

Copyright & Memes: The Fight for *Success Kid*

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This Article explores the complicated relationship between memes and copyright. Internet memes have become a ubiquitous part of social communications. They effectively express an idea, message, or sentiment, often more humorously and efficiently than words. Most memes evolved from original content that Internet users found online and copied, altered, shared, and imbued with new cultural and social meaning. Because memes frequently involve the unauthorized use, alteration, and sharing of a content creator's original image or photograph, they naturally implicate the content creator's copyright. But who owns a meme? What rights, if any, does the creator of the original content have in a meme derived from the work? What rights, if any, do the users of the meme have? This Article examines the current copyright case Griner v. King, involving the unauthorized use of the highly popular Success Kid meme, to explore doctrinal uncertainties involving copyright authorship and ownership, abandonment, social media sharing and implied licensing, and fair use in Internet memes.

INTRODUCTION

Internet memes have become a ubiquitous part of social communications. Want to say something sarcastic to a friend? Say it with the *Condescending Wonka* meme.¹ Feeling cranky? Share it in a *Grumpy Cat* meme.² Want to express triumph about a trivial accomplishment? Do it with the *Success Kid* meme.³ Memes can effectively express an idea, message, or sentiment, often more humorously and efficiently than words. Most memes evolve from original content that Internet users find online and copy, alter, share, and imbue with new cultural and social meaning. Because memes frequently involve the unauthorized use, alteration, and sharing of a content creator's original image or photograph, they naturally implicate the

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¹ *10 Most Popular Internet Memes (In History)*, BROADBAND SEARCH, <https://www.broadbandsearch.net/blog/most-popular-internet-memes-in-history> [<https://perma.cc/JM5E-2WYW>] (last visited Sept. 10, 2021).

² *Id.*

³ *Id.*

content creator's copyright. But who owns a meme? What rights, if any, does the creator of the original content have in a meme derived from the original work? This Article explores the complicated relationship between memes and copyright. It focuses on the current copyright case *Griner v. King*, which involves the unauthorized use of the popular *Success Kid* meme, to examine doctrinal uncertainties of copyright authorship and ownership, abandonment, social media and implied licensing, and fair use in Internet memes.

This Article proceeds as follows: Part I discusses the history of the photograph used in the *Success Kid* meme and the process in which that photograph became a popular meme. Part II details the current litigation between the photographer of the *Success Kid* photograph and former Congressperson Steve King over King's unauthorized use of *Success Kid* to fundraise for his political campaign. Parts III and IV analyze two defenses raised by King in the litigation—copyright abandonment and licensing—and examine whether Griner in this case, and content creators in general, abandon copyright in their content or license their works to the public when their original content becomes a meme. Parts V and VI use the *Griner v. King* litigation to explore two additionally important copyright questions confronting the relationship between copyright and memes. Specifically, Part V focuses on the collaborative nature of memes to suggest distinguishing memes from photographs when determining copyright ownership and infringement. Part VI examines copyright fair use and whether the use of an original image as a meme can be considered transformative fair use.

I. THE STORY OF *SUCCESS KID*

On August 26, 2007, Laney Griner took a photograph of her eleven-month-old son Sam at the beach.⁴ Like many parents, she was hoping for a cherubic smile but instead got a different expression. Sam, hand clenched in a fist, looks “smug,”⁵ “determined,”⁶ “satisfied,”⁷ “victor[ious],”⁸ “pugnacious.”⁹ Griner later provided context to the photo, explaining that

⁴ *Success Kid / I Hate Sandcastles*, KNOW YOUR MEME [hereinafter *Success Kid*, KNOW YOUR MEME] <https://knowyourmeme.com/memes/success-kid-i-hate-sandcastles> [<https://perma.cc/GNS8-DZ4Q>] (last visited Sept. 10, 2021).

⁵ *Id.*

⁶ Ed Payne, ‘*Success Kid*’ Appeals to Social Media to Get His Dad a Kidney Transplant, CNN (Apr. 15, 2015, 4:30 AM), <https://www.cnn.com/2015/04/15/living/success-kid-dad-needs-help/> [<https://perma.cc/Y9WN-UQQX>].

⁷ *Id.*

⁸ Sydney Lupkin, *Success Kid's Dad Needs a Kidney Transplant*, ABC NEWS (Apr. 14, 2015, 9:57 AM), <https://abcnews.go.com/Health/internet-success-kids-dad-kidney-transplant/story?id=30288035> [<https://perma.cc/8LSX-2UTQ>].

⁹ Gillian Mohney, *Dad of ‘Success Kid’ Undergoes Successful Kidney Transplant*, ABC NEWS (Aug. 18, 2015, 4:57 PM), <https://abcnews.go.com/Health/dad-success-kid->

Sam was eating sand,¹⁰ but people viewing the photo on Griner’s Flickr account apparently had other ideas about what the photo means.¹¹ Griner’s photograph of her son became the popular meme known as *Success Kid*.



The word “meme” was originally coined by evolutionary biologist Richard Dawkins to describe any “unit of cultural transmission” that stays alive by “leaping from brain to brain.”¹² It has since been co-opted to describe images, videos, or texts that are copied and spread rapidly by people online.¹³ Some memes are created to circulate a specific idea or message.¹⁴ Most memes, however, involve content that people find online and transform into memes by imbuing that content with new meanings, messages, and cultural contexts.¹⁵ The most common format of an Internet meme involves an image that is combined with a relevant catchphrase or text.¹⁶ The *Success Kid* meme, which follows this common format, features

undergoes-successful-kidney-transplant/story?id=33159971 [https://perma.cc/K9A2-TKSZ].

¹⁰ Lupkin, *supra* note 8.

¹¹ *Id.*

¹² RICHARD DAWKINS, *THE SELFISH GENE* 249 (40th anniversary ed. 2016).

¹³ See Olivia Solon, *Richard Dawkins on the Internet’s Hijacking of the Word ‘Meme,’* WIRED (June 20, 2013, 12:00 PM), <https://www.wired.co.uk/article/richard-dawkins-memes> [https://perma.cc/5XZM-GNY6].

¹⁴ Examples include the *Happy Merchant* cartoon portraying the profile of a man used to express anti-Semitic ideas, and the *NPC Wojak* image of a bald man with a blank stare used to denigrate “people who do not think for themselves.” *Happy Merchant*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/happy-merchant> [https://perma.cc/E7QA-VE5L] (last visited Sept. 10, 2021); *NPC Wojak*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/npc-wojak> [https://perma.cc/ELN7-TKXM] (last visited Sept. 11, 2021).

¹⁵ See David Nield, *6 Easy Ways to Make Your Own Memes*, WIRED (May 30, 2021, 8:00 AM), <https://www.wired.com/story/6-easy-ways-make-memes/> [https://perma.cc/Y8BJ-N35F].

¹⁶ See Katherine Gallagher, *50 Famous Memes and What They Mean*, STACKER (Aug. 5, 2021), <https://stacker.com/stories/2650/50-famous-memes-and-what-they-mean> [https://perma.cc/M7HM-SMV4].

the image of Sam either with the original blurred beach background or superimposed over a blue sunbeam background with text added to the top and bottom of the frame.

Griner's photograph of Sam quickly became famous on the Internet. By the beginning of 2008, Griner's photograph was already being used as the basis for a MySpace layout.¹⁷ A few years later, the photo got a boost when it was uploaded to a Reddit community called "r/AdviceAnimals," which specializes in posting images with the potential to catch on as culturally popular memes.¹⁸ One commenter remarked that the image was "underrated,"¹⁹ with another stating that Sam "still has potential."²⁰ The photo fulfilled its potential. A month after being posted to Reddit, there were more than 66,000 instances of *Success Kid* as a meme on Quickmeme,²¹ a site that encourages the pasting of captions on photos to create memes. The overwhelming interpretation of the photo was to use it to illustrate successes, victories, and triumphs, hence the name Success Kid.²² By that summer, there were entire blogs dedicated to collecting instances of the meme.²³ A few years later, CNN deemed Sam Griner "the Internet's most famous baby."²⁴ ABC News reporter Sydney Lupkin's assessment was, "If you've spent any time on the Internet in the past few years, you've come across the Success Kid meme"²⁵

After the photo achieved epic meme status, Griner successfully monetized its fame, licensing the photograph to Vitamin Water and Virgin Mobile for their use in advertisements.²⁶ Griner also licensed official *Success Kid* merchandise.²⁷ She further used the meme to raise money for

¹⁷ *Success Kid*, KNOW YOUR MEME, *supra* note 4; Payne, *supra* note 6.

¹⁸ poringo, *Success Kid Finds a Controller*, REDDIT, https://www.reddit.com/r/AdviceAnimals/comments/farnt/success_kid_finds_a_controller/ [https://perma.cc/B324-6A82] (last visited July 29, 2021).

¹⁹ Comment to *Success Kid Finds a Controller*, REDDIT, (Jan. 28, 2011, 11:56 AM), https://www.reddit.com/r/AdviceAnimals/comments/farnt/success_kid_finds_a_controller/c1ek0zz?utm_source=share&utm_medium=web2x&context=3 [https://perma.cc/B324-6A82].

²⁰ poringo, Comment to *Success Kid Finds a Controller*, REDDIT, (Jan. 28, 2011, 01:01 PM), https://www.reddit.com/r/AdviceAnimals/comments/farnt/success_kid_finds_a_controller/c1ekbh6?utm_source=share&utm_medium=web2x&context=3 [https://perma.cc/B324-6A82].

²¹ *Success Kid*, KNOW YOUR MEME, *supra* note 4.

²² Interestingly, the meaning of the meme has morphed over time. It was initially known as "I'm gonna F you up" and then "I Hate Sandcastles," interpreted in violent, bullying ways. Lupkin, *supra* note 8; Karen Feagins, '*Success Kid*' Is from Jacksonville, WJCT PUBLIC MEDIA (Apr. 5, 2013), <https://news.wjct.org/post/success-kid-jacksonville> [https://perma.cc/GR53-CX5W].

²³ *Success Kid*, KNOW YOUR MEME, *supra* note 4.

²⁴ Payne, *supra* note 6.

²⁵ Lupkin, *supra* note 8.

²⁶ Feagins, *supra* note 22.

²⁷ *Id.*

her husband's kidney-related medical care, raising more than \$83,000 via a GoFundMe campaign for the "sick father of the 'Success Kid' meme."²⁸ The meme was also used in a political context when the Obama Administration used it to promote immigration reform.²⁹ The Administration obtained Griner's permission for its use of the meme.³⁰

II. STEVE KING'S UNAUTHORIZED USE OF *SUCCESS KID*

In January 2020, the *Success Kid* meme appeared on Congressperson Steve King's campaign fundraising pages on Facebook as well as on WinRed, a Republican fundraising website that King used for his political campaign.³¹ The image of a seemingly determined Sam, his fist raised, is superimposed over an image of the U.S. Capitol.³² Added to the top of the frame were the words "Fund our memes!!!"³³ This fundraising advertisement linked to a platform accepting financial donations to King's campaign for Congress.³⁴ At that time, King was serving as the U.S. Representative for Iowa's fourth congressional district and running for reelection.³⁵ King was an extremely divisive and controversial politician with a documented history of racist and xenophobic comments and insults.³⁶ He publicly promoted white nationalists and neo-Nazis on social media³⁷ and infamously asked in an interview, "White nationalist, white supremacist, Western civilization—how did that language become

²⁸ Harry Readhead, 'Success Kid' Fundraising Target Smashed After Redditor Posts Metro Article, METRO (Apr. 15, 2015, 5:30 PM), <https://metro.co.uk/2015/04/15/success-kid-fundraising-target-smashed-after-redditor-posts-metro-article-5151979/>.

²⁹ Allyson Chiu, 'Vile Man': Mother of 'Success Kid' Demands Republican Steve King Stop Using Son's Picture, INDEPENDENT (Jan. 28, 2020, 4:39 PM), <https://www.independent.co.uk/news/world/americas/us-politics/success-kid-meme-steve-king-campaign-iowa-mom-a9306211.html> [<https://perma.cc/GC4A-WUBL>].

³⁰ *Id.*

³¹ Alan Yuhas, Mother of 'Success Kid' Demands Steve King Stop Using His Meme, N.Y. TIMES (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/us/politics/steve-king-success-kid-meme.html>.

³² *Id.*

³³ *Id.*

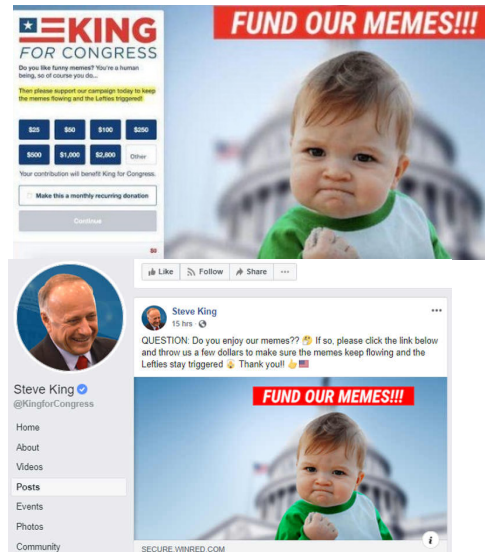
³⁴ *Id.*

³⁵ See Barbara Sprunt, Iowa Rep. Steve King, Known for Racist Comments, Loses Reelection Bid, NPR (June 3, 2021, 12:03 AM), <https://www.npr.org/2020/06/03/865823546/iowa-rep-steve-king-ousted-in-gop-primary-ap-projects> [<https://perma.cc/RE2X-6M9F>].

³⁶ Trip Gabriel, A Timeline of Steve King's Racist Remarks and Divisive Actions, N.Y. TIMES (June 15, 2019), <https://www.nytimes.com/2019/01/15/us/politics/steve-king-offensive-quotes.html>.

³⁷ See *id.*; Christopher Mathias, Republican Rep. Steve King Retweets a Known White Supremacist on Twitter... Again, HUFFPOST (Sept. 12, 2018, 4:58 PM), https://www.huffpost.com/entry/steve-king-tweets-white-nationalist-lana-lokteff_n_5b995994e4b0511db3e8a0fc [<https://perma.cc/CRV8-CB9R>].

offensive?”³⁸ King’s rhetoric was so extreme that he garnered bipartisan criticism and censure, including in January 2019 when the Republicans stripped him of his House committee assignments.³⁹ A year later, Griner found her photograph being used to solicit funds for King’s reelection campaign.⁴⁰



Griner immediately turned to social media to denounce King and his campaign’s unauthorized use of her photograph, making it clear that “neither I, my son, nor ‘Success Kid’ have any affiliation with Representative King, nor would we have ever agreed to this use. I do not endorse Representative King and, like most people, I strongly disagree with his views.”⁴¹ She made statements to the media calling out King’s “bigotry” and explained that she would “never attach her son’s face willingly to any negative ad, but Steve King is just the worst of the worst.”⁴² Griner’s attorney followed up with a cease-and-desist letter to King and his campaign,⁴³ and on December 30, 2020, Griner filed suit against King, his

³⁸ Trip Gabriel, *Before Trump, Steve King Set the Agenda for the Wall and Anti-immigrant Politics*, N.Y. TIMES (Jan. 10, 2019), <https://www.nytimes.com/2019/01/10/us/politics/steve-king-trump-immigration-wall.html>.

³⁹ Trip Gabriel, Jonathan Martin & Nicholas Fandos, *Steve King Removed from Committee Assignments over White Supremacy Remark*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/us/politics/steve-king-white-supremacy.html>.

⁴⁰ See Yuhas, *supra* note 31.

⁴¹ Laney Griner (@laneymg), TWITTER (Jan. 27, 2020, 3:49 PM), <https://twitter.com/laneymg/status/1221898122928033797> [<https://perma.cc/P438MXUR>].

⁴² Yuhas, *supra* note 31.

⁴³ Stephanie K. Baer, *The Mom of “Success Kid” Sent Rep. Steve King a Cease-and-Desist Letter for Using the Meme in an Ad*, BUZZFEED NEWS (Jan. 27, 2020, 5:47 PM), <https://www.buzzfeednews.com/article/skbaer/success-kid-meme-steve-king-ad> [<https://perma.cc/533H-B4N5>].

campaign, and WinRed, alleging, among other claims, copyright infringement.⁴⁴

In the complaint, Griner charges King with willfully infringing her copyright in the photograph when King reproduced it on his campaign fundraising pages on Facebook and WinRed “for the express purpose of soliciting money for King’s congressional re-election campaign.”⁴⁵ As the author and copyright holder of her photograph, Griner has the exclusive right to reproduce, distribute, display, and create derivative works of her copyrighted work.⁴⁶ In addition to asserting a copyright infringement claim, Griner in her complaint highlights King’s reputation for making “racist comments that lost him the support of many Republican leaders” and for being “widely rebuked by party leadership” and called “unworthy of his elected position.”⁴⁷ Griner acknowledges that her photograph of Sam “quickly gained widespread popularity and became an Internet ‘meme’ through millions of people non-commercially posting the Photograph on their social media accounts”⁴⁸ She also claims to have licensed her photograph “commercially to legitimate advertisers including Coca-Cola, General Mills, Microsoft, Vitamin Water, Hot Topic, Virgin Mobil [sic], and many others wishing to associate their messaging with the Photograph’s uplifting success theme.”⁴⁹

This is not the first time that a content creator has filed suit for unauthorized uses of the content as a meme. In 2018, Matt Furie sued Alex Jones’ Infowars for its unauthorized use of Pepe the Frog.⁵⁰ Furie had created Pepe, a green anthropomorphic frog, as a character in the comic book series *Boy’s Club*.⁵¹ Furie’s Pepe is “mellow,” “chill,” “pretty good natured,” and liked “hanging out, playing pranks . . . , eating pizza, [and]

⁴⁴ See Complaint at 5, Griner v. King, No. 20-CV-3848 (D.D.C. Dec. 30, 2020) [hereinafter Complaint]. In addition to copyright infringement, Griner added a claim under the Digital Millennium Copyright Act, 17 U.S.C. § 1202, which prohibits the “removal or alteration of copyright management information” such as the name of the author of a work. *Id.* paras. 31-34. Laney Griner’s son Sam further asserted a claim against the defendants for their unauthorized use of his likeness. See *id.* paras. 35-40. This Article will focus on the copyright infringement claim.

⁴⁵ *Id.* para. 20.

⁴⁶ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (“author . . . is ‘he to whom anything owes its origin; originator; maker;’ . . . the nature of copyright . . . was . . . the exclusive right of a man to the production of his own genius or intellect.”). See also 17 U.S.C. § 106. Griner also registered her photograph with the U.S. Copyright Office, and this registration allowed her to file this copyright infringement suit. See § 411(a).

⁴⁷ Complaint, *supra* note 44, para. 9.

⁴⁸ *Id.* para. 15.

⁴⁹ *Id.* para. 16.

⁵⁰ *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 956 (C.D. Cal. 2019).

⁵¹ Giaco Furino, *Pepe the Frog’s Creator Talks Making Zine History*, VICE (Aug. 3, 2016, 12:25 PM), https://www.vice.com/en_us/article/qkw97d/pepe-frog-creator-matt-furie-talks-zine-history [<https://perma.cc/75PL-MU4J>].

partying.”⁵² Memes of Pepe quickly went viral. Earlier on, Internet users shared memes of Pepe to express melancholy, anger, or surprise.⁵³ But then the alt-right segment of the white supremacist movement co-opted Pepe by recreating him “to appear with a Hitler-like mustache, wearing a skullcap or a Ku Klux Klan hood” and used him “in hateful messages aimed at Jewish and other users on Twitter.”⁵⁴ Pepe was also recreated on Infowars, the Daily Stormer, and other alt-right media or neo-Nazi websites.⁵⁵ Pepe the Frog became so symbolic of the extremist white supremacist movement that his image was added to the Anti-Defamation League’s hate symbols database.⁵⁶ Furie filed multiple Digital Millennium Copyright Act takedown requests to remove racist, anti-Semitic, or alt-right propagandized uses of Pepe.⁵⁷ He eventually sued Infowars for its unauthorized use and commercial sale of Pepe in a Make America Great Again (MAGA) poster.⁵⁸ In *Furie v. Infowars, LLC*, Infowars raised a number of defenses, including that Furie had abandoned his copyright to Pepe, Infowars had an implied license to use Pepe, and Infowars’ use of Pepe in the MAGA poster was fair use.⁵⁹ That case eventually settled, with Infowars paying Furie \$15,000 after the court declined to dismiss Furie’s copyright claim on summary judgment.⁶⁰

In response to Griner’s claims, King filed a motion to dismiss,⁶¹ arguing similar points to the ones that Infowars raised in *Furie*.⁶² Specifically, King

⁵² Adam Serwer, *It’s Not Easy Being Meme*, ATLANTIC (Sept. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/09/its-not-easy-being-green/499892/>.

⁵³ Imad Khan, *4chan’s Pepe the Frog Is Bigger Than Ever—and His Creator Feels Good, Man*, DAILY DOT (May 29, 2021, 2:29 AM), <https://www.dailydot.com/unclick/4chan-pepe-the-frog-renaissance/> [<https://perma.cc/P8SF-T4E2>].

⁵⁴ Christopher Mele, *Pepe the Frog Meme Listed as a Hate Symbol*, N.Y. TIMES (Sept. 27, 2016), <https://www.nytimes.com/2016/09/28/us/pepe-the-frog-is-listed-as-a-hate-symbol-by-the-anti-defamation-league.html>.

⁵⁵ Liam Stack, *Infowars Agrees to Part Ways with Pepe the Frog*, N.Y. TIMES (June 10, 2019), <https://www.nytimes.com/2019/06/10/us/pepe-frog-infowars-alt-right.html>.

⁵⁶ See *Pepe the Frog*, ADL, <https://www.adl.org/education/references/hate-symbols/pepe-the-frog> [<https://perma.cc/G2JN-WCZU>] (last visited Sept. 12, 2021); Mele, *supra* note 54.

⁵⁷ Aja Romano, *To Save Pepe the Frog from the Alt-right, His Creator Has Invoked Copyright Law’s Darker Side*, VOX (Sept. 21, 2017, 11:40 AM), <https://www.vox.com/culture/2017/9/21/16333162/pepe-the-frog-alt-right-dmca-takedown-fair-use-matt-furie> [<https://perma.cc/L3FT-4HN6>].

⁵⁸ See *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952 (C.D. Cal. 2019).

⁵⁹ See *id.* at 956.

⁶⁰ See *id.*; Scott Neuman, *Alex Jones to Pay \$15,000 in Pepe the Frog Copyright Infringement Case*, NPR (June 11, 2019, 4:11 AM), <https://www.npr.org/2019/06/11/731520403/alex-jones-to-pay-15-000-in-pepe-the-frog-copyright-infringement-case> [<https://perma.cc/L58M-2T8W>].

⁶¹ See Motion to Dismiss, *Griner v. King*, No. 20-CV-3848 (D.D.C. Dec. 30, 2020) [hereinafter King’s Motion]. On June 23, 2021, the case was transferred to the District Court for the Northern District of Iowa and, on July 21, 2021, King refiled the same motion to dismiss. See *Griner v. King*, No. 21-cv-04024 (N.D. Iowa, June 23, 2021). On October 20, 2021, the court denied King’s motion to dismiss. See *id.*

⁶² See *Furie*, 401 F. Supp. 3d at 956.

argues that Griner does not own a copyright in her photograph of Sam because she had “abandoned” it.⁶³ He also argues that, even if Griner owns the copyright in the photograph, King has permission, or a “license,” to use Griner’s photograph.⁶⁴ King’s defenses are examples of arguments that are likely to become common in copyright claims involving the unauthorized use of content as memes. Given memes’ increasing popularity as a medium, collaborative and transformative nature, and propensity for being appropriated for commercial and political uses, one can anticipate that disputes involving memes will only increase in the future. The following two Parts of this Article analyze King’s two main arguments.

III. ABANDONING COPYRIGHTS IN MEMES

One of the defenses that King raises in his motion is copyright abandonment. Copyright abandonment is a copyright owner’s “intentional relinquishment” of copyright in a copyrighted work.⁶⁵ King argues, for instance, that “Griner released the . . . Image into the public domain,” and that “Griner purportedly authored the . . . Image in 2007, gave it away, and sat on her hands for many years.”⁶⁶ Although his motion never uses the term “copyright abandonment,” King does claim that Griner “abandoned her right to these copies[,]” appearing to argue that Griner had abandoned the copyright in her photograph, thereby placing it into the public domain.⁶⁷ There is precedent for this argument. As discussed above, in *Furie*, Infowars raised the same argument against *Furie*—that he had abandoned his copyright in the image of Pepe the Frog.⁶⁸

When an author abandons the copyright, the author relinquishes all rights and control over the work, thereby placing it into the public domain.⁶⁹ An “original work[] of authorship is copyrighted as soon as it is “fixed in any tangible medium.”⁷⁰ This means that an author’s work is automatically protected by copyright, in most cases for “the life of the author and 70 years after the author’s death,”⁷¹ regardless of whether the author desired this protection.⁷² Copyright abandonment, on the other hand, requires “both (1)

⁶³ See King’s Motion, *supra* note 61, at 4–5, 9, 25.

⁶⁴ *Id.* at 4–5, 26–27.

⁶⁵ *Furie*, 401 F. Supp. 3d at 965 (quoting *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001)).

⁶⁶ King’s Motion, *supra* note 61, at 25.

⁶⁷ See Order Denying Defendants’ Motion to Dismiss at 13, *Griner v. King*, No. 21-CV-4024 (N.D. Iowa Oct. 20, 2021) [hereinafter Order].

⁶⁸ See *Furie*, 401 F. Supp. 3d at 964–65.

⁶⁹ See Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 391 (2010) (“Once a copyrighted work is dedicated to the public domain, it can never be privately owned again.”).

⁷⁰ 17 U.S.C. § 102(a).

⁷¹ *Id.* § 302(a).

⁷² Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487, 490 (2020).

an intent by the copyright owner to surrender the rights and (2) an overt act showing that intent.”⁷³ Examples of “an overt act” include copyright owners’ signing an “Abandonment of Copyright” document stating that they “hereby abandon our copyright,”⁷⁴ gifting the copyrighted work to the Library of Congress and “dedicat[ing] to the public all rights, including copyrights throughout the world . . . in this collection,”⁷⁵ and including a statement in a published work’s copyright notice that the copyright will expire on a specific time and date.⁷⁶ The “mere inaction” to police unauthorized uses of a copyrighted work is typically not enough to constitute an overt act evidencing intent to abandon copyright.⁷⁷ Most of the facts that King includes in his motion to support his copyright abandonment argument relate to the extensive and unauthorized third-party uses of Griner’s copyrighted work as a meme. For example, King argues:

Griner told the world, in no uncertain terms, that she was glad that her son’s image achieved popularity. The world took her at her word and fabricated one-offs at a pace that only computers could track. Laney Griner not only approves of third party uses of the . . . Image, she comments on them, she reposts them, she provides links to users to acquire template versions of the . . . Image.⁷⁸

If this were enough to find copyright abandonment, then copyright to any content that has become famous on the Internet or become a meme would be considered abandoned and the content entered into the public domain. But there is certainly a difference between a copyright owner “making a work accessible to the public on a limited basis” and the copyright owner’s “wholesale relinquishment of control over the work.”⁷⁹ The popularity of a copyrighted work does not destroy the creator’s copyright interest in the work.⁸⁰

⁷³ Order, *supra* note 67, at 13; *see also id.* at 493.

⁷⁴ *Id.* at 541–42 (citing *Bates v. Keirse*, No. D041368, 2004 WL 2850153 (Cal. Ct. App. Dec. 13, 2004)).

⁷⁵ *Id.* at 542 (citing First Amended Complaint, *Highsmith v. Getty Images, Inc.*, No. 1:16-cv-05924-JSR (S.D.N.Y. Aug. 17, 2016)).

⁷⁶ *See id.* (citing *Hadady Corp. v. Dean Witter Reynolds, Inc.*, 739 F. Supp. 1392, 1396 (C.D. Cal. 1990)).

⁷⁷ *Id.* at 540 (citing *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960); *Dodd, Mead & Co. v. Lilienthal*, 514 F. Supp. 105, 108 (S.D.N.Y. 1981)).

⁷⁸ *See King’s Motion*, *supra* note 61, at 4–5.

⁷⁹ *Fagundes & Perzanowski*, *supra* note 72, at 545.

⁸⁰ *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 974 (C.D. Cal. 2019) (quoting *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 380–81 (S.D.N.Y. 1993)) (“[N]o matter how popular a character may become, the copyright owner is entitled to guard against the unauthorized commercial exploitation of that character.”).

Although the failure to police a copyrighted work would not alone be an overt act indicating intent to abandon,⁸¹ courts have considered public statements by copyright owners to support abandonment. For instance, in *Furie*, the court considered whether public statements made by Pepe the Frog's creator supported his intent to abandon copyright to Pepe.⁸² Specifically, in interviews with the media, Furie stated that he "believe[d] in supporting people's decision to profit off of Pepe in order to provide them with the most positive business experience possible."⁸³ Furie also said that he "realized that Pepe is beyond [his] control . . . [Pepe is] like a kid, he grew up and now I have to set him free to live his life."⁸⁴ Furie acknowledged that "it's just out of my control, what people are doing with [Pepe], and my thoughts on it, are more of amusement."⁸⁵ Eventually, Furie publicly "killed Pepe"⁸⁶ because "associations of Pepe got interwoven with some kind of Neo-Nazi or Alt Right agenda. [Pepe] had become, in the eyes of some, a mascot for hate groups."⁸⁷ Nevertheless, because the determination of whether a copyright owner has abandoned copyright "turns on his intent as evidenced by how his public statements should be interpreted," the court denied summary judgment on the issue of abandonment in *Furie*.⁸⁸ Similarly, *Marya v. Warner/Chappell Music, Inc.* involved the copyright to the lyrics of the popular song *Happy Birthday*.⁸⁹ In *Marya*, the court indicated that a statement by the copyright owner to have "long ago resigned herself to the fact that her [copyrighted] ditty had become common property of the nation" would, if believed, be an "overt act on which a reasonable fact finder could base a finding that [the copyright owner] abandoned her copyright interest in the lyrics."⁹⁰ But again, the court in that case found triable issues of fact precluding summary judgment.⁹¹ In both *Marya* and *Furie*, however, the court appeared willing to entertain the argument that certain public statements made by the copyright owner could support an intent to abandon copyright.⁹² However, in cases involving factual disputes and conflicting statements by the

⁸¹ See Order, *supra* note 67, at 13 ("Failure to object or to act has usually not shown 'intent to relinquish' the rights, however.>").

⁸² See *id.* at 965–66.

⁸³ *Id.* at 965. Furie claimed that this response "was made 'sarcastically.'" *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ James Vincent, *Pepe the Frog Is Officially Dead*, VERGE (May 8, 2017, 7:43 AM), <https://www.theverge.com/2017/5/8/15577340/pepe-the-frog-is-dead-matt-furie> [<https://perma.cc/U82B-YCTM>] ("Pepe the Frog's battles are finally over. Cartoonist Matt Furie has officially killed off his most famous creation . . .").

⁸⁷ *Furie*, 401 F. Supp. 3d at 966.

⁸⁸ *Id.* at 966–67. The case settled. Neuman, *supra* note 60.

⁸⁹ 131 F. Supp. 3d 975, 982 (C.D. Cal. 2015).

⁹⁰ *Id.* at 992–93.

⁹¹ *Id.* at 993.

⁹² See *Furie*, 401 F. Supp. 3d at 965–66 (finding genuine dispute of material fact as to whether public statements demonstrate abandonment); *Marya*, 131 F. Supp. 3d at 993 (finding paraphrased quote from journalist insufficient evidence for directed verdict).

copyright owner, at least one court has said that it is more appropriate for a jury than the court to determine the copyright owner's intent.⁹³

In King's motion, he supports his copyright abandonment argument by quoting Griner's public statements supporting third-party uses of *Success Kid*:

Initially, I didn't like the attention and it felt like a violation. I would contact people, insisting they remove the . . . Image immediately. No one ever did. So I was sort of forced to see the experience differently, it became a fun, positive, exciting thing, and, if nothing else, a really cool story for Sam to tell one day. It's nice to know you've made people smile a little. It's been an amazing and fun experience. Without it, we'd never get to do such awesome things⁹⁴

Is this public statement an overt act evidencing Griner's intent to abandon her copyright in her photograph of her son? Copyright abandonment is irrevocable and results in a total relinquishment of control and loss of any potential income from the copyrighted work.⁹⁵ Because of the serious consequences of abandonment, the threshold for finding intent to abandon copyright is appropriately high.⁹⁶ Statements made by a copyright owner celebrating the popularity of the copyrighted work should not be enough to abandon copyright in the work. Because of the serious consequences of abandoning copyright, an overt act should not be found unless there is "a document expressly memorializ[ing] the copyright holder's intent to relinquish their rights."⁹⁷ In this case, even if Griner's public statement could somehow support her intent to abandon copyright, statements that King made in his motion actually contradict his own argument. For instance, King claims in his motion that Griner gave the image away and sat on her hands.⁹⁸ But in that same motion, he claims that "Griner pesters companies for payments for use of the . . . Image post hoc Overall Griner's licensing pursuits resemble a shake down more so than traditional negotiation."⁹⁹ That alleged behavior is certainly not consistent with someone who has intentionally relinquished all of her rights in her work. Indeed, the *Griner* court agreed: it denied King's motion to dismiss, finding that Griner's "licensing behavior shows that she did not commit any overt act that showed an intent to surrender her rights in the work."¹⁰⁰

⁹³ See *Furie*, 401 F. Supp. 3d at 966–68.

⁹⁴ King's Motion, *supra* note 61, at 9.

⁹⁵ See Fagundes & Perzanowski, *supra* note 72, at 552.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See King's Motion, *supra* note 61, at 3–4.

⁹⁹ *Id.* at 3.

¹⁰⁰ Order, *supra* note 67, at 14.

IV. SOCIAL MEDIA SHARING AND IMPLIED LICENSING

Another argument made by King in his motion concerns the licensing of the photograph and advances two arguments: (1) by posting the photograph to Facebook and Instagram, allegedly per the social media sites' terms of use, Griner had granted an express license for all users—including King—to do whatever they wished with the photograph;¹⁰¹ or, in the alternative, (2) even if the specific terms of use did not support an express license, Griner's conduct in posting the photograph to the Internet and allowing some people to use it as a meme manifested an implied license that all Internet users could do whatever they wished with the photograph.¹⁰² Both arguments miss the mark.¹⁰³

Memes are frequently derived from content that creators post and share publicly, sometimes on social media websites such as Twitter, Facebook, and Instagram. In the terms governing the use of their respective platforms, both Facebook and Instagram are careful to state that users continue to own all of the intellectual property rights—including copyright—to everything uploaded to the sites.¹⁰⁴ Therefore, Griner continues to own the copyright in the photograph, regardless of whether she posted it on Facebook or Instagram. In uploading the content, however, Griner did grant licenses to both Instagram and Facebook.¹⁰⁵ However, both of those licenses are expressly limited by the websites' respective terms of use, particularly because the license is granted to the individual platform companies.¹⁰⁶ That

¹⁰¹ See *id.* at 4 (“Both Facebook and Instagram acquire non-exclusive copyright licenses for all content posted on them, including with a right to further sublicense content.”).

¹⁰² See *id.* at 4–5.

¹⁰³ The court in its order denying King's motion to dismiss does not squarely assess these arguments because it finds that Griner's allegation of unauthorized use was sufficient to survive the motion. See Order, *supra* note 67, at 11.

¹⁰⁴ *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> [<https://perma.cc/L8F9-RD4C>] (last visited Sept. 11, 2021) (“You own the intellectual property rights (things like copyright or trademarks) in any such content that you create and share on Facebook Nothing in these Terms takes away the rights you have to your own content.”); *Terms of Use*, INSTAGRAM, <https://www.instagram.com/about/legal/terms/before-january-19-2013/> [<https://perma.cc/ELP5-E47W>] (last visited Sept. 11, 2021) (“Instagram does NOT claim ANY ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials . . . that you post on or through the Instagram Services.”).

¹⁰⁵ The motion's focus on Facebook and Instagram is odd because originally Griner posted the photograph to Flickr, and Flickr's terms of use would therefore seem to be the relevant terms governing the original posting of the photograph. See Lupkin, *supra* note 8. However, Griner has reposted the photograph to Facebook and Instagram, as stated in the motion, bringing Facebook's and Instagram's terms of use into play as well. See King's Motion, *supra* note 61, at 4.

¹⁰⁶ FACEBOOK, *supra* note 104 (“[Y]ou grant *us* a . . . license” (emphasis added)); INSTAGRAM, *supra* note 104 (“[Y]ou . . . grant to *Instagram* a . . . license” (emphasis added)).

renders Facebook and Instagram the relevant licensees of Griner's photograph, not Steve King. Courts have resisted attempts to read the license grant more broadly to apply to other users of the platforms.¹⁰⁷ For instance, in *Agence France Presse v. Morel (Morel II)*, the court considered the question of whether the posting of a photograph to Twitter through the app TwitPic granted a license to AFP to republish the photographs in connection with its news stories.¹⁰⁸ In a nutshell, AFP's argument echoes King's argument "that by posting the Photos-at-Issue on [social media], [the photographer] subjected the Photos-at-Issue to the terms of service governing content posted to those websites, and that these terms of service provided AFP with a license."¹⁰⁹ The court was not persuaded by the argument, finding that the evidence did "not reflect a clear intent to grant AFP a license" to distribute the photos in question beyond Twitter.¹¹⁰ The license was granted to *Twitter*, not to any random Internet user who happened to stumble upon the photograph.¹¹¹ Although posting on Twitter might inevitably involve some permitted re-use of the photograph, the court was reluctant to conclude that it permitted *all* re-use of it.¹¹² Indeed, after a close reading of Twitter's terms of use, the court was ultimately persuaded that the photographer was entitled to summary judgment that AFP had no license.¹¹³

Although King's argument centers on Facebook and Instagram rather than Twitter, it appears to be strikingly similar to the argument made in *Morel II*; it is also likely to fail for the same reasons given the substantive similarities among the terms of use in question. As King's motion states, in posting the photograph to Facebook and Instagram, "Laney Griner granted several entities powerful licenses. Several of these entities allow third parties to scour their web sites for content."¹¹⁴ The implication appears to be that Griner, therefore, granted licenses to those third parties. However, that is the exact argument that the court rejected in *Morel II*, finding that Twitter's terms of use "spell out expressly the entities to whom a license is granted, namely Twitter and its partners," which AFP was not.¹¹⁵ King

¹⁰⁷ See, e.g., *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 303 (S.D.N.Y. 2011) ("By their express language, Twitter's terms grant a license to use content only to Twitter and its partners. Similarly, Twitpic's terms grant a license to use photographs only to 'Twitpic.com or affiliated sites.' AFP and TBS do not claim they are partners of Twitter or affiliates of Twitpic licensed under the terms of service. Moreover, the provision that Twitter 'encourage[s] and permit[s] broad re-use of Content' does not clearly confer a right on other users to re-use copyrighted postings.").

¹⁰⁸ See 934 F. Supp. 2d 547, 559 (S.D.N.Y. 2013).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 562.

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.* at 564.

¹¹⁴ King's Motion, *supra* note 61, at 4.

¹¹⁵ 934 F. Supp. 2d at 562.

likewise does not allege to be aligned with Facebook and Instagram such that the license explicitly given to the platforms should also apply to him.¹¹⁶

King argues that just posting the image “to image-sharing web sites” is enough to result in a license.¹¹⁷ However, as the court in *Morel II* stated, “Construing the Twitter [terms of service] to provide an unrestrained, third-party license to remove content from Twitter and commercially license that content would be a gross expansion of the terms of the Twitter [terms of service].”¹¹⁸ This seems to be exactly what King is contending. The court in *Morel II* concluded that the explicit nature of Twitter’s terms concerning the copyright remaining with the original poster counsels against an interpretation of an unrestrained license to all users to re-use content.¹¹⁹ The court determined that the statements regarding the original poster’s retention of the copyright “would have no meaning if the Twitter [terms of service] allowed third parties to remove the content from Twitter and license it to others without the consent of the copyright holder.”¹²⁰

The court found that even if the terms of use permitted others to use the content, this use was limited to the confines of Twitter.¹²¹ Facebook similarly defines the use of content in the terms of use on Facebook, focusing on the interaction of the license granted by the uploading of a photograph with the user’s specific “privacy and application settings.”¹²² Instagram is even more explicit in its terms of use, specifically prohibiting use of content uploaded to Instagram beyond its platform.¹²³ These terms may allow other social media users to “like” or “reshare” a content creator’s uploaded image. It does not, however, convey an unrestrained license in uploaded content to all users of the Internet, as would need to be the case for King’s behavior to be covered by this kind of license. It seems much more likely a court would follow the *Morel II* precedent and find that “a license for one use does not equate to a license for all uses.”¹²⁴ King does

¹¹⁶ King’s Motion, *supra* note 61.

¹¹⁷ *Id.* at 26. The motion’s argument is opaque on this point. It may be related to the abandonment argument discussed *supra*, although presumably the mention of the social media sites’ terms of use is meant to incorporate the licensing implications as well.

¹¹⁸ 934 F. Supp. 2d at 562.

¹¹⁹ *Id.* at 563.

¹²⁰ *Id.*

¹²¹ *Id.* at 563–64.

¹²² FACEBOOK, *supra* note 104.

¹²³ INSTAGRAM, *supra* note 104 (“The Instagram Services contain Content of Users Except as provided within this Agreement, you may not copy, modify, translate, publish, broadcast, transmit, distribute, perform, display, or sell any Content appearing on or through the Instagram Services.”).

¹²⁴ 934 F. Supp. 2d at 564. Although some courts have allowed the possibility that maybe users taking advantage of provided platform tools could be considered sublicensees of the platforms, even those cases have foundered on the lack of evidence of any explicit sublicensees. *See* McGucken v. Newsweek LLC, 464 F. Supp. 3d 594, 603 (S.D.N.Y. 2020), *reconsideration denied*, No. 19 CIV. 9617 (KPF), 2020 WL 6135733 (S.D.N.Y. Oct. 19, 2020) (“Although Instagram’s various terms and policies clearly foresee the possibility of

not allege that he took the photo either from Facebook or Instagram in the first place, so a court is unlikely to find that the photograph was expressly licensed to King just because it was posted on Facebook and Instagram.

King argues in the alternative that Griner provided an implied license, both when she uploaded the photograph to the Internet and when she gave interviews in which she expressed overall joy with the meme.¹²⁵ The defendant in *Furie*, discussed above, made a similar argument based on Furie’s public statements about Pepe the Frog memes.¹²⁶ Implied licenses require the same elements as express licenses, including mutual assent and consideration.¹²⁷ The court in *Furie* held that an original content creator’s public statements in support of a meme cannot be considered a contractual offer.¹²⁸ These statements are too general and lack the definiteness necessary to establish contractual commitment.¹²⁹ Memes may be a relatively new phenomenon, but this bedrock doctrine of licensing law is foundational.

It is unlikely that the general statements referenced by King in his motion will be considered sufficient to establish an implied license between King and Griner.¹³⁰ The leading copyright treatise supports this conclusion: “[A]n implied license requires more than a general intent of the author regarding disposition of his work [T]he terms—including identity of the licensee—should be reasonably clear.”¹³¹ In *Malibu Media, LLC v. Doe*, a case involving the unauthorized distribution of files uploaded to various sites, the court found unpersuasive the defendant’s argument that the presence of the files on the Internet “g[a]ve rise to a nonexclusive license—extending to ‘anyone in the world’ the right to ‘copy, publish, and distribute’ Malibu’s copyrighted works.”¹³² The court “reject[ed] at the outset any suggestion that, by placing a portion of its collection on a limited number of [websites], [the creator] impliedly licensed every person in the

entities such as Defendant using web embeds to share other users’ content . . . , none of them expressly grants a sublicense to those who embed publicly posted content.”); *Sinclair v. Ziff Davis, LLC*, No. 18-CV-790 (KMW), 2020 WL 3450136, at *1 (S.D.N.Y. June 24, 2020). Likewise, King’s motion fails to provide any evidence of a sublicense between Facebook and/or Instagram and King.

¹²⁵ King’s Motion, *supra* note 61, at 26–27.

¹²⁶ See *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 968 (C.D. Cal. 2019).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 968–69.

¹³⁰ Moreover, Griner has previously sued over some uses of the photograph. See Todd Wasserman, *Boom! Success Kid’s Mom Sues Fireworks Company for Using His Image*, MASHABLE (Feb. 25, 2015), <https://mashable.com/archive/success-kid-lawsuit> [<https://perma.cc/DUD6-T7LB>]. This suggests that Griner has not behaved as if she granted a license for all use of the photograph, which would surely have a bearing on the court’s interpretation of the obligations between the parties.

¹³¹ 3 NIMMER ON COPYRIGHT § 10.03(A)(7) (2019).

¹³² 381 F. Supp. 3d 343, 356–57 (M.D. Pa. 2018).

world to download its entire collection of copyrighted materials from any source on the Internet.”¹³³ With no evidence of any “communication or relationship” between the content creator and the alleged infringer, there was “no evidence of any statement or specific conduct by [the creator] toward [the alleged infringer] suggesting an intent to create a licensor-licensee relationship.”¹³⁴ The court concluded that there was no implied license and granted summary judgment to the content creator.¹³⁵ King has likewise not alleged any communication or relationship with Griner. The mere existence of the photograph on the Internet is not enough to constitute an implied license to everyone on the Internet.

V. COPYRIGHT OWNERSHIP AND AUTHORSHIP OF MEMES

There are more interesting arguments to be made when it comes to memes and copyright that are not contained in King’s motion. For instance, the motion gestures to the collaborative nature of a meme but does not fully engage with the implications of that collaborative nature. That is, King contends that he integrated the Griner photograph with a number of new elements, but he does not conclude from that observation that he had made an important contribution to the ongoing and evolving meme such that he could demonstrate some legitimate use.¹³⁶

Memes are an inherently collaborative form of creativity, as the history of *Success Kid* makes clear. Griner cannot create a meme by herself; she can only create a photograph. It takes the assistance of hundreds of thousands of Internet users to make a photograph into a meme.¹³⁷ King, in his motion, identifies this quality of memes.¹³⁸ Without users on MySpace, Reddit, and the rest of social media using the Griner photograph to communicate their own particular expressions, the photograph would never have turned into the *Success Kid* meme. This collaborative character of memes represents a challenge to copyright law that King’s motion does not fully engage with. The transformation of Griner’s photograph into a meme has effectively created two separate works: the photograph of a toddler clutching sand and the meme representing a shorthand communication for “success.” Griner unquestionably owns the copyright to her photograph.¹³⁹ The implicit debate in this case—and any case involving a photograph-turned-meme—is whether Griner also owns the *meme*.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See King’s Motion, *supra* note 61, at 30.

¹³⁷ See Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. RICH. L. REV. 387, 412–13 (2018).

¹³⁸ See King’s Motion, *supra* note 61, at 4.

¹³⁹ See 2 PATRY ON COPYRIGHT § 3:118 (discussing photographs).

Although the word “meme” is used on the Internet to encompass a vast spectrum of behaviors,¹⁴⁰ there are some memes that take on lives of their own. Although they may begin life as copyrighted photographs, their transformation into memes imbues them with meaning and import that are part of a shared cultural conversation. Ordinary photographs of a toddler at the beach without more do not ordinarily communicate “success.” However, one can send *Success Kid* to a friend without a caption and know that it will be immediately understood as shorthand for “success.” In this way, *Success Kid* is operating more like the idea of “success” than like the initial photograph taken by Griner. One cannot use just any photograph to communicate success. Rather, one needs *Success Kid* because users on the Internet had imbued it with that particular meaning.

King’s behavior in using the *Success Kid* meme nicely illustrates this point. King could have used any photograph he wanted to encourage donations, including photographs of the toddlers in his own life. However, King chose *Success Kid* for its status as a recognizable meme with connotations of success and triumph. Indeed, in transplanting the photograph from the beach to the U.S. Capitol, King made the “success” meaning even more overt: he is seeking success in politics. Griner has also acknowledged the difference between her initial photograph and the meme, with its own meaning established collectively by the Internet.¹⁴¹ After all, her photograph was of a toddler eating sand. Initially, the Internet imbued the photograph with a meaning related to bullying,¹⁴² and then later, the Internet’s interpretation equated the photograph with success.¹⁴³ In this way, the photograph evolved to develop a new meaning in its meme context, standing as a symbol to communicate an idea separate from its status as a photograph. That quality of memes may render them closer to unprotectable methods of communication than to pieces of protectable creative expression.

The idea of collaborative authorship is pervasive throughout creative history, from traditional folklore to Wikipedia.¹⁴⁴ However, intellectual property laws “promote exclusivity and commodification,” traits that are antithetical to the free-wheeling nature of collaborative creativity embodied in memes.¹⁴⁵ Memes stand in stark contrast to traditional photographs, where exclusivity and commodification are a more comfortable fit. The copyright authorship test developed to deliberately limit the number of

¹⁴⁰ See Lantagne, *supra* note 137, at 389–94.

¹⁴¹ See Complaint, *supra* note 44, para. 15.

¹⁴² See Lupkin, *supra* note 8.

¹⁴³ *Id.*

¹⁴⁴ See Cathay Y.N. Smith, *Beware the Slender Man: Intellectual Property and Internet Folklore*, 70 FLA. L. REV. 601, 605–06 (2018).

¹⁴⁵ *Id.* at 625.

authors, which promoted this exclusivity and commodification.¹⁴⁶ Under this test, the photograph is ostensibly the work of one person (the photographer). However, pretending that the *meme* is also the work of that one person is nonsensical: a meme, by definition, cannot come into existence through the action of one individual.¹⁴⁷ Given the requisite presence of multiple creators, treating the meme as closer to a piece of folklore, unowned by any single entity and enriching the public domain, makes sense. In the same way that the tales *Beauty and the Beast* and *Rumpelstiltskin* evolved into their present forms over thousands of years of modified tellings,¹⁴⁸ memes can be seen as the modern-day equivalent, happening on the accelerated timeline of the twenty-first century.

Proposing that legally there is a difference between the photograph and the meme would strike the proper balance between the two. Allowing Griner ownership over the meme as well as the photograph would ignore the unique value of memes as communicative tools. This could have the effect of strangling the vibrant creative culture that results in memes. At the other extreme, ignoring the difference between the photograph and the meme and depriving Griner of her copyright in the photograph by finding that she had abandoned or licensed it in the process of its becoming a meme is likewise undesirable. This legal regime would also strangle meme culture in that it would incentivize content creators to closely guard all content posted to the Internet.

A middle ground can be found by acknowledging the difference between a photograph and a meme and seeking to distribute rights according to this difference. Factors could be developed to determine which uses should be treated as photographic uses—requiring the consent of the copyright holder—and which uses should be treated as memes—uses operating outside of traditional copyright protection. In principle, copyright would be respected when the photograph is operating as a photograph and not as part of a meme, that is, a collaborative cultural conversation. Thus, the use of photographs in commercial advertising and on merchandising, for instance, would require licensure in that neither commercial advertising nor merchandising is an expected meme usage of social media sharing and mutation. Courts should also be careful in categorizing a photograph as also being a meme because the sharing of a photograph on social media does not automatically imbue it with the collaborative quality inherent in memes. But where the photograph is operating as a meme, that is, being shared as a shorthand collaborative communication between and among Internet users,

¹⁴⁶ See Stacey M. Lantagne, *Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges*, 17 VA. SPORTS & ENT. L.J. 221, 225 (2018).

¹⁴⁷ See Shontavia Jackson Johnson, *Memetic Theory, Trademarks & the Viral Meme Mark*, 13 J. MARSHALL REV. INTELL. PROP. L. 96, 103 (2013) (explaining that the term was originally coined by Richard Dawkins to identify replicating units).

¹⁴⁸ See *Fairy Tale Origins Thousands of Years Old, Researchers Say*, BBC (Jan. 20, 2016), <https://www.bbc.com/news/uk-35358487> [<https://perma.cc/JM5P-7MAG>].

it should be considered uncopyrightable *in that particular guise*. This kind of regime would allow traditional noncommercial meme-sharing to flourish in the way that it has on social media while simultaneously preserving for the copyright holder the traditional rights of exclusion and commodification.

VI. MEMES AND COPYRIGHT FAIR USE

Even if King did not want to upend the basis of copyright authorship, he could have asserted the defense of fair use. Given that King's allegedly unauthorized use served to support his political campaign, it is surprising that his motion did not include a fair use defense.¹⁴⁹ Copyright fair use is a defense to the unauthorized use of copyrighted works where the use is for the purpose of criticism, commentary, news reporting, teaching, scholarship, research, or some other socially valuable transformative purpose.¹⁵⁰ Fair use involves a case-by-case, fact-specific analysis that sometimes can appear to make outcomes unpredictable.¹⁵¹ In order to determine whether an unauthorized use of a copyrighted work is fair use, courts weigh four factors:

- (1) the purpose and character of the use[;] . . .
- (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.¹⁵²

Although fair use analyses are rarely straightforward,¹⁵³ the *Griner* case presents additional challenges to the fair use analysis. The first challenge is

¹⁴⁹ See Cathay Y. N. Smith, *Political Fair Use*, 62 WM. & MARY L. REV. 2003, 2010–11 (2021). Although political speech occupies a privileged space under the First Amendment, courts have often refused to take on an independent First Amendment analysis in copyright infringement cases, even in cases involving political speech. *See id.* Instead, courts turn to the safeguards already embodied in the Copyright Act, including fair use, to ensure that critical speech and commentary are not suppressed through copyright law. *See id.*

¹⁵⁰ *See* 17 U.S.C. § 107.

¹⁵¹ *See* Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1284 (2008) (“Fair use . . . remains fairly unpredictable and uncertain in many settings”); Michael Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1666 (2004) (“Fair use is an ex post determination, a lottery argument offered by accused infringers forced to gamble, after the fact, that they did not need permission before.”); Lawrence Lessig, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 142 (2004) (“But fair use in America simply means the right to hire a lawyer to defend your right to create.”); David Nimmer, *Fairest of Them All and Other Fair Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 280 (2003).

¹⁵² 17 U.S.C. § 107.

¹⁵³ *See supra* note 151.

the potentially political nature of King's unauthorized use, which can influence the analysis of all four fair use factors and the ultimate outcome of a fair use defense.¹⁵⁴ The second is the nature of the original work as a meme, which raises important questions about the inherently transformative nature of memes. Whether the unauthorized use is transformative is considered under the first factor of fair use (the purpose and character of the defendant's use), and the determination that an unauthorized work is transformative can affect how the court weighs the rest of the fair use factors.¹⁵⁵

The first factor of the fair use analysis examines the purpose and character of the defendant's use of the copyrighted work.¹⁵⁶ Secondary uses that are noncommercial are more likely to be considered fair use.¹⁵⁷ Was King's unauthorized use of *Success Kid* noncommercial? Most courts find political uses of copyrighted works to be noncommercial uses,¹⁵⁸ even when the defendant's unauthorized use was aimed at soliciting financial contributions to a campaign.¹⁵⁹ Based on case law, King has a reasonable argument that his use of *Success Kid* was political and, therefore, noncommercial. There have been a couple of courts, however, that found the unauthorized political uses of copyrighted works to be commercial where, for instance, the infringing use "contained links directing viewers to the . . . campaign website, encouraging them to donate."¹⁶⁰ Because that use allowed "the Defendants [to] 'profit[]' from their use by gaining an advantage without having to pay customary licensing fees to the Plaintiffs," the use was commercial.¹⁶¹ Because King's unauthorized use of *Success Kid* linked to a donation site and appeared to be purely for the purpose of seeking money, Griner could similarly attempt to argue that King's use was commercial because he profited from his use of her photograph without paying Griner's customary licensing fee.

In addition to the profit-nonprofit distinction, the first factor of fair use also considers whether the defendant's unauthorized use transformed the

¹⁵⁴ See Smith, *supra* note 149, at 2011.

¹⁵⁵ See Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 942 (2020); Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 875–83 (2015).

¹⁵⁶ See 17 U.S.C. § 107(1).

¹⁵⁷ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁵⁸ See *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1159 (C.D. Cal. 2010) ("District courts that have actually considered whether campaign advertisements are commercial in the fair use context come down on the side of noncommercial.").

¹⁵⁹ See *MasterCard Int'l, Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 Civ. 6068 (GBD), 2004 WL 434404, at *8 (S.D.N.Y. Mar. 8, 2004).

¹⁶⁰ *Henley*, 733 F. Supp. 2d at 1159; see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) ("[T]he crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

¹⁶¹ *Henley*, 733 F. Supp. 2d at 1159.

content or purpose of the original copyrighted work by giving it a new meaning, message, or purpose.¹⁶² King took the image of Sam from Griner's photograph, superimposed it over a blurry image of the U.S. Capitol, and added the words "Fund our memes!!!" at the top of the frame.¹⁶³ The purpose of this unauthorized use was not to comment on Griner's skills or artistry, nor was it to comment on the subject matter or person (Sam) featured in the copyrighted work.¹⁶⁴ Furthermore, unlike some of the other political fair use cases involving unauthorized uses of photographs,¹⁶⁵ King's unauthorized use of the copyrighted work did not appear to express any form of political speech or expression. It did not transform the image with new meaning, message, or purpose. Instead, King's use appeared to be entirely about using a popular image to attract attention to solicit money for his campaign.

If this case were only about King's unauthorized use of Griner's original photo, the analysis under this factor might be more clear-cut. However, meme copyright cases are complicated by the transformative nature of a meme. As discussed above, memes often start out as a photograph or image. The original photograph or image might have its own meaning. For instance, the *Pepe the Frog* meme started out as a chill and friendly anthropomorphic frog in a comic series and now is a symbol for hate and white supremacy.¹⁶⁶ The *Condescending Wonka* meme started out as a screenshot of Gene Wilder as Wonka in *Willy Wonka and the Chocolate Factory*. In the original film scene, Wonka asks the excited children in his factory, "Would you like to see?"¹⁶⁷ Internet users, however, recontextualized Wonka's "wide eyes and slight smile, frozen in time" into a meme used to express sarcasm and insulting humor.¹⁶⁸ The original images that these memes were based upon served as the "raw material" that Internet users "transformed [to create] new information, new aesthetics, new insights and understandings."¹⁶⁹ They became memes when Internet users collaboratively transformed those original images by imbuing them with new meanings, messages, and social contexts and understandings. In most cases, the meme serves a fundamentally different purpose than the original image or photograph from which the meme is derived.¹⁷⁰ For instance, Griner's original photograph might have served the purpose of

¹⁶² See *Campbell*, 510 U.S. at 579.

¹⁶³ See Yugas, *supra* note 31.

¹⁶⁴ See Smith, *supra* note 149, at 2048.

¹⁶⁵ See *id.* at 2018–26.

¹⁶⁶ See *supra* Part II.

¹⁶⁷ *10 Most Popular Memes (in History)*, *supra* note 1.

¹⁶⁸ *Id.*

¹⁶⁹ *Blanch v. Koons*, 467 F.3d 244, 251–52 (2d Cir. 2006) (quoting *Castle Rock Ent. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998)).

¹⁷⁰ See Asay, Sloan & Sobczak, *supra* note 155, at 949; Tushnet, *supra* note 155, at 869 ("[D]efendants who made exact copies with transformative purposes (according to the courts) have done extremely well" in fair use defenses.).

capturing a funny moment of Sam eating sand on the beach, but as *Success Kid*, it serves as an image-shorthand for humorously expressing success and triumph. An original image and the meme derived from it serve different purposes and often embody different meanings. But are those differences enough to support a finding that a meme represents a transformative use of the original image?¹⁷¹ Once an original image becomes a meme, is every use of the meme transformative within the meaning of the first fair use factor? Or should each use of the meme continue to be analyzed on a case-by-case basis, consistent with traditional fair use analysis? These are some of the questions that can complicate a copyright fair use analysis—and especially analysis of the first factor—when original content becomes a meme. In this case, even though the original photograph had become a meme, the court is likely to analyze King’s specific use of the *Success Kid* meme to determine whether his use was transformative.

The second fair use factor examines the nature of the original copyrighted work.¹⁷² Courts recognize “that creative works are ‘closer to the core of intended copyright protection’ than informational and functional works.”¹⁷³ In other words, the more creative the original work, the less likely its unauthorized use is fair. Under this factor, some courts have found photographic works such as Griner’s original photograph to be creative,¹⁷⁴ while other courts have found photographs to be primarily informational or factual.¹⁷⁵ Many courts explicitly dismiss the significance of the second fair use factor to the overall fair use balancing.¹⁷⁶ But should this factor carry

¹⁷¹ Cf. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, No. 19-2420-cv, 2021 WL 3742835, at *8 (2d Cir. Aug. 24, 2021) (“[W]here a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a ‘higher or different artistic use,’ . . . is insufficient to render a work transformative. Rather, the secondary work itself must reasonably be perceived as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material.” (citation omitted)).

¹⁷² 17 U.S.C. § 107(2).

¹⁷³ *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1151 (C.D. Cal. 2010) (quoting *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003)).

¹⁷⁴ See, e.g., *Peterman v. Republican Nat’l Comm.*, 320 F. Supp. 3d 1151, 1159–60 (D. Mont. 2018) (finding the photograph to be creative and closer to the core of the intended copyright protection where “[t]he photograph includes elements in its framing that are not factual in nature. Instead, the Work creatively and visually develops a portrait of [the politician] and his candidacy, including the balance of the photograph, the illuminated cowboy hat atop [his] head, the three stage lights in the distance, and the dark background employed.”).

¹⁷⁵ See, e.g., *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1195 (N.D. Ill. 2018) (finding a photograph to be factual where it was a “candid image taken of [a politician] at a political event,” which the photographer took “during a live parade” where “he obviously did not stage the action depicted in it.” (quoting *Kienitz v. Sconnie Nation LLC*, 965 F. Supp. 2d 1042, 1052 (W.D. Wis. 2013)).

¹⁷⁶ See, e.g., *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 974 (C.D. Cal. 2019) (“[T]his [second] factor has been described as ‘not . . . terribly significant in the overall fair use balancing,’ it carries little weight.” (quoting *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003)).

more weight when the original work that the defendant used was a highly used, shared, and transformed meme? As a preliminary matter, in fair use cases involving the unauthorized political uses of a copyrighted work, courts explicitly or implicitly consider whether the original copyrighted work itself had a political nature.¹⁷⁷ If the original copyrighted work has a political nature, such as a photograph of a politician or a political advertisement, courts overwhelmingly find the secondary unauthorized political use of that work to be fair use.¹⁷⁸ On the other hand, if the original copyrighted work does not have a political nature, courts have been less likely to find that the unauthorized political use to be fair use.¹⁷⁹ In this case, Griner's original photograph of Sam did not have a political nature, which would mean that under a political fair use analysis, King's use would not weigh in favor of fair use. But how, if at all, should this factor account for the status of the original work as a meme? The "nature of the copyrighted work" (the second factor) certainly changes when original content becomes a meme that the defendant then uses. Although the court in *Furie* explained that there is no "authority for the proposition that 'meme-ification' of an image or character destroys or diminishes the original author's copyright interest,"¹⁸⁰ courts analyzing the second fair use factor might consider a different balance when the nature of the original work is a popular meme.

The third factor examines the amount that the defendant copied from the original copyrighted work.¹⁸¹ It considers both the quantitative amount that the defendant took from the original work as well as the "qualitative nature of the taking."¹⁸² It also considers whether the amount taken is justified by the purpose of the defendant's taking.¹⁸³ In this case, King took the heart of Griner's work: the image of Sam, his face, and his raised fist clutching sand. Furthermore, King did not need to use Griner's work to express his goal: soliciting money for King's reelection campaign. Fair use is not meant to protect "lazy appropriators" but is instead meant to "facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors."¹⁸⁴ King, by his unauthorized use of Griner's photograph, did not engage with the image either politically or with its meaning or social context. In other words, King's unauthorized use appears to have been more about getting attention and appropriating the connotation and recognizability of the meme than with the sort of creative commentary that is tantamount to true engagement with a meme. King could have chosen any other image or created an image himself to express the same "fund my campaign" message and did not need to use *Success Kid* to do so. Therefore,

¹⁷⁷ See Smith, *supra* note 149, at 2040–45.

¹⁷⁸ See *id.* at 2041.

¹⁷⁹ See *id.* at 2043.

¹⁸⁰ 401 F. Supp. 3d at 974.

¹⁸¹ 17 U.S.C. § 107(3).

¹⁸² Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985).

¹⁸³ See *id.*

¹⁸⁴ *Kienitz v. Scornie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014).

this factor likely weighs against King's fair use defense. But what about other or future cases in which a defendant chooses to use a meme because that meme perfectly expresses the message? What if that message appropriately uses or creatively engages with the social context or cultural understanding of the meme? In a case like that, this factor should account for a defendant who may not be able to express the intended message without using the heart of the meme or the entirety of the meme.

The fourth fair use factor examines the effect of the defendant's use on the potential market for or value of the copyrighted works.¹⁸⁵ It considers the market harm that the defendant's unauthorized use has on the original copyrighted work and on the potential licensing market for derivative works.¹⁸⁶ Given that Griner appears to regularly license commercial uses of *Success Kid*, King's unauthorized use did deprive her of her customary licensing fee. Furthermore, if the sort of use by King were to become a widespread practice, it would certainly harm Griner's ability to license the photograph, especially her potential to license *Success Kid* for other political uses.¹⁸⁷ Therefore, this factor would likely weigh against fair use. At the same time, *Success Kid* has been used as a meme by thousands of Internet users who did not seek Griner's permission and did not pay her a licensing fee. Does Griner, in fact, suffer real commercial harm from this marginal unauthorized use? In light of King's reputation, Griner is understandably concerned about the potential damage and disparagement that King's use may have on *Success Kid*. But reputational harm is not the type of harm with which courts have concerned themselves in a copyright fair use analysis.¹⁸⁸ Memes are derived from but also transform the original content that they are based upon. As discussed above, this inherent nature of memes has the potential to complicate and alter the traditional weighing of all four copyright fair use factors.

CONCLUSION

Laney Griner's *Success Kid* journey started as an ordinary photograph of her child at the beach and turned into a money-making asset licensed to global corporations like Vitamin Water, Virgin Mobile UK, and Hot Topic. *Success Kid* is not unique in corporations' desire to engage with popular memes.¹⁸⁹ As memes become even more common and social media

¹⁸⁵ 17 U.S.C. § 107(4).

¹⁸⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

¹⁸⁷ See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, No. 19-2420-cv, 2021 WL 3742835, at *16 (2d Cir. Aug. 24, 2021).

¹⁸⁸ See Smith, *supra* note 149, at 2059–61.

¹⁸⁹ See Michael Humphrey, *Honey Badger Goes Dancing with the Stars: A Brief Meme History*, FORBES (Oct. 3, 2011, 10:39 AM), <https://www.forbes.com/sites/michael-humphrey/2011/10/03/honey-badger-goes-dancing-with-the-stars-a-brief-meme-history/?sh=751f9b4c30d1> [<https://perma.cc/66V8-E7TW>].

becomes an even more valuable marketing channel,¹⁹⁰ commercial and political entities will continue to capitalize on their popularity and use memes to reach and connect with the changing demographics of their consumers and constituents. In response, we are likely to see more disputes involving content creators challenging commercial and political entities' unauthorized use of their content as memes. Some creators may be dismayed by the transformation of their content into memes, while others may embrace that outcome. At the same time, content creators may still wish to limit unauthorized commercial and political exploitation of their works, especially when those works are used for ideas or causes with which they disagree. But who owns the meme derived from an original work? Can a content creator control uses of original content once it has become a meme? By exploring these questions of authorship, ownership, abandonment, licensing, and fair use of memes, this Article takes a step toward detangling the complicated relationship between memes and copyright.

¹⁹⁰ See Andrew Hutchinson, *Why Your Brand Needs to Invest in Social Media*, SOCIAL MEDIA TODAY (Mar. 29, 2019), <https://www.socialmediatoday.com/news/why-your-brand-needs-to-invest-in-social-media-infographic/551559/> [https://perma.cc/82JD-6EDE].