

# The dangers of controlling memes through copyright law

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## Abstract

*Intertextuality plays a great role in the production and comprehension of various forms of humorous expressions, such as parodies and memes. The latter often rely on previous facts, images, videos, statements etc., to express a certain comic idea. Nowadays, memes and parodic videos are not just made by comedians, but also by ordinary people on social networks, mostly using images, videos and gifs found in search engines like Google. However, attempts at regulating the use of such materials, particularly from the point of view of copyright, threaten the freedom of this sort of humorous expression. The article discusses a case from Brazil in 2017, when the then President Michel Temer tried to stop the unauthorised use of his image in the creation of memes, stating that the pictures in the Presidency's website were available for journalistic purposes only, and any other use needed the government's consent. This strange situation, that could give the president the power of approving the satire made at his expense, was itself the subject of various memes, which ultimately forced the government to step back. The article then discusses similar risks of a directive recently approved by the European Parliament, which, under the flag of protecting copyright, may have a controversial chilling effect in the creation of memes and satiric videos.*

*Keywords: humour, copyright, consent, meme, intertextuality.*

## 1. Introduction

It is somewhat surprising that in a world filled with so many authoritarian governments one of the greatest threats against humorous speech comes from copyright<sup>1</sup> owners.<sup>2</sup> This can be

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<sup>1</sup> Throughout the whole text the expression *copyright* will be treated as a legal equivalent to what, in Brazilian legislation, is called *author rights* (following the French tradition of *droit d'auteur*, to what Brazil and other Continental Europe's countries are more attached). The same was previously done by other jurists writing about this issue in English (e.g. Branco 2007).

<sup>2</sup> It should not be forgotten that copyright and freedom of speech both receive explicit protection of international treaties and declarations, not to mention the protection of national constitutions and statutes. For example, the United Nations' 1948 Universal Declaration of Human Rights states in Article 27(2): "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic

diagnosed from current or intended legal measures that, in theory, are designed to protect copyright, but in fact can curb the freedom to produce and share memes, videos and other forms of comic content.

In Brazil, the manifestation of this threat itself sounds humorous: in May 2017, a branch of the presidential bureaucracy sent notifications to bloggers and producers of comic content for social networks who had used photographs of the president in memes. The text of the notification said that the presidency's concern was to protect the copyrights of the photographers who had taken these pictures. But in practical terms it virtually obstructed the very creation of political memes, especially material with criticism against the president himself. The tactic was seen as an intimidation attempt and as a result the government quickly stepped back.

However, the question raised by the controversy is very serious: if taken strictly, Brazilian Copyright Act actually requires the previous consent of the photographer in case of any modifications of his/her picture. Moreover, the photographer can also object to the derisive use of the photo (which can be claimed in the case of using the picture for a meme: even if no changes were made into it, maybe the humorous text itself that is normally added can give a serious picture a totally different connotation). It is necessary to appeal to higher constitutional guarantees of freedom of speech to defend the production of memes, but apparently – for now – Brazilian lawmakers are not paying attention to this aspect of the legislation.

Nonetheless, concerns of this kind are taking place in the European Union, where a directive recently voted by the European Parliament expands dramatically the obligations of content providers such as YouTube in the field of copyrights. As concisely explained by the magazine *Wired*, the directive's polemical Article 13 (nowadays turned into Article 17) "require web giants to automatically filter copyrighted material – songs, images, videos – uploaded on their platforms, unless it has been specifically licensed" (Volpicelli 2018). So far, as also explained by *Wired*, platforms were not responsible for copyright violations, although they should remove content when directed to do so by the rights holders (Reynolds 2019). That is to say, the once standard procedure, called "notice and take down", required the platforms to remove copyright-harmful content as soon as they were warned about it, usually by the content producers or owners themselves. The directive shifted the burden to the platforms: they must be able to identify, during the upload process, if the content infringes copyrights. If the answer is "yes", they must block them instantaneously.

In a widely discussed article published in the newspaper *Financial Times*, Susan Wojcicki (2018), chief executive of YouTube, criticised the directive, which has often been described by the media as a "meme killer" (Volpicelli 2018). Wojcicki argues that it is not consensual what content actually infringes copyright and how the platforms are expected to identify it. It is necessary to discuss how far copyright protection should go in order to avoid the annihilation of forms of humorous expression that are intrinsically connected to pre-existing material such as memes and video parodies.

Departing from two very different situations, the article intends to explain why humourists should be concerned and what are the possible arguments and limits of the law. But before delving into such discussions, it is necessary to establish the conceptual framework surrounding the issue, especially what memes are and why intertextuality is so vital for their existence.

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production of which he is the author". From the same document, Article 19 reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". For a comprehensive analysis of protection of freedom of speech as a fundamental right see Hare (2009: 62-80).

## 2. Memes and intertextuality

In her seminal book *Memes in Digital Culture*, Limor Shifman (2014: 9) explains that the concept of meme, coined by Richard Dawkins in *The Selfish Gene* (1976), refers to “small units of transmission, analogous to genes, that spread from person to person by copying or imitation”. Dawkins used the Greek word *mimema* (‘something that is imitated’) as point of departure to make a pun on the word *gene*. Examples of memes, originally speaking (i.e. as Dawkins thought of them) were “melodies, catchphrases, and clothing fashions, as well as abstract beliefs (for instance, the concept of God)” (Shifman 2014: 9).

Nowadays, however, when we think about memes, perhaps the first thing popping up in our minds are pictures with phrases superimposed over them (it can be a quote or even an entire joke; see Hale 2018: 524), generally funny, and spread through our social networks. But the word also applies to videos, gifs and other sorts of humoristic expressions. Dawkins’ formulation suits all of them: they are pieces of cultural information, passed along from person to person, spread on a micro basis but with impacts on a macro level – in a sense that memes shape mindsets and behaviours of social groups (Shifman 2014: 18). In contemporary digital culture, sharing has not just this inherent meaning of distributing a certain content to a larger audience. The act of sharing a funny video or a politically charged montage is able not only to comment on a certain issue – it also expresses our feelings (Shifman 2014: 18) – including states of happiness, sadness, political dissatisfaction and so on.

Internet memes also carry a paradox within them. The means through which they spread (i.e. the internet) enables them to be forwarded without any change (unlike, e.g., a joke, which almost always undergoes a substitution of words, set-up, characters, etc.; see Davies 2011). However, a considerable number of internet users decide to create their own version of the meme and to forward this last version. Shifman (2014: 20) calls this process *mimicry* and *remix*. This is particularly noticeable on YouTube: almost every video that breaks a certain number of viewers encourages parodies and amateur versions (which, by the way, is a good indicator of the attention a certain content is receiving; Shifman 2014: 32). The process is enhanced and simplified thanks to tools such as Photoshop and sound and video editors.

It would be right to say, therefore, that memes are somewhat universal but at the same time responsive and dependent on context. They can follow certain global formulas and comment on universal issues, but can also be very culture-specific, adapted for the understanding of smaller communities. As Shifman (2014: 30) proposes, memes can express one’s uniqueness and connectivity. Sharing a certain meme represents the awareness of a trend, a fact, a pop cultural product. However, going further – remixing the meme – brings up the user’s ability to construct their own “self”, without missing the affiliation with a given community (Shifman 2014: 34).

Internet memes, in other words, are imitated or transformed by the very users that make them circulate (Shifman 2014: 41), albeit the merits of this process cannot be attributed to each sole user. One important feature of the memes is the awareness they bear of each other, so that there might be implicit or explicit connections and responses to what has been previously done by other users – which makes intertextuality one of the greatest characteristics of memes. It is commonly accepted in contemporary linguistics that intertextuality permeates everything we say or write, which is, to a certain extent, a response to previous texts (see among others Tsakona 2018: 2-3). When it comes to memes, however, this relatability reaches higher standards, especially because the internet is essentially a great repository of a huge amount of data, among them humorous expressions. And, as suggested by Hale (2018: 508), such humorous manifestations can evolve “into a variety of other texts which add to, expand on, and prolong, the prestige of the original text”.

Something to be noticed is the *intention* behind intertextuality – the “conscious effort to keep a humorous text ‘alive’” (Hale 2018: 512) – which is particularly noticeable in the meme culture and the expectations that the reader is able to recognise the implicit or explicit references. Laineste & Voolaid (2016: 29) notice that memes from countries that used to be part of the Soviet Union often include punchlines or even full jokes from Soviet times referring to present-day politics. But not only: Shifman (2014: 15) reminds us that “Internet memes can be treated as (post)modern folklore, in which shared norms and values are constructed through cultural artefacts such as Photoshopped images or urban legends”. Memes take this intertextuality to a higher degree, as they are often re-created by the audience “in complex, creative, and surprising ways” – something “highly valued” in a “so-called participatory culture” (Shifman 2014: 2, 4). The creation of comic content, therefore, is more than ever spread through society instead of being in the hands of professional humourists.

Therefore, the interpretation of memes must consider not only the inherent intertextuality of every text, particularly its humorous aspect (Tsakona 2018: 2), but also that memes rely on previously existing material, usually well-known by the audience that will receive them and will be encouraged to create their own version afterwards. The problem, as will be demonstrated below, begins when the right holders of such pre-existent material are not willing to allow them to be used for free – or to be used at all.

### **3. The Brazilian case**

At the end of May 2017, in the middle of the latest national corruption scandal, the Secretary of Social Communication, directly subordinate to the Presidency of the Republic of Brazil, sent the following notification by e-mail to some profiles on Facebook and Twitter, most of them known for being and producers of humoristic content for the internet even though they are not professional humourists:

Dear Sirs,

The Department of Production and Promotion of Images of the Presidency of the Republic, aiming to improve the production and promotion of the honourable President Michel Temer’s official pictures, hereby shares the links of both its page and its Flickr, in order to facilitate the download of the presidential images.

The use of the pictures is free for journalistic purposes and for the promotion of governmental actions. For other purposes, the previous consent of the Presidency’s Secretary of Press is required.

[...] The reproduction of the images is allowed provided the credits are mentioned, as determined in the Brazilian Copyright Act, in its article 24: “The moral rights of the authors are: [...] the right to have his or her name, pseudonym or conventional signal pointed out or announced as the author, whenever the work is used”.

Please confirm this message was received.

Regards.<sup>3</sup>

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<sup>3</sup> The translation from Portuguese to English was made by the author of this article. The same goes for all the other texts in Portuguese unless otherwise stated. The original version of the text reads as follows:

Prezados Senhores, O Departamento de Produção e Divulgação de Imagens da Presidência da República em busca de melhorias na produção e divulgação das fotografias oficiais do Exmo. Sr. Presidente Michel Temer, vem por meio desta divulgar os endereços eletrônicos (Portal e Flickr) para download das imagens presidenciais. Todas as fotografias estão liberadas para uso jornalístico e divulgação das ações governamentais. Para outras finalidades, é necessária autorização prévia da Secretaria de Imprensa da Presidência da República. [...] Os interessados podem reproduzir as imagens desde que citado [sic] os créditos, conforme determina a Lei 9.610/98 dos Direitos Autorais.

The humourists perceived this notification as a form of intimidation, as widely reported by the press. One of them, Sandro Sanfelice, who runs the webpage *Capinaremos*, said: “At first we were apprehensive. It is not every day that you get a formal e-mail from the government, let alone in such terms. I got it as a threat, as if they were saying ‘Stop using the president’s pictures for non-journalistic purposes’” (Vecchioli 2017). To another newspaper, Sanfelice said: “Memes are a form of expression, like an article or a cartoon. It is pointless to forbid or to curb its production” (Avedaño 2017).

### 3.1. Fighting the “meme ban” with memes

With the typical speed of the internet, profiles on Facebook and Twitter (not only the ones that received the notification) delivered an ironic response, as can be noticed in the memes that circulated in the following days. The memes alluded to the situation experienced by the humourists, severely criticising the presidency’s decision and expressing solidarity for the ones directly affected by the notification – since the potential victims included virtually every person connected to social networks who enjoyed the process of “mimicry and remix” described by Shifman 2014: 20; see Section 2). Either way, the dialog between the memes and the content of the presidential message is evident. Above all, they represent, in one way or another, an indirect answer to the notification, and therefore bear clear bounds of intertextuality with it. Some of those memes are shown in Figures (1-5).<sup>4</sup>

The funniness of the meme in Figure (1) comes from the fact that the credits of the picture ended up covering the photograph itself, making its reproduction almost pointless. Nonetheless, it is possible to identify, behind the letters, the then president, whose consent was theoretically required to use the picture. In this context, the intended repetition of the word *Planalto* (a reference to the headquarters of the government) and the excess of acknowledgment of the source of the picture make the message undeniably ironic. As if not clear enough, there is an explicit credit for the photograph. The watermark “Memes Planalto” – as well as Brazil’s flag’s colours green, yellow, and blue, seen right beside it, over the president’s shirt – also points to the official source of the material (that is, the presidency’s website or Flickr, as mentioned in the notification), as if the meme has been properly allowed by the government. It is important to notice that the creator of the meme was one of the recipients of the presidential message, Sandro Sanfelice (we can see the symbol of his page, *Capinaremos*, the “C” in green and yellow, on the left side of the image). The authorship of the meme, posted on Sanfelice’s humour website, perhaps explains the fact that, among the memes presented in this Section, this is the one with more references to the *content* of the notification. The other memes seen below allude more to *the fact that the notification was sent* to creators of digital content and the potential implications for the creation of humour.

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<sup>4</sup> Naturally, as observes Tsakona (2018: 1), “[t]he implicitness and allusions of political jokes may spoil the fun if somebody does not grasp their meanings or does not agree with the political attitudes encoded”. The same holds true for political memes. The author will try to fill in these gaps explaining as much as possible the allusions made in each of the memes featured in Figures (1-5).



**Figure 1.** “This meme uses an image properly credited to the government. It means that the government has ceded the image. Thank you very much, government, for allowing this meme. Credits: Palace of Government”<sup>5</sup> (Sanfelice 2017)

The meme in Figure (2) was found by the reporters of *El País Brasil* (the local version of the Spanish newspaper) in the Facebook profile kept by *Mídia Ninja* [Ninja Media], a left-wing oriented group of journalists who were severe critics of Temer. The humorous piece seems to be more concerned with the mocking of the *president himself* than the one analysed in Figure (1) (focusing on ridiculing the *text* received by the humourists). In Figure (2), the intertextuality with the episode relies mainly in the content of the words uttered by Temer, related to what is seen, in practical terms, as a meme prohibition. As far as it is known, *Mídia Ninja* was not among the recipients of the notification. Also, they were not the creators of the meme, as explained by e-mail to the author of this article. That makes the posting and sharing of the humorous piece more an act of solidarity with the humourists and an attack on a president whose ideals (and whose ascension to the power) were subject of strong criticism. *Mídia Ninja* maintains that the impeachment of former president Dilma Rousseff – which led Temer to the presidency – was actually a disguised *coup d’État*. If sharing a meme in social media, as mentioned in Section (2), can be a form of making a political statement, *Mídia Ninja* expressed both dissatisfaction with Temer’s latest attitudes and endorsed the humourists’ protest against them.

Regarding its content, the meme follows a well-known formula: the mocking of a given sentence by repetition. The funniness comes from the picture that illustrates each of the moments. Both were taken during a presidential address, apparently punctuated with very emphatic moments, but the second one, in which Temer’s face is totally contracted, signalling extreme passion during the speech, is connected with a sentence that would be meaningless if we did not know what the first meant. The replacement of the first sentence’s vowels by the single vowel “i” makes it sound like a child’s tantrum and, therefore, the presidential command is framed more as a hysterical and illogical desire than the result of reflections of a thoughtful leader. The humorous effect, by the way, comes precisely from these contrast between how the leader was supposed to behave and how effectively was his dealing with the state affairs. The mercurial face of the second picture embodies the message of a ruler intolerant to criticism, willing to use his power to suffocate what is seen as an unlawful meme rebellion.

<sup>5</sup> The word *planalto* used by the meme means ‘plateau’ in Portuguese. It refers to the Palace of the Plateau, the headquarters of the federal government. The palace got its name from the local geography, as the capital Brasilia was built on Brazil’s so called “Central Plateau”. In order to simplify the reference, the author opted to translate “Planalto” as “Government”, as the palace is used as a metonymy for the Presidency of the Republic.



**Figure 2.** “Now you can’t do memes anymore / [The same sentence written in an unintelligible way, as if the ex-president was in the middle of a tantrum]” (Avedaño 2017). Originally published at: <https://www.facebook.com/MidiaNINJA/posts/894783070679839:0>

The meme in Figure (3) was also mentioned in a report made by *El País Brasil* about the episode. It was originally posted on Twitter by Mayuska Yafa, who apparently had not received the notification. However, also just like with *Mídia Ninja*, the posting and sharing of the meme sound as a political comment, as an act against Temer, pairing with the 25,300 tweets she posted so far, most of them re-tweets with noticeable left-wing and humorous connotations.

The humorous piece pays tribute to the well-known memes of “worried/nervous laughter”<sup>6</sup> – that is, the laughter that poorly disguises actual symptoms of anxiety or preoccupation. In a first and more obvious level, the meme plays with the possibility of Temer being actually uncomfortable with the satire made at his expense, under the mask of not caring or even enjoying it. However, there is an additional level of humour, coming from two elements that need to be read together: (1) the rather effeminate pose struck by the then president (the picture was taken during an interview, and the act of pointing the hands to himself probably signalled that he was emphasising a personal position or statement – something like “this is what *I* did/think”); and (2) the deliberate use of the adjective *worried* with a feminine ending (*preocupada* instead of *preocupado* in Brazilian Portuguese, in which the adjective usually has different endings according to the gender of the noun it refers to). The creator of the meme probably has chosen this specific photo just to use the feminine suffix for the word worried, as in Brazil adjectives with feminine endings (if possible accompanied by an ironic tone of voice) can sometimes intentionally refer to males who, according to their interlocutor, are overreacting to a certain situation. This is obviously not in accordance with the grammatical rules – instead, it is a conscious violation of the norms to make humour. It is also somewhat sexist, as it frames women as emotionally unstable, and ‘true’ men as calm and capable of digesting bad news with stoicism. If the meme in Figure (2) paints Temer as a

<sup>6</sup> See, for instance: <https://knowyourmeme.com/photos/623945-descriptive-noise> and <https://tenor.com/search/nervous-laughter-gifs>, both accessed 02.02.2019.

childish leader, the one in Figure (3) takes his overreaction to the copyright issue to another – and unexpected– target of mockery: his masculinity.



**Figure 3.** “The government will notify whoever posts Michel Temer’s memes... Oh really? I’m laughing but I’m worried” (Avedaño 2017). Originally published at: [https://twitter.com/MaiaYafa/status/867010625003827200/photo/1?ref\\_src=twsrc%5Etfw&ref\\_url=https%3A%2F%2Fbrasil.elpais.com%2Fbrasil%2F2017%2F05%2F27%2Fciencia%2F1495899503\\_382776.html](https://twitter.com/MaiaYafa/status/867010625003827200/photo/1?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fbrasil.elpais.com%2Fbrasil%2F2017%2F05%2F27%2Fciencia%2F1495899503_382776.html)

Unlike the memes presented in Figures (2) and (3), the humorous piece in Figure (4) mocks the ex-president more indirectly. The intertextuality noticed in this meme, also mentioned by *El País Brasil* report, links a then present political attitude (the veto for the use of the official pictures in memes) to previous controversial policies endorsed by Temer. His qualities as a leader or his masculinity are not under discussion. Nevertheless, the harsh criticism of his policies makes clear that the tolerance with them is almost over – at least from the point of view of the meme’s creator, Vitor Vinicius, a young lawyer with more than 54,300 tweets and 3,700 followers, who apparently had not received the notification but, like *Mídia Ninja* and Mayuska Yafa, took advantage of the situation to criticise Temer’s policies and make a point on Brazilian politics and society.

The fictional dialog in Figure (4) plays with the reputation of Brazilians being far too understanding with the rulers of the country – a stereotyped image that has crossed generations, school books and anthropology theses.<sup>7</sup> According to the meme, the population

<sup>7</sup> The constraints of space of this article do not allow a proper development of the issue. But just in order to provide a glimpse of the debate, a quotation of *Raízes do Brasil [Brazil’s Roots]* (2006 [1936]: 160-161), by one of Brazil’s most distinguished historians and sociologists, Sérgio Buarque de Hollanda, on the Independence from Portugal (7 September 1822) and the Proclamation of the Republic (15 November 1889) is elucidative:

Democracy in Brazil has always been an unfortunate misunderstanding. A rural, semi-feudal aristocracy imported it and made efforts to accommodate it, wherever possible, with its rights and privileges, the same privileges that had been the subject of the bourgeoisie fight against the aristocrats in the Old World. Brazilian aristocracy was able, then, to incorporate to the traditional situation (at least as a façade or an

can accept the abolition of rights such as pensions (at least in their configuration at that time). The pensions reform, one of the central projects of Temer's presidency,<sup>8</sup> was intensely debated, and there were prognoses of working until well past the current retirement age if the reform was approved. The profanity served to underline the extent of the so-called violation of the rights that was in course – with the people's condescendence. The meme humorously plays with the supposition that the restrictions on the use of official pictures would mean banning this kind of humour, which was exaggeratedly equalled as a *laughter ban*, given the importance memes have acquired in Brazilian pop culture.



**Figure 4.** “Temer: ‘I’m going to fuck the pensions, your rights and your asses’. Brazilians: ‘Ok’. Temer: ‘I want you to stop making memes too’. [Brazilians prepare for war]”.(Avedaño

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external decoration) some mottos that seemed to be among the most suitable for that times, and that were celebrated in books and speeches. It is curious to notice that in Brazil every apparently reforming movement almost always departed from the top to the bottom [...] Saint-Hilaire, who around this time kept notes of his trips through the countryside of Brazil, observed that in Rio the liberal agitations before 12 January were promoted by Europeans, and the revolutions in the provinces of the countryside came from some rich and powerful families. “The mass of the people”, he wrote, “was indifferent to everything, as if asking, like the donkey in the fable: ‘Don’t I have to carry the saddle my whole life anyway?’”.

Original version in Portuguese as follows:

A democracia no Brasil sempre foi um lamentável mal entendido. Uma aristocracia rural e semifeudal importou-a e tratou de acomodá-la, onde fosse possível, aos seus direitos e privilégios, os mesmos privilégios que tinham sido, no Velho Mundo, o alvo da luta da burguesia contra os aristocratas. E assim puderam incorporar à situação tradicional, ao menos como fachada ou decoração externa, alguns lemas que pareciam os mais acertados para a época e eram exaltados nos livros e nos discursos. É curioso notar que os movimentos aparentemente reformadores, no Brasil, partiram quase sempre de cima para baixo. [...] Saint-Hilaire, que por essa época anotava suas impressões de viagem pelo interior brasileiro, observa que, no Rio, as agitações do liberalismo anteriores ao 12 de janeiro foram promovidas por europeus e que as revoluções das províncias partiram de algumas famílias ricas e poderosas. “A massa do povo”, diz, “ficou indiferente a tudo, parecendo perguntar como o burro da fábula: ‘Não terei a vida toda de carregar a albarda?’”.

<sup>8</sup> The reform proposed by Temer ended up not being appreciated by the Congress, mostly because Members of Parliament realised it might cost them votes in the upcoming elections of 2018. In 2019, president Jair Bolsonaro, elected with a liberal economic agenda, managed to approve a similar reform, praised by most of the entrepreneurs but also criticised for keeping a significant portion of privileges untouched.

2017). Originally published at  
[https://twitter.com/b\\_eyondthewall2/status/867405989968007168/photo/1](https://twitter.com/b_eyondthewall2/status/867405989968007168/photo/1).

All the memes so far were shared in private users' social networks, and made a clear political statement, even though they did not have potential for making a direct impact on Brazilian state of affairs. This was not the case of the meme in Figure (5), mentioned by the report made by *Superinteressante's* ('Superinteresting') website. *Super*, as it is popularly known, is a monthly magazine famous for reports on science and polemic, curious topics (the covers of some of the last issues were black holes, the future of food, clones, and anxiety).

Also, unlike memes in Figures (2) and (3), the meme has a clear and known authorship: it was created by the Labour Party (Partido dos Trabalhadores, or simply PT) supporters and posted on its Facebook profile. It was a clearly provocative response to Temer, a former ally who became an enemy. Temer was Dilma Rousseff's vice-president, and his party, MDB (Movimento Democrático Brasileiro, or Brazilian Democratic Movement), formed a political alliance with PT that was successful in the 2010 and 2014 elections. During and after Dilma's impeachment, however, the Labour Party accused Temer of conspiring for the impeachment, a situation that would directly benefit him. After the breaking of the alliance, the party did not miss an opportunity to criticise Temer and the liberal policies he implemented once he became president, most of them directly opposed to what his predecessor has done. The meme invites the internet audience to obtain Temer's pictures in the Labour Party's Flickr account, with no worries about the copyright issues raised by the government. The colour chosen for the most important message of the meme (that the official pictures' ban would not affect the party's archives) is presented in red, the official colour of PT. The pictures chosen to illustrate the meme, just like what happened with Figure (2), are meant to be as derisive as possible, especially the ones in black-and-white, taken during a famous meal in which barbecue was served – in them, Temer is apparently making great efforts to clean his teeth with his tongue. The coloured picture, on the other hand, perhaps is another subtle allusion to the "worried laughter" meme, already mentioned above.



**Figure 5.** "Michel Temer has vetoed the use of his pictures for memes. But we did not" (Caputo 2017). Originally published at:  
<https://www.facebook.com/pt.brasil/posts/1377981528954885:0>

After such backlash, and also considering the storm caused by the scandal that preceded this Quixotic copyright battle, the government stepped back. Nothing else was heard about the notification, and the social media humourists have not complained again of anything similar coming from President Temer or his successor, Jair Bolsonaro.

### 3.2. What the meme episode shows about the Brazilian copyright legislation

The perspective of depending on the presidency's consent to use official pictures – as well as having to give the respective credits to the photographers – put creators of content for the internet on the alert. The widespread response in memes, joined even by digital influencers who had not received the government's request, was portrayed by the press as a new crusade for freedom of speech. But even if the government efforts reached some notoriety by the end of May 2017, it lasted no more than a few days and probably is not remembered by most Brazilians nowadays. So what is the point in bringing this issue back if not for the sake of dissection of the memes that distilled elaborate forms of ridiculing the president? It is that the episode is a perfect excuse to discuss the limitations of the copyright's legal framework in Brazil. In other words, although the notification was seen as a disguised attempt to prevent criticism aimed at the president, speaking in strictly legal terms it was not entirely wrong, especially considering that the Brazilian Copyright Act (Bill n. 9.610/1998), drawn from the 1886 Berne Copyright Convention, is said to be among the world's most restrictive provisions regulating this branch of the law (Branco 2007).

The statute actually protects the photograph (Art. 7º, VII) and gives the photographer the right to use his/her photograph and decide what to do with it (Art. 28). Art. 29, in turn, requires the previous and express consent of the photographer for his/her work to be partially or totally used in any way. Unauthorised use of the picture is illegal (Art. 5º, VII). Any changes made to the original photograph also depend on previous consent (Art. 28, III). The statute is even redundant about it, stating in its Article 79, §2º, that “[i]t is prohibited to reproduce any photograph that is not in absolute correspondence with the original, unless authorised by the photographer”. The Copyright Act also mentions the right of the creator to be credited, to be associated with the body of work (Art. 24, II). Art. 79, §1º underlines such right, stating that “The photograph, whenever used by third parties, will always legibly indicate the name of the photographer”.

Memes seem to be closer to what the Brazilian Law calls “works of collective creation”, a result of the participation of many authors, merged into an autonomous work (Art. 5º, VIII, “h”).<sup>9</sup> This categorisation, however, theoretically does not eclipse the right of the photographer “to defend the integrity of his or her work, to oppose to every modification on it or to the practice of acts that can somehow damage it or reflect on the author's honour or reputation” (Art. 24, IV). According to the Brazilian Copyright Act, the photographer can also demand to “withdraw the circulation of a certain work, even though it was previously consented to, if the work is causing damage to his or her reputation and image” (Art. 24, VI).

The law naturally has its exceptions. One of the most important ones is the legal provision about parodies and paraphrases, which are not considered violations of copyright, provided they are not mere reproductions of the original work and do not discredit it (Art. 47). There is a natural element of subjectivity in the appreciation of this condition presented by the law. As Judge Luis Felipe Salomão, from the Superior Court of Justice, stated in a fascinating case (Special Appeal [Recurso Especial] 1.548.849/SP, determined 20 June 2017) involving *Falha [Fail] de S. Paulo*, a parody of *Folha [Gazette] de S. Paulo*, Brazil's most influential newspaper: “In fact, irony and criticism are the essence of parody. When the law mentions and

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<sup>9</sup> In the common law tradition the memes are categorised as “derivative works”.

protects this kind of expression it is protecting the irreverence of the content presented”.<sup>10</sup> In other words, the law must be read in a reasonable fashion, in a way that it does not make the parody pointless. But can memes be considered parodies?

### 3.3. Parodies, the fair use doctrine and the copyright limitations

The word *parody*, according to Harries (2000: 5), has been said to be a derivative of *paroidia*, a Greek term meaning ‘counter-song’, as the prefix *para* has a connotation of contrariety. However, *para* can also mean ‘besides’, which would bring “a suggestion of intimacy instead of contrast”. A parody, therefore, emulates a certain text and mocks it at the same time, in what can be described as an “oscillating process that binds both discursive directions” (Harries, 2000: 5). It is not hard to notice, then, how parody is a genre intrinsically defined by intertextuality, as the existence of a previous text to be emulated and ridiculed is central to the creation of the new one. Also important to remember what has been said in Section (2) on the current (and broad) understanding of the word *text*, and how the dialog between texts is especially important in the digital era.

Nonetheless, parody is not defined by Brazilian legislation. Giving definitions is usually not the statutes’ task (the Romans warned that *omnis definition in jure periculosa est*, i.e., in law every definition is dangerous), and relying only on dictionaries is probably not the best practice (as shown by Condren et al. 2008a: 286-292). On the other hand, academics normally seem to be still confined to understand parody as a literary tradition, as noted by Condren et al. (2008a: 276-277):

parody and satire are no longer confined to principally literary practices; indeed many hard cases presented before courts these days are likely to deal with digital appropriation of sound and images. Standard definitions of the terms have not yet taken full account of these major changes in the media of parody and satire. If the provisions are not to be interpreted so as to freeze artistic practices in the print age, definitions are needed which accommodate and reflect how the forms are developing.

Considering modern culture, Condren et al. (2008b: 402) propose a broader definition of parody: “the borrowing from, imitation, or appropriation of a text, or other cultural product or practice, for the purpose of commenting, usually humorously, upon either it or something else”.<sup>11</sup> This bold definition would encompass memes made at the expense of the appropriation of other cultural practice (pictures, characters, etc.) to comment humorously on every aspect of human experience. Indeed, memes use part of a pre-existing work to create a new one, with a new meaning.

However, copyright law, at least in Brazil, usually adopts a strict interpretation – which, by the way, is an explicit guideline for contracts in this area (Art. 4º of the Copyright Act). Following these footsteps, courts tend to be conservative when interpreting exceptions to copyright protection. Therefore, this might not be the easiest way out.

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<sup>10</sup> Original version in Brazilian Portuguese as follows: “De fato, a ironia e a crítica são a essência da paródia e quando a lei prevê e protege esse tipo de manifestação e expressão está protegendo a irreverência do conteúdo apresentado”.

<sup>11</sup> Clearer definitions of what is parody and what is satire became important in Australia after a new bill was approved by the Parliament in 2007. Sections 41A and 103A of the Act consecrate works for the purpose of parody and satire as fair dealing that do not constitute infringement to copyright law. This legislative change forced the legal community to rearrange interpretations on what those exceptions really are, in order to solve the incoming disputes. For a comprehensive analysis on the issue, and an analytical criticism on why simply importing definitions from other countries with different legal systems can be a problem, see Condren et al. 2013. Seemingly Brazil also needs such broader discussion.

One might wonder if “fair use” would not be a good defensive argument. But Brazilian law does not have the open concept of “fair use”, as do the countries that have adopted the “common law” legal system (that is, a system whose core are the courts decisions, in opposition to “civil law” or “Roman-Germanic” countries, in which the statutes occupy the most privileged position).<sup>12</sup> Visser (2005: 321) explains that “copyright systems traditionally adopt one of two approaches to locating the parody defence – either by creating a special exception from copyright infringement, or by treating it as part of a general exception from copyright infringement, such as fair use or fair dealing”. In other words, in countries such as the United Kingdom, the United States, and Australia, the fair use is an umbrella concept under which are sheltered exceptions from copyright infringement, including parody. In the United States, the “fair use doctrine”, created by the courts, is now incorporated in §107 of the 1976 Copyright Act:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

In short, according to the law, courts must consider four factors to determine whether the use is considered or not fair: (1) if the defendant is using the plaintiff’s work to create a new one, also deserving copyright protection; (2) works unpublished or fictional receive additional protection; (3) if the defendant reproduced the entire copyrighted work; and (4) if the defendant’s work deprived the plaintiff of revenue that would be obtained if the allegedly infringing work did not exist (Nimmer 2003: 268).

In civil law countries, such as France and Spain, according to Visser (2005: 322-323), the legislation has a list of situations that are not considered copyright infringement – parody is traditionally mentioned as an exception if it has a humorous intent, if it does not create a risk of confusion with the original work, and if it does not injure or degrade the original author. These are provisions from the 1886 Berne Convention, that consecrated the “Three Step Test” in its Article 9.2:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The Berne Convention served as inspiration to the “TRIPS” (Trade Related Aspects of Intellectual Property Rights) Agreement, signed by all the members of the World Trade Organization (WTO) (Basso 2017: 494), and to the Brazilian Copyright Act, that has a specific chapter for “Limitations to Copyright”.

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<sup>12</sup> This division was notably expressed in René David’s classical work *Les grands systèmes de droit contemporains (Droit comparé) [The great systems of contemporary law (Comparative law)]*.

The differences between the common law and civil law systems, however, is more theoretical than practical, as both rely on open and undetermined criteria that depend substantially on how the courts apply them in the concrete case:

my review of the cases convinces me that the high correspondence in judicial opinions between the individual fair use factors and courts' ultimate disposition, as opposed to the absence of any meaningful correspondence in the chart, reflects an important insight into how judges actually resolve fair use cases: Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.

(Nimmer 2003: 281)

From the side of the civil law, uncertainty also rules. Jacques (2016), for instance, lists a series of contradictory decisions from French courts on the conflict between trademark protection and parody.

### **3.4. Memes and freedom of expression**

In this intricate legal framework, in which it is debatable if memes can be considered parodies, and in which the protection granted to parody has different sources according to the legal system, the meme's issue remains unsolved from the point of view of Brazilian legislation. It seems necessary to assess higher constitutional values, as the copyright provisions from ordinary legislation should not censor the right to create memes – a legitimate form of expression<sup>13</sup> – or impose financial compensation requirements so elevated to chill the spirits of the content creators. This concern reaches a higher level when we ask ourselves who benefits from all these restrictions. It seems obvious that, although the Presidency's notification allegedly tried to preserve the rights of the photographers, its practical effect was to frustrate criticism made at the expense of the president. Copyright seemed to be used as an excuse to achieve a different desired goal with technical arguments.

In this context, memes should not be taken for granted. If some of them are silly and harmless, there are also plenty of examples containing relevant political content, making relevant criticism about politicians' choices and wrongs. Instead of being treated as "trivial and mundane artefacts", memes actually "reflect deep social and cultural structures", as stressed by Shifman (2014: 15). This issue was mentioned, for example, in a newspaper interview covering the issue reported here, where Viktor Chagas, a Brazilian scholar specializing in digital culture and one of the creators of the Meme Museum, said that "[m]emes are criticised for being shallow and superficial, but they serve to broaden the political discussion, enabling the participation of audiences that would not normally join the debate" (Avedaño 2017). Indeed, movements such as Occupy Wall Street (OWS) grew and gained attention of the society (and of the traditional media) after being popularised by internet memes (Milner 2013: 2358–2360).

Similarly, Shifman (2014: 120) associates the rise of the internet with the perception that commenting on a political blog and posting jokes about politicians are forms of political

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<sup>13</sup> If it is clear that memes are legitimate forms of expression, that deserve the protection of the law, it is also necessary to discuss their role in what Harries (2000: 3) called "ironic supersaturation" – the fact that especially new generations are often not aware or did not have direct contact with the "classic" canons referred to in humorous discourse. The author formulated this idea for parody in cinema, but I deem it applicable to the meme culture, as a considerable portion of the population apparently do not follow the news so consistently in order to interpret the memes critically and therefore being aware of manipulative or false assumptions underlining its discourse.

participation, which is not limited to formal activities such as voting or joining political organisations. As a conclusion, it is not hard to acknowledge that “[m]eme creation is an accessible, cheap, and enjoyable route for voicing one’s political opinions” (Shifman 2014: 123). Furthermore, in countries where freedom of expression is restrained, creating and sharing political memes may be the only possible discursive opportunity for democracy (Shifman 2014: 144).

The protection of such freedom of speech seems much more impregnated with constitutional density than the protection of photographers’ copyrights or the president’s image and honour. In doing so, the government ended up harming a central element for the creation of memes (the previous material available online) and the intertextuality inherent to this form of expression.

Even though the memes discussed in this Section are undeniably short, they fall into the discussion of topics of public interest, the very core of freedom of speech protection, as once stated by U.S. Supreme Court Justice William Brennan in the famous *New York Times Co. v. Sullivan* case: “debate on public issues should be uninhibited, robust and wide-open [...] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” (376 U.S. 254, determined 9 March 1964).

The Brazilian Supreme Court has already acknowledged the role played by humour in this debate:

The effective functioning of representative democracy requires total respect for the broad freedom of expression, enabling freedom of opinion and freedom of artistic creation, as well as the proliferation of information and the circulation of ideas, in order to guarantee the diverse and antagonistic speeches – moralistic and obscene, conservative and progressist, scientific, literary, journalistic and humorous (Direct Unconstitutionality Action 4451/DF, Opinion of the Court written by Justice Alexandre de Moraes, determined 21 June 2018).<sup>14</sup>

Attempts to control humorous speech are not exactly new in Brazil – one may recall the changes incorporated into the Elections Code to forbid satire against politicians during the campaign (eventually declared unconstitutional by the Supreme Court, in the decision from which the quote above is extracted; more details about it can be seen in Capelotti 2016). But the use of copyrights to achieve this disguised goal seem to be unprecedented and, in certain ways, unthinkable in countries in which freedom of speech and criticism of public citizens are more incorporated into the legal culture.

#### 4. EU’s “Meme Killer Directive”

The Brazilian case discussed above showcases how copyrights can be used as a weapon to restrict freedom of speech with political purposes. At first glance, it might just look like another bizarre legal case coming from somewhere lacking tradition in the defence of freedom of expression. But, as this topic aims to discuss, the use of copyright as a tool to restrain speech posted on social media is also taking place in the European Union, most known for its democratic tradition and respect for fundamental rights. As outlined below, the purpose of the directive recently approved by the European Parliament might not be so restrictive,

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<sup>14</sup> Original version in Brazilian Portuguese as follows:

O funcionamento eficaz da democracia representativa exige absoluto respeito à ampla liberdade de expressão, possibilitando a liberdade de opinião, de criação artística, a proliferação de informações, a circulação de ideias; garantindo-se, portanto, os diversos e antagônicos discursos – moralistas e obscenos, conservadores e progressistas, científicos, literários, jornalísticos ou humorísticos.

nonetheless, the practical results of either the Brazilian notification and the European directive seem to be the same: imposing increasing difficulties to create memes under the flag of protecting creator's rights. As a result, some analysts expect an inevitable chilling effect on the production of content dependent on pre-existing material, normally covered by copyright protection. The directive impacts not only on all the countries under the long lasting and powerful economic bloc – which would be considerable in its own terms – but also in the countries that do business with them and draw inspiration for their own laws from the European experiences.

Reactions against the first rounds of approval for the directive, in September 2018, came from various directions – from international organisations concerned with freedom of speech to the companies potentially affected by the law, passing by the internet users who thought they would be deprived of their rights of expression. David Kaye (2019), Special Rapporteur on freedom of speech for the United Nations Office of the High Commissioner for Human Rights, expressed serious concerns about the directive: “Europe has a responsibility to modernise its copyright law to address the challenges of the digital age. But this should not be done at the expense of the freedom of expression that Europeans enjoy today”. YouTube, perhaps one of the greatest affected by the directive, launched a campaign called “Save Your Internet”<sup>15</sup> with short videos conveying the message that the internet as we know it would be completely changed by the directive. The users also exercised their right to complain through a petition in Change.org with more than 4.7 million signatures (Stokel-Walker 2019). But all the public outcry about it did not work out. After a temporary pause by the end of January 2019 (Stolton 2019) the legislative proceedings resumed, with most European governments supporting the deal – which was essential for the voting of the directive's final version (Lee 2019), approved 26 March 2019. The member States have now two years to transpose the directive's guidelines into national law.

Axel Voss, a German member of the Parliament and perhaps the greatest enthusiast of the directive, states that European creators nowadays produce content for huge platforms such as YouTube and Facebook but receive a very small amount (if nothing) of the profits generated by this exposure – which make their lives “miserable”, as he said in an interview for the Parliament's press (Voss 2018). The directive aims to change this state of play by radically changing the liability of the platforms for copyright violations, currently synthesised by the expression “notice and take down” – meaning that the platforms must disable a determined content when notified to do so. This rule meant they were not supposed to check and filter every video, photo, gif, etc., that is uploaded by the users. Liability arose only in case of negligence in removing copyright-violating content (see Jacques et al. 2018 for an analysis of the court cases that built this reasoning in the United States).

The drastic alteration proposed by the directive was made by Article 13 (now, after some changes in the text, Article 17). According to it, platforms with more than 5 million visitors per month must adopt their “best efforts” to avoid the new upload of a content that had already been removed for infringing copyright. Platforms with more than three years of existence and 10 million visitors per month will be liable from the moment a content infringing copyrights (such as an uncredited picture or a song whose rights have not been paid) is uploaded. In addition to this duty of searching and inspecting the content inserted by users, the platforms are also expected to show higher standards of transparency: they must be able to explain to the copyright holders that the mechanisms created to filter the contents are adequate and efficient to detect violations.<sup>16</sup>

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<sup>15</sup> The videos are available at: <https://www.youtube.com/saveyourinternet>. Accessed 22.02.2019.

<sup>16</sup> See also *Considerandum* 39:

Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders

The idea is to improve systems like the Content ID developed by YouTube, in which the algorithms make a match between the material uploaded by the user and a database of copyrighted works. Google reportedly invested already over 100 million dollars on the program (Valente 2019). The rules are not applicable to cloud services, non-profit encyclopaedias such as Wikipedia and scientific repositories without profitable purposes. Other companies such as Netflix and Spotify are also not reached by the directive, as they offer in their platforms only licenced material, and no content can be uploaded by the users (Valente 2019).

Voss (2018) swore that memes and other forms of humorous content are not threatened, as they are covered by already existing laws on the violation of copyrights. According to him, “No, they [memes and derivative fan works] are absolutely not at risk. They will still be covered by the copyright exception that already exists in national legislation. The user is not affected by this reform at all. Only the platforms are responsible” (Voss 2018).

Trying to silence criticism on the directive’s possible effect on humour, huge changes have been added to the original version of Article 13 (Article 17 in present), contemplating clear and repetitive safe-conducts for humour:

5. The cooperation between online content service providers and right holders shall not result in the prevention of the availability of works or other subject matter uploaded by users which do not infringe copyright and related rights, including where such works or subject matter are covered by an exception or limitation. Member States shall ensure that users in all Member States are able to rely on the following existing exceptions and limitations when uploading and making available content generated by users on online content sharing services:

- (a) quotation, criticism, review;
- (b) use for the purpose of caricature, parody or pastiche.

8. [...] In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules.

This Directive shall in no way affect legitimate uses, such as uses under exceptions and limitations provided for in Union law [...].

However, it seems clear that, if the platforms are expected to take on more responsibilities, the user (both the meme creator and the audience who sees it) will be inevitably affected. In case of absence of licenced material, the blocking of the content will be the inevitable alternative for the platforms. A creator who wanted to use a certain picture for a meme, for instance, may be frustrated on the way to share it online. Although the user will not be held responsible for copyright violation, as Voss (2018) explains, it seems evident that he or she is indeed affected. It is certain, nonetheless, that the impact is likely to be different in different branches of the cultural industry. Films and music are traditionally more organised in catalogues, which theoretically makes it easier to licence protected content. The same cannot be said about images and texts, for an example (Valente 2019).

In her article published in the *Financial Times*, Susan Wojcicki (2018), the chief executive of YouTube, complained about the difficulties of checking 400 hours of material

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is essential for the functioning of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and their success rate for the recognition of rightholders’ content. Those technologies should also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.

uploaded every minute. She claims the algorithms already in use recognise a series of copyright and terms of use violations, but, in order to be compliant with the new law, the programming would have to be much more restrictive.

There is also the other side to be considered. As Jacques et al. (2018: 218) correctly warns, the directive, in practical terms, privatises the process of content removal. In so far it might have had the interference of courts and some degree of accountability, the new directive leaves the responsibility with the platforms and their rather opaque criteria for blocking and removing videos, pictures and texts. Although the directive seeks to enhance the transparency of this process, it does it on the interest of the right holders, not the audience's.

Besides, the exceptions explicitly mentioned by the directive do not include memes, but only three forms of humorous expression (caricature, parody<sup>17</sup> and pastiche<sup>18</sup>). As mentioned in Section (3), there is plenty of academic controversy about the boundaries of each of them, and how to categorise the memes themselves.

It is true that the list of exceptions conveyed by the directive is larger than the one kept by the Brazilian Copyright Act, which has only paraphrase and parody as limitations to the authors' rights and in which the concept of "fair use" is not adopted. But as in both of them the lists end up excluding a wide variety of humorous expressions, concerns of humourists are justifiable, and litigation might arise. In the opinion of this writer, both legal systems would benefit from broader definitions allowing generic use of copyrighted material for humorous purposes.

Valente (2019) explains the Content ID, the tool developed by Google already in use, has a considerable number of "false positives", blocking user-generated content made of material in public domain or under common copyright exceptions. As she points out, it is hard even for experienced lawyers to differentiate what is "fair use" and what is copyright infringement. Teaching it to algorithms, in a much more restrictive scenario, seems unrealistic – particularly in the European Union, where copyright law has significant variations among the member States (Kaye 2019).

As pointed out by Julia Reda (2018), a Member of the European Parliament from Germany, like Voss, the discussions around the new directive were sold as David versus Goliath, the European creators versus the big tech companies. In fact, according to her, the winners are the great media enterprises. She says:

Posting and sharing is how we participate online. Uploads and links are what makes the internet more meaningful for society than cable TV. The upload filters – that platforms will have no choice but to implement to limit their liability – will likely err on the side of over-blocking, withholding legitimate acts of expression to avoid legal trouble: in the court of the automated filter, we'll be assumed guilty until proven innocent.

But there are considerable questions yet to be answered, perhaps the most important being how each member State and respective courts will enforce this law. As stated by Stokel-Walker (2019), "put in the hands of bureaucrats and suits that don't understand the digital world, [Article 13] might become a blunt instrument that could stifle the remix culture of the internet".

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<sup>17</sup> See, for instance, the following definition of *parody*: "Imitation grossière dans le but de faire rire" [Crude imitation with the purpose of making fun] (Falardeau 2015: 178).

<sup>18</sup> About *pastiche*, Condren et al. (2008b: 408) state the following: "This form of sampling is often referred to as 'appropriation' and even when it does shade into humour, the intent may be to use the original to comment on something else altogether; by combining the old and the new in this way, a pastiche is created".

## **5. Conclusion**

This article discussed two totally different experiences – one from Brazil, one from the European Union – that have a similar effect: the restriction of freedom of expression with copyright tools, affecting particularly memes, forms of humorous expression that rely on intertextuality with pre-existent material (above all pictures, but also characters, phrases and other content that is usually protected). The risks in the Brazilian case were more supposed than effective, as the government stepped back from its attempt to forbid the use of the president’s official pictures. However, a comprehensive analysis of Brazilian law indicates a legal framework that is apparently overprotective when it comes to copyright, and is not considerate of how content creation – especially in humour – works in the present day internet. In the European Union case, on the other hand, harms are also said to be coming, as platforms such as YouTube and Facebook are expected to adopt stricter content filters to protect copyrighted material. Although the legislation passed by the European Union explicitly protects some forms of humour, analysts are concerned with potential overblocking, and the chilling effect that might come with it. Again, just like in the Brazilian case, forms of humour that are particularly intertextual and connected with other material are supposed to be the most affected. As Jacques et al. (2018: 227) assert, “the current operation is more likely to hinder competition, and to create a chilling effect on creativity and innovation, rather than promoting it”.

All that has been written here is built on an assumption that is normally taken for granted: that behind every meme we see there is a picture, a video, an expression, a character that was created by someone else. The copyright crisis described in this article tries to punctuate that we might be forced to explicitly recognise this reality.

An interesting report by BBC (Kale 2019) showed how ordinary people’s lives are affected when the memes about them became viral. One of the interviewees, the “disaster girl” (the smiling kid in front of a burning house), indicated that she made some money out of it by selling the picture taken by her father to a social media marketing company. The sum helped a bit with college fees. Besides, advertising campaigns and games also earned her some money. The question is: Is the law moving on to expect us to do the same? The answer, at the moment the article is being written, is an exercise in futurology.

In Brazil, although the legislation protects copyright holders very strongly, the legal system and the courts do not seem to be too concerned with the issue. The problem involving the presidential pictures, described above, was not debated enough before being dropped and the gaps in the law are not easy to fill.

In the European Union, the so-called “meme killer directive” was passed despite the protests of internet giants and users, even though the latest changes proposed to the text try as much as possible to preserve humour from its effects. But it is yet to be seen if such theoretical tolerance and respect with humour, suggested by the changes incorporated into the directive, will prevail over the expected restrictions about to be enforced by content platforms in order to avoid fees.

It should be noted that the focus of the article in Brazil and European Union does not mean the problem does not exist in other countries or even across borders. For example, in 2015 US-based Getty Images asked a German blog a licence fee of 785.40 euros for posting a meme with a penguin’s picture, originally published in National Geographic but belonging to Getty’s catalogue (Siao-Sun 2015).

Meanwhile, and despite that, the internet still holds its reputation of an environment of scarce control, where not much can be done to avoid the spread of content deemed undesirable by certain persons. From the same BBC report mentioned above (Kale 2019), another “meme character” philosophises: “sometimes things will happen to you online, and you lose control,

and there's nothing you can do about it". The "accidental hipster", who initially posted in his own profile on Facebook a picture that became viral, is even more complacent: "you don't choose to become a meme, it just happens to you". Such conformist attitudes are apparently not shared by copyright holders, who seem to be doing everything they can about it. It is yet to be seen how far they will be able to go.

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