when engaging with close friends and family.[103]

I agree with Nissenbaum's suggestion, particularly in the context of social media platforms. Most users, like myself, when posting online, expect to share their posts with those who are in their social media network. They do not expect to have the images, text, or videos that they have posted to their network become an overnight sensation or go viral on the internet as a joke.

Vodovis argues that unlike with physical boundaries, 'on the internet, it is unclear where a user has a reasonable expectation of privacy, and what level of privacy is afforded to them'.[104] This further emphasises the difficulty of drawing the line between the private sphere and the public sphere on the internet. As mentioned by Vodovis, while secure banking pages are presumed to be private, blogs and websites, on the other hand, are presumed as public. However, Facebook and other social media platforms like Instagram and Twitter are in-between.[105] This difficulty in understanding what is public

[100] Ibid.
[101] Ibid 312.
[102] Ibid.
[103] Ibid.
[104] Maayan Y Vodovis 'Look Over Your Figurative Shoulder: How to Save Individual Dignity and Privacy on the Internet' 40 (2012) *Hofstra Law Review* at 827
[105] Ibid.

and what is private on the Internet make it increasingly challenging to determine whether the acquisition of the information was from the private or public sphere.[106]

Thornthwaite examines how the principle of reasonable expectation of privacy applies on social media context, particularly in cases of employment dismissal. Thornthwaite discusses some cases which have appeared in front of the Australian national industrial tribunal, the Fair Work Commission. In earlier decisions, the Fair Work Commission viewed social media platforms as public forums, and therefore, posting on these platforms was considered a form of global broadcasting.[107] Therefore, in the social media context, a reasonable expectation of privacy did not exist for employees who posted on these platforms. Thornthwaite explains the Commission's recent shift in approach to the concept of reasonable expectation of privacy in the social media context. Her analysis of the decisions of the Commission shows that employees could be entitled to a reasonable expectation of privacy in certain circumstances, if the employee had activated their privacy settings.[108]

Mills explains that the foundation of social media is to provide a platform on which users may share their opinions, experiences, and information about themselves.[109] The conduct of sharing has become vital to the development of our identities and the development of like-minded communities. Social media has appealed to our innate nature to share information with others in attempts of discovering where we belong.[110] Mills argues that sharing is an important part of the development of identity and community, and they describe social media as a community.[111] The danger of social media is that an image, text, or video posted by an individual on their social media platform may be disseminated and shared across many different profiles, something that the originator did not intend to happen.[112] Mills furthermore shows that people who had set the privacy settings of their Facebook profiles posted more than those who had

[106] Ibid.
[107] Louise Thornthwaite 'Social media and dismissal: Towards a reasonable expectation of privacy' (2018) 60 *Journal of Industrial Relations* at 133.
[108] Ibid.
[109] Max Mills 'Sharing privately: the effect publication on social media has on expectations of privacy' 9 (2017) *Journal of Media Law* 46.
[110] Ibid at 47.
[111] Ibid.
[112] Ibid at 48.

not changed their privacy settings.[113] This shows that people still wish to share their information and experiences, but privately.[114] This also testifies to the fact that people share more openly in group settings where they believe that their information will remain in the group setting.[115] The law of privacy, in Mills's perspective, should focus on the relationship between the victim and the person who has infringed the victim's privacy, instead of the information itself.[116] If the law continues to emphasise the level of secrecy of the information or whether it comes from the private sphere or public sphere, little protection will be given to social media users.[117] If the law focused on the relationship between the parties, like in the principle of breach of confidence, then privacy will be protected by the morals and norms of that relationship.[118] Secondly, Mills suggests that we begin to view information as property. This perspective will give the author of the post the entitlement to dictate who they want to be privy to the post.[119] Thirdly, Mills suggests the use of copyright law. Copyright which subsists in an individual's social media posts can be used to protect their privacy, however, regard to the freedom of expression must still be kept, to ensure that the law of copyright is not used to silence the masses, especially in issues where the public interest outweigh the interest of the individual.[120] Lastly, Mills supports the argument by Nissenbaum, mentioned above, which is to understand privacy as contextual integrity.[121] This concept of contextual privacy recognises that privacy can be infringed through the unauthorised dissemination of information, which was shared in a particular environment, to environments which the information was not initially intended to be revealed in.[122] Understanding privacy in this way will protect the privacy of social media users, by guarding against the unauthorised dissemination of posts to profiles other than those in the author's social network.[123]

[113] Ibid at 50.
[114] Ibid.
[115] Ibid.
[116] Ibid at 65.
[117] Ibid.
[118] Ibid.
[119] Ibid at 67.
[120] Ibid at 68-69.
[121] Ibid at 69.
[122] Ibid.
[123] Ibid at 70.

The South African courts have not yet been faced with a case that requires them to apply the reasonable expectation of privacy test to the social media context, hence there is not much certainty around on the subject.

With the definition of the test in mind, I submit that the concept of reasonable expectation of privacy has been framed in a manner that is broad enough to consider the changes in how people share and interact on social media. The court in *Financial Mail v Sage Holdings* held that there are two circumstances in which the privacy of an individual can be invaded. The first circumstance is when the plaintiff's privacy has been unlawfully intruded upon, an example of this is trespassing.[124] The second circumstance is where private facts about the victim have been unlawfully published.[125] The Court in *NM v Smith* defined private facts as personal information which, if disclosed would cause mental distress or harm to a person who possessed ordinary feelings and intelligence and who wanted the information to be kept private.[126] When determining the lawfulness of the wrongdoer's conduct in each of these two situations, the particular facts of each case in light of the contemporary *boni mores* and the 'general sense of justice of the community as perceived by the Court' must be considered.[127] The Court in *Financial Holdings* set a broad understanding of lawfulness in cases of privacy infringement. The Court mentioned that it is the *contemporary boni mores* and a general sense of justice of the community which must be considered to create space for the dynamic nature of societal views, especially in a subject as personal as privacy.

The conventional view of privacy which conflates privacy with secrecy is no longer appropriate, given the developments in technology and social media interaction. An interpretation of the right to privacy in this way leaves victims with no recourse to the common law of privacy. A more appropriate approach is for the Court to consider the nature of human beings, which is to share their personal information with a trusted few to develop their identity and form part of a community, as explained by Mills above. Factors that the courts should consider when an individual's privacy has been infringed

[124] *Financial Mail (PTY) Ltd and Others v Sage Holdings Ltd and Others* [1993] 2 All SA 109 (A) at p 117.
[125] Ibid.
[126] *NM and Others v Smith and Others* 2007 (5) SA 250 (CC) at para 34.
[127] Ibid.

on social media may be the privacy settings of the victim's social media platform, the content which was posted by the victim, how the wrongdoer accessed the content, and how the user framed the post. However, how can a person whose picture has already been distributed on social media as a meme find recourse in the law? The courts have not yet been faced with this issue. I realize that one can only rely on the common law of privacy once such a matter has been brought before the courts. The courts would have to develop the common law of privacy to bring it in line with technological developments such as social media. There is, however, another kind of law that victims of this kind of privacy infringement can rely on, and that is copyright law. In the following section, I will explain how copyright law can be used to protect the right to privacy and dignity of users whose pictures have been altered and disseminated as memes on social media.

IV SOCIALMEDIA MEMES, PRIVACY, AND DIGNITY

Privacy is closely related to an individual's dignity, and this was highlighted by the Constitutional Court *in AmaBhungane Centre for Investigative Journalism v Minister of Justice and Correctional Service*.[128] Additionally, the Constitutional Court in *S v Makwanyane* stated that the right to dignity is the 'acknowledgment of the intrinsic worth of human beings, and further stated that the right to dignity is the basis of many of the rights which are enshrined in the Constitution.[129] The Constitutional Court further emphasised this sentiment in *Ferreira v Levin NO and Others* and stated that an important part of the right to dignity is to allow people to develop their identity, and therefore, people must be given the widest sense of freedom.[130]

As I have maintained above, privacy must be given a contemporary understanding that considers the technological developments and changes in social interaction. Mills explains that people who post on social media still do expect some privacy, users expect that what they post on their social media profile will remain on their social media

[128] Supra note 125 at para 28.
[129] *S v Makwanyane* and Another 1995 (3) SA 391 (CC) at para 328.
[130] *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) at para 48-49.

profile.[131] I further argue that the approach which is most aligned with the explanation given by the Constitutional Court in *Ferreira v Levin NO* is to give freedom to individuals to post their images on social media without having them feel as though they have surrendered their privacy.

Social media memes often manifest from an image that already exists, a picture that was posted by an individual on their own social media platform to share with their social media network. The meme generator appropriates the image shared by an individual on their page, alters it into a meme, and distributes the infringing meme to an audience that is different from the originator's original audience. This is an infringement of the right to privacy, and therefore the right to dignity, of the original poster, a user should be able to post their images online without having them distributed to unintended audiences. As much as this is a privacy infringement, this is also an infringement of copyright. If the post satisfies the requirements for copyright protection, the remedies afforded by copyright law may be available to the author of the social media post. Copyright law serves as protection for social media posts where they are original and grants a copyright owner control over their work, and if that control is interrupted by the conduct of a wrongdoer, the copyright owner has remedies that they may rely on.

V SOCIAL MEDIA POSTS AND COPYRIGHT LAW IN SOUTH AFRICA

In this section, I will discuss the components of social media posts which may qualify for copyright protection in South Africa. In South Africa, copyright protection automatically grants authors and copyright owners a bundle of rights by the operation of the Copyright Act. Copyright protection vests in the expression of the idea or thought, it does not vest in the thought or idea in and of itself.

Section 2 of the Copyright Act contains the list of works that are eligible for copyright protection.[132] The work must be original if it is to be protected by copyright law. The Court in *Waylite Diary* explains that the concept of originality and the type of work is

[131] Max Mills 'Sharing privately: the effect publication on social media has on expectations of privacy' op cit note 102 at 50
[132] Copyright Act 98 of 1978.

interconnected.[133] To determine if the work is original the court must carry out a value judgment to determine whether the efforts of the author have produced an original work.[134] The concept of originality must not be used to determine the similarities between the two works. Originality is a requirement for copyright protection. To determine whether a work is original, the court must consider how much of the work is the result of the skill or labour of the author of the work, this is referred to as the 'sweat of the brow' enquiry.[135] The determination of originality is therefore a subjective enquiry. The court in *Moneyweb* stated that for a work to be original the author must have adequately applied their mind to produce the work. A contentious issue is whether the court in *Moneyweb* had created a new standard for originality. As explained by Geyer, many South African scholars do not believe that the court in *Moneyweb* has moved away from the already established 'sweat of the brow' inquiry. I agree with these scholars. As explained by Andanda, originality does not require the idea or the expression of the work to be original, what is required is that the author used either their skill or labour in creating the work.[136] In my opinion, the Court in *Moneyweb* did not steer too far away from the initial test the 'sweat of the brow', I believe that the Court was merely expounding on the test. The Court states that the test can be easily misunderstood and explains that the test does not require mere labour on the expression of the idea, the test will consider all relevant factors, which will reveal whether the author sufficiently applied their effort, time, and skill in creating the work.[137]

Social media posts comprise of either photographs, text or video, and some aspects of a post may be eligible for copyright and other parts of the posts may not be eligible for copyright protection. Furthermore, different aspects of a social media post may fall under different categories of works. [138] For instance, in a post that is a picture that also contains

[133] *Waylite Diary CC v First National Bank LTD* [1995] 1 All SA 451 (A) at 452.
[134] Ibid at 453.
[135] Sunelle Geyer 'Determining Origionality in South African Copyright Law: Is It "or", "and" or Something "More"?' 85 (2022) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 181.
[136] Pamela Andanda, 'Copyright law and online journalism: a South African perspective on fair use and reasonable media practice' 6 (2016) *Queen Mary Journal of Intellectual Property* at 418.
[137] Moneyweb (Pty) Limited v Media 24 Limited and another [2016] JOL 35803 (GJ) at para 15.
[138] Owen Dean & Alison Dyer op cit note 36 para 1.2.1.

a text caption, the picture itself will fall under artistic works, and the text will fall under literary work, but only if they are both original, they will both be copyright-protected works.

Social media posts that are comprised only of text, such as a tweet, fall under literary works. The words do not have to reveal poetic and intellectual talents for the author to receive copyright protection.[139] However, the work must be worthy of being granted copyright protection. The focus of this paper, however, is mainly the social media posts that contain photographs. According to section 1 of the Copyright Act, photographs fall under the definition of artistic works.[140]

The contentious issue about photographs is determining who is the author of the photograph, and therefore the owner of the copyright. The Copyright Act does not define the author, instead, it lays out the exclusive rights given to an author.[141] As explained by Ncube and Oriakhogba, the concept of originality is significant when addressing the question of authorship.[142] To be an author of the copyright-protected work, a party, juristic or natural must show that their effort and intellect were involved in the creation of the work, therefore, the work is 'original to them'.[143] Ncube and Oriakhogba argue that the author of a photograph, due to the requirement of originality, is the person who 'composed' the photograph. Within the South African context, the author is the party that is 'responsible for the composition of the photograph'.[144] The term 'compose' is defined by Ncube and Oriakhogba as 'taking deliberate steps to arrange the visual elements, lighting, angle, and ambience of an image. It is a calculated intellectual act with an anticipated outcome'.[145]

Therefore, a picture taken by a social media user and posted on a social media platform such as Facebook, Instagram, and Twitter, is eligible for copyright protection. Whom the copyright is vested depends on the party who composed the photograph, as explained above. Therefore, a social media user who takes a picture of themselves or their loved

[139] Supra note 18 at 455.
[140] Copyright Act op cit note 31 at s 1
[141] Ncube CB & Oriakhogba DO 'Monkey Selfie and Authorship in Copyright Law: The Nigerian and South African Perspectives' (2018) 21 *Pioneer in peer-reviewed, open access online publications* 14.
[142] Ibid at 15
[143] Ibid.
[144] Reinard Michau 'Publication of photographs' (1995) 3 *Juta's Business Law* 22.
[145] Ncube CB & Oriakhogba DO op cit note 134 at 22.

ones, becomes the author of the photograph because they composed it. Now that I have explained who the general author of a copyright-protected photograph is, in the following subsection, I aim to take a deeper look at the terms of service of the different social media platforms. Users enter these contracts to use the social media platforms, the terms of use normally contain terms that refer to copyright in the pictures posted on the platform.

a) The copyright owner of social media posts

In this section, I will discuss who owns the copyright over posts on social media platforms between the user and the Service Provider. According to the 'Terms of Service' of the social media platforms, Instagram, Facebook, and Twitter, the user retains ownership of the content he or she posts. This means that users retain copyright ownership of their content posted on these social media platforms, and therefore users enjoy exclusive rights over their content.[146]

On the other hand, the terms of service continue to state that by consenting to the 'Terms of Service', the user grants the above social media platforms a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate and create derivative works of users' content.[147] In cases of an exclusive license, it is the licensee alone who can perform copyright-restricted acts, this license also excludes the copyright owner from exercising their copyright entitlements.[148] A non-exclusive license allows another party, who is not the copyright owner, to perform acts that are otherwise restricted to the copyright owner.[149] In cases of non-exclusive rights, the license does not stop the copyright owner from entering into another license. Unlike the exclusive license, there are no formalities which are prescribed by law for a non-exclusive license to come into force.[150]

The terms above protect the Service Provider from any copyright infringement claim that could arise from a user. The license that the user agrees to grant the social media platform

[146] Sylia Papadopoulos & Sizwe Snail ka Mtuze op cit note 32 at 181.
[147] Ibid at 228
[148] Ibid.
[149]Ibid.
[150] Ibid at 229.

allows the platform to perform many of the restricted acts which are entitled to a copyright owner. However, the copyright owner is still the user, and by accepting the terms of service of the social media platform, the user has only granted the non-exclusive license to the platform, and not to other users. Therefore, the user may still be able to institute a copyright infringement claim against any other user who performs a restricted act relating to the copyright-protected work.

b) Copyright as means to protect privacy

Although it may not be obvious, a link between copyright, privacy, and dignity does exist, and this link is entrenched by the Copyright Act. One might wonder whether privacy is an interest that copyright law sought to protect. I argue that it is. According to Tau, the role of copyright law is 'to create an incentive for creative efforts'.[151] One of the incentives is that copyright grants the owner control over his or her creative works, the copyright owner is entitled to choose how they want to profit from the protected work, and the copyright owner can restrict anyone else from profiting from the work. However, apart from the rights which involve economic returns to the copyright owner, authors of copyright-protected work are also entitled to moral rights.[152]

Moral rights are established and protected by section 20 of the Copyright Act. Moral rights vest in literary, musical, or artistic works, cinematograph films, and computer programmers, and are only granted to an author of a copyright-protected work. Therefore, a copyright owner, who is not the author of the protected work, is not entitled to the moral rights in the protected work.[153] There are two moral rights to which an author is entitled, the first is referred to as the paternity right. According to this right, an author may demand to be properly recognised and acknowledged as the author of the work.[154] The second moral right is referred to as the integrity right. The integrity right 'entitles the author to protect their honour or reputation by objecting to any distortion, mutilation or other

[151] Stephen B. Thau 'Copyright, Privacy, and Fair Use' (1995) *Hofstra Law Review* at 187.
[152] Copyright Act 98 of 1978 at s 20.
[153] Sylia Papadopoulos & Sizwe Snail ka Mtuze op cit note 32 at 218.
[154] Ibid.

modification of the work which will cause prejudice to the author'.[155] Moral rights subsist in the author, it is a personality right, whereas economic rights subsist in the author or copyright owners.[156] Moral rights protect the intangible interest of the author, section 20 protects the author by ensuring that their work is not distorted or changed in a way that would be prejudicial to the author's honour or reputation.[157] Therefore, what can be noted from these moral rights is that copyright law recognises that an author's creative work is closely tied to their personality. Furthermore, Tau argues that, for a work to be original, as required for suitability for copyright protection, a creative work must contain a fraction of the author's personality to set his or her work apart from others.[158] Therefore, it must follow that the interest of privacy is a consideration that copyright law seeks to protect, especially where the modification of a work could lead to the infringement of an author's honour or reputation.

Adler argues that moral rights are in direct conflict with contemporary artistic practice.[159] Adler speaks from the perspective of the buyer of a work, who should be able to do what they want with their property.[160] I disagree with Adler, I assert that moral rights are a perfect remedy for people who have had their works, mutated, distorted, and distributed without their consent. One may argue that moral rights broaden the scope of copyright protection too far, and as a result, this will lead to the freedom of expression of others being infringed. As I have explained earlier in this paper, the Court in *Laugh it Off* held that the property interests in copyright must be balanced with other rights such as the right to freedom of expression. No right, in South Africa, is absolute. I argue that moral rights are the most pertinent form of copyright protection that social media users should rely on. An author can only rely on their moral rights once they have surrendered their economic right over the works, this guards against the undue enrichment of the author. Most social media users, unless their social media is used for monetary reasons, do not

[155] Ibid.
[156] M Jansen 'The protection of copyright works on the internet – an overview' (2005) *Comparative and International Law Journal of Southern Africa* at 345.
[157] Ya-fan Wong 'MORAL RIGHTS IN THE CONTEXT OF COPYRIGHT LAW IN SOUTH AFRICA' (2015) available at https://dommisseattorneys.co.za/incubator-portal/ accessed on 02 December 2022.
[158] Stephen B. Tau 'Copyright, Privacy, and Fair Use' op cit note 143 at 203.
[159] Amy M. Adler 'Against Moral Rights' 97 (2009) *California Law Review* at 265.
[160] Ibid at 271.

use their posts for economic gain. They should be allowed to rely on their moral rights to stop the distribution of a mutated version, a meme, of their work, the social media post.

VI CONCLUSION

In this paper, I have shown that internet memes are by their nature borne from existing content, which may be personal to the author. Internet memes are an appropriation and distortion of existing content. These mutations of the work are then distributed across the internet, without the knowledge or consent of the author. Thus, raising concerns regarding suitable legal recourse for authors whose contents are misused. The discussion in the preceding sections of this report established that the scope and definition of the common law protection of the right to privacy is limited and narrowed by the test of reasonable expectation to privacy. This test is far too narrow to address the concerns raised by internet memes. The test does not fit into the current social media context, where an individual would like to have control over who to share their posts with. Privacy is not only about being left alone, but in some cases, it is about deciding who is privy to private facts about yourself. It is about controlling when you would like private facts about yourself to be shared and how. I have also shown the negative implications that internet memes can have on the dignity of the authors, and this is where the connection between privacy and copyright law arises. In conclusion, I argue that copyright law, in particular reference to moral rights of an author, can provide recourse that social media users have against meme generators. Considering the equal status of all the fundamental rights in the Constitution, this will not lead to the triumph of property interests over interests in freedom of speech. The Court in *Laugh it Off* case stated that the two rights must be balanced against one another. Furthermore, the author cannot rely on copyright law to protect both their moral and economic interests simultaneously, this ensures that the monopoly rights granted by copyright law are not abused. In conclusion, the world is evolving and the legal issues we face are ever-changing. The law needs to be used in innovative and creative ways to address the complex legal issues which, arise from this technologically immersed environment. In this paper, my main aim is to suggest copyright law as a mechanism for the protection of privacy in the social media setting. Acknowledging that the court would

have to develop the law further, I conclude that is a part of law that social media users can rely on.

VII BIBLIOGRAPHY

Legislation

The Constitution of the Republic of South Africa, 1996.

Copyright Act 98 of 1978.

Protection of Personal Information Act 14 of 2013.

Case law

AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others [2021] ZACC 3.

Bernstein and Others v Bester NO and Others 1996 (4) BCLR 449 (CC).

Ferreira v Levin NO and Others 1996 (1) SA 984 (CC).

Financial Mail (PTY) Ltd and Others v Sage Holdings Ltd and Others [1993] 2 All SA 109 (A).

Galago Publishers (Pty) Ltd v Erasmus 1989 (1) SA 276 (A).

Moneyweb (Pty) Limited v Media 24 Limited and another [2016] JOL 35803 (GJ).

NM v Smith 2007 (5) SA 250 (CC).

S v Makwanyane and Another 1995 (3) SA 391 (CC).

Waylite Diary CC v First National Bank LTD [1995] 1 All SA 451 (A).

Books

Owen Dean & Alison Dyer *Introduction to Intellectual Property Law* (2014).

Sylia Papadopoulos & Sizwe Snail ka Mtuze *Cyberlaw@SA: the law of the internet in South Africa* (2022) 4 ed.

Journal articles

Aidan Forde ‘The Conceptual Relationship Between Privacy and Data Protection (2016) 1 *Cambridge Law Review*

Amy M. Adler ‘Against Moral Rights’ 97 (2009*) California Law Review*.

Coenraad Visser ‘The location of the parody defence in copyright law: some comparative perspectives’ (2005) 38 *The Comparative and International Law Journal of Southern Africa*.

Gilad Katzav ‘Compartmentalised data protection in South Africa: The right to privacy in the Protection of Personal Information Act’ (2022) 139 Juta’s South African Law Journal.

H. Bosher & S. Yeşiloğlu ‘An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram’ (2019) 33 International Review of Law, Computers & Technology.

H. Bosher & S. Yeşiloğlu ‘An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram’ (2019) *International Review of Law, Computers & Technology*.

Jonathan A. Obar & Steve Wildman ‘Social media definition and the governance challenge: An introduction to the special issue’ (2015) 39 Telecommunications Policy.

Lee J Matalon ‘Modern problems require modern solutions: internet memes and copyright’ (2019) 98 *Texas Law Review*.

Louise Thornthwaite ‘Social media and dismissal: Towards a reasonable expectation of privacy’ (2018) 60 *Journal of Industrial Relations*.

M Jansen ‘The protection of copyright works on the internet – an overview’ (2005) *Comparative and International Law Journal of Southern Africa*.

Maayan Y Vodovis ‘Look Over Your Figurative Shoulder: How to Save Individual Dignity and Privacy on the Internet’ 40 (2012) *Hofstra Law Review*.

Max Mills ‘Sharing privately: the effect publication on social media has on expectations of privacy’ 9 (2017) *Journal of Media Law*.

Naomi Smith & Simon Copland ‘Memetic Moments: The Speed of Twitter Memes’ (2022) 4 *Journal Digital Social Research*.

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

Ncube CB & Oriakhogba DO ‘Monkey Selfie and Authorship in Copyright Law: The Nigerian and South African Perspectives’ (2018) 21 *Pioneer in peer-reviewed, open access online publications*.

Pamela Andanda, ‘Copyright law and online journalism: a South African perspective on fair use and reasonable media practice’ 6 (2016) *Queen Mary Journal of Intellectual Property*.

Ralph Van Niekerk ‘Taking the Mickey’ (2014) Without Prejudice.

Reinard Michau ‘Publication of photographs’ (1995) 3 *Juta’s Business Law*.

Ritvik Garg ‘Privacy v Social Media’ 12 (2019) *Supremo Amicus*.

RM Shay ‘Fair Deuce: an uneasy fair dealing-fair use duality’ (2016) *De Jure*.

Ronak Patel ‘First World Problems: A Fair Use Analysis of Internet Memes’ (2013) 20 *UCLA Entertainment Law Review*.

Russell Newman, Victor Chang & Robert John Walters et al ‘Web 2.0—The past and the future’ (2016) *International Journal of Information Management*.

Stacey M. Lantagne “Mutating Internet Memes and the Amplification of Copyright’s Authorship Challenges (2018) 17 *Virginia Sports and Entertainment Law Journal*

Stephen B. Thau ‘Copyright, Privacy, and Fair Use’ (1995) *Hofstra Law Review*.

Sunelle Geyer ‘Determining Origionality in South African Copyright Law: Is It “or”, “and” or Something “More”?’ 85 (2022) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*.

Tommaso Edoardo Frosini 'Access to the Internet as a Fundament Right' (2013) *Italian Journal of Public Law*.

Internet sources

‘Twitter by the Numbers: Stats, Demographics & Fun Facts’ available at https://www.omnicoreagency.com/twitter-statistics/.
Alyssa Provassa ‘Definition smartphone’ available at https://www.techtarget.com/searchmobilecomputing/definition/smartphone.

Number of Instagram Users Worldwide from 2020 to 2025’ available at https://www.statista.com/statistics/183585/instagram-number-of-global-users/.

S. Dixon ‘Leading countries based on Facebook audience size as of January 2022’ available at https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/.

Ya-fan Wong ‘MORAL RIGHTS IN THE CONTEXT OF COPYRIGHT LAW IN SOUTH AFRICA’ (2015) available at https://dommisseattorneys.co.za/incubator-portal/.