

UPDATE: Success for “Success Kid” before the Eighth Circuit in Copyright Dispute

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A few months' back, the TMCA wrote about a copyright dispute between the campaign committee of former Iowa Congressman Steve King and Laney Griner, the owner of the photograph used in the popular "Success Kid" meme. The Eighth Circuit Court of Appeals has since affirmed the jury's finding that the campaign was liable for copyright infringement for using the meme in a fundraising message for King's unsuccessful reelection campaign.

Of most interest, the Eighth Circuit affirmed the jury's rejection of the campaign's fair use defense. The campaign had claimed that Griner, who took the photograph of her son, Sam, the "Success Kid," should not be allowed to encourage use of the photograph generally but then also target the campaign's commercial use of the photograph. They based their argument on the first, third, and fourth fair use factors. The Eighth Circuit's analysis focused primarily on the first factor, the purpose and character of the use.

This case marks the first time that the Eighth Circuit has applied the Supreme Court's

recent seminal fair use case, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 143 S. Ct. 1258, 215 L. Ed. 2d 473 (2023). As discussed by the TMCA, after *Warhol*, courts assessing the first fair use factor must focus on: (i) whether and to what extent the challenged use has a purpose that is different from that of the original work; and (ii) whether the challenged use is commercial or non-commercial.

The campaign argued that its use of “Success Kid” was like the billions of other uses of the photograph: the creation and dissemination of a meme. The Eighth Circuit was unpersuaded, however, largely because of the campaign’s admittedly commercial use of the meme for fundraising purposes. Quoting *Warhol*, the Court noted that “the ‘commercial nature of the use’—while ‘not dispositive’—is to be weighed against the degree to which the use has a further purpose or different character.” The Court explicitly stated that fair use is more difficult to establish when memes are used for commercial purposes. In the Court’s own words: “Memes used commercially in advertising or fundraising are subject to stricter copyright standards than memes used noncommercially, which are often fair use.” This statement clarifies that memes are to be treated no differently than other uses.

The campaign did not satisfy that stricter standard because its use was not transformative, so there was nothing to weigh against the commerciality of the use when assessing the first fair use factor. The Court rejected the campaign’s claim that their fundraising meme was transformative because the original purpose for Griner photographing her son had nothing to do with memes. The Eighth Circuit disagreed, focusing not on Griner’s original purpose for taking the photograph, but instead on her reason for asserting her copyright rights in the photograph: to control the commercial use of the photograph in memes. The Court thus found that the campaign’s use of the photograph in a meme did not add to or alter the purpose or character of the original work.

The Court was also sure to note that, like other uses, memes are transformative to differing degrees, depending on the circumstances. But here, any evidence of transformativeness was lacking because the purpose of the use was the same as Griner’s use. As the Court noted: “The fact that everyone else is doing it is not a particularly compelling justification, especially considering the vast majority of these uses are non-commercial.”

The Eighth Circuit also held that the third fair use factor—the amount and substantiality of the portion used in relation to the copyrighted work as a whole—favored Griner because the photograph of “Success Kid,” which was the heart of the template used to create memes, was used in the campaign’s meme.

The fourth fair use factor was neutral. The effect of the campaign’s use on the market for the copyrighted photograph could not be determined. Griner had licensed the photograph to many well-known brands over the years, though licensing requests had decreased before the campaign’s use. There was no evidence that the campaign’s use increased the market for licensing the photograph, and a reasonable jury could have found that an association with King and his campaign could further dampen the licensing market.

The Court also upheld the denial of attorneys' fees to the campaign because it did not prevail, despite having made an offer of judgment for more than the statutory minimum of damages awarded to Griner. It also upheld the district court's decision not to award attorneys' fees to King himself, who did prevail on the merits below.

The full text of the opinion can be found [here](#).