

Will “Success Kid” Owner Continue to Succeed on Appeal in Copyright Dispute?

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Years ago, Laney Griner took a picture of her then toddler son, Sam, at the beach clenching his fist in what appeared like a celebratory gesture. The photo went viral, and later became a widely used meme on the internet known as “Success Kid.” Griner registered the copyright in the photo, and has successfully licensed its use to several large companies. She also has encouraged non-commercial uses of the photograph by publishing instructions on how to create a meme using “Success Kid.” The campaign committee of former Iowa Congressman Steve King used “Success Kid” without Griner’s permission to fundraise for King’s unsuccessful bid at reelection, adding a fundraising message to the image of Sam that said: “Fund our memes.” Griner sued both King and his campaign for copyright infringement, and the jury found the campaign liable, awarding Griner the statutory minimum of \$750.

Despite being liable for only the statutory minimum, the campaign appealed on multiple grounds, including that the Eighth Circuit should apply a different standard to determining an implied license, that the jury incorrectly rejected the fair use defense, and that the district court erred when it refused to award attorneys’ fees to the campaign. King—whom the jury found not liable for copyright infringement—also appealed the trial court’s refusal to award him attorneys’ fees as a prevailing party.

The Eighth Circuit Court of Appeals recently heard oral argument on the appeal, which potentially raises multiple issues relevant to copyright owners of works used widely on the internet for non-commercial and commercial purposes.

The campaign relied heavily on claims that Griner should not be permitted to both allow and encourage wide-spread use of “Success Kid”—which counsel called one of the five most popular memes ever—to increase the photo’s value for commercial licensing, but then to selectively target the campaign’s admittedly commercial use of the meme. The campaign urged the Court to imply a license to use the photo through Griner’s conduct, rather than apply the traditional factors required for an implied license. Griner’s counsel noted that musicians use a similar business model: making their music available for non-commercial uses on platforms like the Instagram Music Library, but then licensing that music for commercial purposes. One member of the panel wondered what would be left of copyright law in the Internet age if the Court agreed with the campaign and found an implied license (or that works passed into the public domain) due to widespread use of the work in memes. Though it would be more interesting from a copyright law perspective for the Court to weigh in on these arguments, it may not do so because the campaign appeared to have waived its implied license argument at trial.

The campaign also argued that the purpose and character of its use of “Success Kid” favored a finding of fair use because the use was political, was like billions of other uses of the photo, and Griner had acquiesced to and encouraged the use of the photo as a meme. The campaign failed to recognize or to cite to the Supreme Court’s seminal fair use case, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, which had been decided a few months before the campaign filed its brief. The Eighth Circuit has yet to publish a decision applying *Andy Warhol*, but questioned both counsel about its effects in this case and more generally. One member of the panel even asked point blank: “What’s

left of the fair use doctrine after the *Andy Warhol* case?” As it applies to this case, counsel for Griner argued that the campaign’s use was commercial, and was not otherwise sufficiently transformative, so the first fair use factor favored Griner. Other than adding a fundraising message to the photo, the campaign did not point to other evidence distinguishing its use.

Though the case presents an opportunity for the Eighth Circuit to apply *Andy Warhol*, the extent to which it will do so may be limited. The fair use argument not only appears to favor Griner here, but also, as one panelist noted, the campaign “is pushing a big rock up a big hill” in its efforts to overturn the jury’s finding of infringement. If the Court upholds that verdict, the case supports a copyright owner’s continued right to control the commercial use of their work, even where it has been widely used online for non-commercial purposes, and even where the copyright owner has encouraged such non-commercial use (though the financial incentives for doing so under similar circumstances may be small).

Relevant to the potential financial incentives and risks facing copyright owners, the panel also will decide whether the district court properly exercised its discretion in denying attorneys’ fees to the defendants. The Eighth Circuit has not directly addressed the intersection of Rule 68 and Section 505 of the Copyright Act. The district court applied *Marek v. Chesney*, 473 U.S. 1 (1985), and found that Section 505 only supports awarding fees to a defendant whose offer of judgment was more favorable than the final award if the defendant was a prevailing party. So, even though Griner had rejected a Rule 68 offer of judgment for \$15,000, the campaign could not recover its post-offer fees because it did not prevail on the infringement claim. As to King, who prevailed on the copyright claim, the court exercised its statutory discretion to award attorneys’ fees in any copyright case and determined that fees were not appropriate in part because Griner’s claim was reasonable and—contrary to King’s claims that the lawsuit was politically motivated—her motivations were not malicious.

On appeal, Griner urges the Eighth Circuit to weigh in on Rule 68 offers in copyright actions, to agree with the district court, and to expressly adopt the reasoning of the Seventh and Ninth Circuits to find that defendants are only potentially entitled to attorneys’ fees in copyright cases if they actually prevail on the merits of the infringement claim. Doing so would ensure that copyright owners who prove infringement would not be on the hook for the infringer’s attorneys’ fees. In questioning Griner’s counsel on this issue, the panel instead focused on the trial court’s broad discretion to award fees in copyright cases, potentially signaling a reluctance to adopt the bright-line position urged by Griner.

The TMCA will monitor this case to see what guidance the Eighth Circuit may offer to copyright litigants on these issues, and will be sure to provide our valued readers with any relevant updates.