



## FALL 2018 E-NEWSLETTER

At Digital Mountain we assist our clients with their computer forensics, e-discovery, and cybersecurity needs. For this E-Newsletter, we discuss memes and emojis and their impact on our industry.

### When a Picture is Worth More Than a Thousand Words

In April 2013, Pamela and Bernard Holland stepped up for their son, Adam, in a big way. Adam, born with Down Syndrome, was photographed displaying a drawing he'd created in art class for persons with developmental disabilities and the photo was subsequently posted on the internet. Eight years after the photograph was posted on the internet, Adam's mother was notified that Adam's picture had been used without permission as the basis for unflattering memes, the illustration-based jokes popular

on the internet. As their son's legal conservators, the Hollands were understandably upset by the cruel use made of their son's image. With the help from a legal aid group, the Hollands sued a broadcast media organization, an on-air radio personality, and an individual who creates internet graphics, including memes, for profit. The Hollands complaint included such torts as False Light Invasion of Privacy, Misappropriation of Likeness and Image, Intentional Infliction of Emotional Distress, and Defamation. After settling out of court with the broadcast media organization, the suit went to trial, and the Hollands won damages exceeding \$150,000 for their son, in addition to the amount of the out of court settlement (*Holland v. Gigahertz*, No. 3:13-cv-00373, Mid. Dist. TN (2015)). In addition, the case established precedent that while a meme may be a joke, it's not necessarily a laughing matter, and may end up being costly in many aspects.



#### Easy Laughs

Thanks to alteration software, it's simple to modify a photograph or an illustration of any kind, and add text. A meme is an image with an accompanying text that is supposed to be humorous. It's a visual joke. Without either half, the image or the text, the joke doesn't work. A photo of an actor whose roles seem to come to early ends all too often is simply an image of that actor. Once the text "One simply does not live through an entire movie," is added, the joke, by way of a reference to a line said by this actor, is made: this guy never seems to get a "happily ever after" role. Without the image, however, that line of text doesn't really make sense, and certainly isn't funny.

GIFs (Graphic Interchange Format) are short, repeating loops of animations or video clips that may or may not be accompanied by text, meant to convey meaning (almost like a moving emoji). A well-known sister of a reality TV family rolling her eyes can be used to convey the same sentiment as the eyes looking up emoji, with a little more clarity because a GIF face is a real human face as opposed to a yellow circle with facial features. GIFs have become so popular that GIF “battles” and “challenges” occur on various social media sites. There are add-on keyboard apps devoted to making GIFs easier to access and share, and in case you’re thinking this is the domain of bored teens, Giphy, arguably the most popular GIF creation/sharing corporation, was valued at \$600 million in 2016, with almost no revenue stream.

### **The Formula for Success May Be the Same as the One for Trouble**

Success for memes and GIFs isn’t measured in laughs, it’s measured in sharing and popularity. How often the meme or GIF is forwarded, posted, tweeted, copied, and texted is what matters. Sharing, however, is also the fastest way to copyright infringement, and crediting a source may be irrelevant without permission to use. Copyright infringement is just one of a variety of causes that are landing GIF and meme users in court. Cases for defamation, publication of private facts or information, false light, invasion of privacy, unauthorized use of property, intellectual property disputes, and copyright infringement have all been heard in courts with either memes or GIFs at their cores. Making a meme of someone’s photo, or a GIF of someone’s video, could not only be any of the causes listed above, but depending on the state in which the claim is brought, civil harassment.

### **A Bad-Tempered Cat Worth \$700,000, Pepe the Frog, and a Deadly GIF**

In *Grumpy Cat Limited v. Grenade Beverage LLC*, 8:15-cv-02063-DOC-DFM, Cent. Dist. CA (2018), Grumpy Cat, an internet personality based on a real-life cat with a distinctive face, sued a California beverage company for copyright and trademark infringement, as well as breach of contract, resulting from the unauthorized use of the cat’s image most commonly found elsewhere as the subject of memes. While the case is currently in appeals, the initial judgment awarded Grumpy Cat in excess of \$700,000 in statutory damages.

Illustrator Matt Furie, the creator of Pepe the Frog, filed suit in March 2018 against media personality Alex Jones of InfoWars, and InfoWars parent company, for a copyright infringement of the frog illustration in *Matt Furie v. Infowars, LLC*, 2:18-cv-01830 Cent. Dist. CA, (2018). On September 12, 2018, the matter was referred by the court order to alternative dispute resolution. Furie, who created Pepe the Frog originally as a comic-based character, achieved greater success by turning Pepe into a meme. Furie has several times sued to protect his work from infringement from other artists and internet personalities, as well as served Digital Millennium Copyright Act takedown requests to various internet platforms. A DMCA takedown request is a legal mechanism by which the owner of copyrighted material informs and requests that the infringing use is removed from internet sites and search engine results.

Finally, in a case that is not at all a laughing matter, in *United States v. John Rayne Rivello*, 3-17MJ192-BK N. Dist. TX (2017), Federal prosecutors charged Rivello with attempting to “kill, injure, harass, and intimidate” Newsweek reporter Kurt Eichenwald with a strobing GIF. Eichenwald, who has publicly written about suffering from epileptic seizures, received a Tweet with the message “You deserve a seizure for your post,” and a strobing GIF which caused Eichenwald to seizure. Investigators found among other evidence on Rivello’s computer equipment a list of triggers for epileptic seizures and personal information about Eichenwald. While the federal case ultimately dismissed, Rivello still faces a civil suit from Eichenwald and Dallas County for criminal charges.

## No Laughing Matter

Many of the cases we've reviewed here highlight aspects of memes and GIFs that just aren't funny. Whether it's misuse of intellectual property, cruel jokes, or a weaponized GIF, the darker side of creativity has not bypassed this trend in visual humor. Fortunately, both civil causes of action and criminal prosecution are working as they should to keep in check those who would misuse these images. And that's a good thing, because a picture is very often worth a thousand words, but a witty caption is generally less than 15 words, and when it's a little kid power sliding in a little pink convertible holding up a "rock on" sign, we should all be able to enjoy that.

Please direct questions and inquiries about cybersecurity, computer forensics and electronic discovery to [info@digitalmountain.com](mailto:info@digitalmountain.com).

## UPCOMING INDUSTRY EVENTS

### MASTERS CONFERENCE

Washington, DC: October 23-24, 2018

### THE SEDONA CONFERENCE WORKING GROUP ON ELECTRONIC DOCUMENT RETENTION & PRODUCTION (WG1) 2018 ANNUAL MEETING

Los Angeles, CA: October 25-26, 2018

### TODAY'S GENERAL COUNSEL, "THE EXCHANGE" EDISCOVERY

Houston, TX: November 1, 2018

### "THE EXCHANGE" DATA PRIVACY AND CYBERSECURITY FORUM

Washington, DC: November 1, 2018

### "THE EXCHANGE" DATA PRIVACY AND CYBERSECURITY FORUM

DALLAS, TX: November 1, 2018

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*Digital Mountain, Inc. Founder and CEO, Julie Lewis, will be presenting at various upcoming industry events. Please send requests for speaker or panel participation for her to [marketing@digitalmountain.com](mailto:marketing@digitalmountain.com).*

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