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**OPINION, U.S. COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
(JUNE 7, 2024)**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LANEY MARIE GRINER,

Plaintiff-Appellee,

SAM GRINER,

Plaintiff,

v.

STEVEN ARNOLD KING,

Defendant,

KING FOR CONGRESS,

Defendant-Appellant.

No. 22-3623

LANEY MARIE GRINER; SAM GRINER,

Plaintiffs-Appellees,

v.

STEVEN ARNOLD KING; KING FOR CONGRESS,

*Defendants-
Appellants,*

No. 23-2117

Appeal from United States District Court
for the Northern District of Iowa - Western
Before: BENTON, ERICKSON, and KOBES,
Circuit Judges.

BENTON, Circuit Judge.

The King for Congress Committee posted a meme—a humorous online image—asking supporters of the Congressman to “FUND OUR MEMES!!!” Laney M. Griner, the owner of the copyright to the meme’s template photo, sued the Congressman and the Committee for copyright infringement. A jury found the Committee, but not the Congressman, liable for copyright infringement, awarding Griner \$750, the statutory minimum. Both parties moved for costs and attorney’s fees. The district court¹ granted-in-part and denied-in-part costs to both parties, but denied all attor-

¹ The Honorable C.J. Williams, Chief United States District Judge for the Northern District of Iowa.

ney's fees. The Congressman and the Committee (collectively, the Defendants) appeal. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I

In 2007, Laney Griner took a photo of her then 11-month-old son (Sam) on the beach. That photo went viral, becoming one of the first (and most popular) internet memes, known as "Success Kid," with billions of uses. A meme is "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." Meme, Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/meme> (last accessed May 19, 2024).



²

In 2012, Griner registered the copyright in the Success Kid template with the United States Copyright Office. Using this copyright, she licensed the template to many companies—including Virgin Mobile, Vitamin Water, Microsoft, and Coca-Cola—that used versions of it in advertisements.

In 2020, the Committee posted a version of the meme on its website, Facebook page, and Twitter account (among other places). This version of the

² The original photo by Laney Griner of her son, commonly known as “Success Kid.” See Rebecca Macatee, *Boy From “Success Kid” Meme Is Now 8, Fundraising for His Dad’s Kidney Transplant*, *E! News* (Apr. 15, 2015) <https://www.eonline.com/news/646577/boy-from-success-kid-meme-is-now-8-fundraising-for-his-dad-s-kidney-transplant> (last accessed May 31, 2024) (containing this image).

App.5a

meme placed the Success Kid in front of the United States Capitol, declaring “FUND OUR MEMES!!!” The post asked viewers to “please click the link below and throw us a few dollars to make sure the memes keep flowing and the Lefties stay triggered.” The link connected users to a donation page. The Defendants never sought or received permission to use the Success Kid template.



Griner, through her attorney, notified the Defendants that they infringed her copyright. She requested removal of the posts, suggesting a settlement for past unauthorized uses. No settlement was reached. Griner sued for copyright infringement and a violation of Sam’s privacy.

At trial, the jury found that neither the Congressman nor the Committee were liable for an

³ A screenshot of the meme on the campaign Facebook page. See 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> (last accessed May 31, 2024) (containing the image).

invasion of Sam’s privacy, that the Congressman had not infringed Griner’s copyright, but that the Committee had innocently infringed the copyright—awarding \$750 in damages, the statutory minimum. Both parties sought costs and attorney’s fees. The district court denied all attorney’s fees but granted-in-part and denied-in-part the motions for costs.

The Committee appeals the damages, asserting it had an implied license to use, and made fair use of, the Success Kid template and thus did not infringe the copyright. The Committee also argues the district court abused its discretion in two evidentiary rulings, and that the jury should have been instructed it could give less than the statutory minimum for damages. The Defendants appeal the denial of attorney’s fees and some costs.⁴

II

The Committee raises two copyright infringement defenses: that the Committee had an “implied license” to use the Success Kid template in a meme; and, that the meme is a fair use of the Success Kid template.

A

The Committee argues it had an implied license to use the Success Kid template. “Courts may find a nonexclusive implied license where: ‘(1) a person

⁴ The Defendants assert that the district court erred in ruling that Sam’s invasion of privacy claim was not preempted. Because the jury found the Defendants did not invade his privacy, this claim is moot. *See Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (“An appeal must be dismissed as moot when our decision will have no ‘effectual relief whatever to a prevailing party.’”).

requests the creation of a work; (2) the creator makes the particular work and delivers it to the person who requested it; and (3) the licensor intends that the licensee-requestor copy and distribute the work.” *Beaulieu v. Stockwell*, 46 F.4th 871, 878 (8th Cir. 2022).

The district court ruled that the “defendants withdrew their implied licenses defense.” *Griner v. King*, 2023 WL 2163994, at *8 (N.D. Iowa Feb. 22, 2023). At trial, Griner’s counsel said: “I don’t see any way that a colorable argument could be made for implied license.” The Defendants’ counsel agreed: “I don’t disagree with opposing counsel. I think that’s probably right. I think we’ll concede that.”

Issues conceded at trial are waived on appeal. *See Dahlgren v. First Nat. Bank of Holdrege*, 533 F.3d 681, 693 n.7 (8th Cir. 2008), *citing United States v. Olano*, 507 U.S. 725, 733 (1993). The Committee waived the issue of implied license.

B

The Committee argues it “can defend against a claim of copyright infringement because it made ‘fair use’” of the Success Kid template. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 525 (2023). “The fair use of a copyrighted work . . . is not an infringement on copyright.” 17 U.S.C. § 107.

The jury found that the Defendants did not make fair use of the Success Kid template. This court reviews mixed questions of law and fact de novo, while giving deference to the jury’s findings of underlying facts. *See Google LLC v. Oracle Am., Inc.*, 593 U.S. 1,

23-24 (2021). “[R]eviewing courts should appropriately defer to the jury’s findings of underlying facts; but that the ultimate question whether those facts showed a ‘fair use’ is a legal question for judges to decide de novo.” *Id.*

Four factors, in the Copyright Act, define fair use:

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

17 U.S.C. § 107. “[T]he four statutory fair use factors may not ‘be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.’” *Andy Warhol*, 598 U.S. at 550-51, quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994). The Committee argues that the first, third, and fourth factors favor a determination that it made fair use of the Success Kid template (and concedes the second factor).

As for the first factor, the Committee argues its use is like the billions of other uses of the Success Kid template, the creation and dissemination of a meme. In the first factor, the “‘central’ question” is “whether the use ‘merely supersedes the objects of the original creation . . . (supplanting the original), or instead adds something new, with a further purpose or different

character.” *Id.* at 528, *quoting Campbell*, 510 U.S. at 579.

When an infringing use “is commercial as opposed to nonprofit,” 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.” *Id.* at 531. “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Id.*, *quoting Campbell*, 510 U.S. at 579. *See United Telephone Co. of Missouri v. Johnson Pub. Co., Inc.*, 855 F.2d 604, 609 (8th Cir. 1988) (“Fair use is not favored ‘when the user stands to profit from the exploitation of the copyrighted material without paying the customary price.’”), *quoting Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985). A use that “shrink[s] the protected market opportunities of the copyrighted work” is less justified because it “undermines the goal of copyright.” *Andy Warhol*, 598 U.S. at 531-32, *quoting Authors Guild v. Google, Inc.*, 804 F.3d 202, 207 (2d Cir. 2015). Memes used commercially in advertising or fundraising are subject to stricter copyright standards than memes used noncommercially, which are often fair use. *See Campbell*, 510 U.S. at 585 (“The use, for example, of a copyrighted work to advertise a product . . . will be entitled to less indulgence under the first factor of the fair use enquiry”).

“The fair use provision, and the first factor in particular, requires an analysis of the specific ‘use’ of a copyrighted work that is alleged to be ‘an infringement.’” *Andy Warhol*, 598 U.S. at 533. This

court weighs commerciality against its transformativeness. *See id.* at 531.

As for commerciality, it is undisputed that the Committee’s use was purely commercial—the meme solicited campaign donations with its call to “FUND OUR MEMES!!!” The Committee sought to exploit the copyrighted material, for financial gain, without paying the customary price.

As for transformativeness—adding a purpose or character to the original work—there is a dispute. Creating a meme was not the original purpose when Griner photographed Sam. However, controlling the commercial use of the meme was the original purpose to copyright the image of Sam, the meme’s template. The Committee, by creating and disseminating a meme, did not add a further purpose or different character to Success Kid template. *See Andy Warhol*, 598 U.S. at 532-33 (“If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.”).

Transformativeness “relates to the justification for the use.” *See id.* at 531. Memes are transformative to differing degrees, requiring a case-by-case determination. *See id.* at 532 n.7 (“the question of justification will depend on the individual use or uses”). The Committee asserts that memes, including its own, combine a compelling image with a pithy phrase to invoke a response, usually humor.

Because the Committee’s meme was a “commercial use” of the Success Kid template, a “particularly compelling justification is needed.” *Id.* at 547. The

Committee’s stated justification is that they were creating and disseminating a meme on social media, as happens millions (if not billions) of times each day. “[T]he fact that everyone else is doing it” is not a particularly compelling justification, especially considering the vast majority of these uses are non-commercial. *Cf. Firexo, Inc. v. Firexo Grp. Ltd.*, 99 F.4th 304, 321 (6th Cir. 2024) (finding the “everyone else is doing it” justification unpersuasive in a jurisdictional context). Beyond this, the Committee “offers no independent justification, let alone a compelling one, for copying the photograph, other than to convey a new meaning or message. As explained, that alone is not enough for the first factor to favor fair use.” *Andy Warhol*, 598 U.S. at 547. “[A]lthough a use’s transformativeness may outweigh its commercial character, here, both elements point in the same direction.” *Id.* at 538.

Due to the lack of a further purpose, a different character, or a compelling justification *and* the undisputed commercial use, the first factor weighs in favor of Griner.

As for the third factor, the “heart” (the most substantial part of the work) of the Success Kid template—the Success Kid himself—is used in the Committee’s meme. *See Harper & Row, Publishers*, 471 U.S. at 544. The third factor weighs in favor of Griner.

As for the fourth factor, it is difficult to determine what impact the Committee’s use of the Success Kid template had on its commerciality. True, Griner licensed the use of the template to many well-known brands. Licensing requests, however, had decreased before the Committee’s use, although a reasonable

jury could conclude that association with King would drive away some potential licensees. There is no evidence that the Committee's meme revitalized the market for licensing the Success Kid template. The fourth factor weighs in neither party's favor.

Because the fair use test weighs heavily for Griner, the jury properly concluded that the Committee did not make fair use of the Success Kid template.

III

Defendants raise three other issues: two evidentiary disputes, a challenge to damages instruction, and the issue of costs and attorney's fees.

A

The Committee asserts that the district court abused its discretion by (1) excluding, for a lack of relevance, evidence connecting Success Kid with Pepe the Frog and (2) allowing the testimony of Ben Clark, Sam's entertainment agent.

This court reviews evidentiary rulings "for clear abuse of discretion, 'reversing only when an improper evidentiary ruling affected the defendant's substantial rights or had more than a slight influence on the verdict.'" *United States v. Anderson*, 783 F.3d 727, 745 (8th Cir. 2015), citing *United States v. Henley*, 766 F.3d 893, 914 (8th Cir. 2014). This court "will not reverse a harmless error." *United States v. Johnson*, 860 F.3d 1133, 1139 (8th Cir. 2017). "An evidentiary error is harmless when, after reviewing the entire record, we determine that the substantial rights of the defendant were unaffected, and that the error did not influence or had only a slight influence on the verdict."

United States v. Farish, 535 F.3d 815, 820 (8th Cir. 2008).

At trial, the Defendants sought to introduce evidence that Griner was politically motivated, had accepted past associations with inflammatory political groups, and promoted distasteful uses of the meme. The Defendants particularly highlight their offer of evidence linking Success Kid to Pepe the Frog (which the defendants call an emblem of the alt-right). The district court excluded all this “political” evidence. On appeal, the Committee does not contend that the exclusion was an abuse of discretion, only that it should have considered the evidence in the “award of attorneys’ fees.” The Committee asserts the connection of Success Kid to Pepe the Frog lessens Griner’s “moral indignation” towards King. Any moral indignation Griner may have has no bearing on copyright infringement. Thus, the evidence could not influence the verdict, and any error was harmless. The district court did not abuse its discretion.

At trial, Ben Clark testified about the actual damages the Defendants’ meme caused. On appeal, the Committee does not explain how Clark’s testimony had any influence, let alone more than a slight influence on the verdict—even pondering whether admission of Clark’s testimony was harmless error. Clark testified to actual damages, not to violations of the Copyright Act. After finding the Committee infringed Griner’s copyright, the jury awarded the statutory minimum under the Act. Thus, the exclusion of Clark’s testimony could not have influenced the

jury to the Committee's detriment. The district court did not abuse its discretion.⁵

B

The Committee challenges the jury instruction of the \$750 statutory minimum. It did not object to the jury instruction when given. "If a party does not properly object to preserve the issue for appeal, objections to jury instructions are waived, absent a showing of plain error." *Riggs v. Gibbs*, 66 F.4th 716, 719 (8th Cir. 2023). "Plain error is a stringently limited standard of review, especially in the civil context, and must result in a miscarriage of justice in order to compel reversal." *Id.*, quoting *Bady v. Murphy-Kjos*, 628 F.3d 1000, 1003 (8th Cir. 2011). Even if the Committee were correct, it does not assert a miscarriage of justice. The jury instruction challenge is waived.

C

The Defendants assert the district court abused its discretion in not awarding attorney's fees and additional costs to the Defendants. The Committee seeks attorney's fees because Griner rejected a pre-trial settlement offer that was greater than the jury award and because it made novel legal arguments. *See generally* Fed. R. Civ. P. 68; *Marek v. Chesny*, 473 U.S. 1, 9 (1985) ("the term 'costs' in Rule 68 was intended

⁵ The Committee asserts a discovery violation preceding the Clark testimony and in obtaining a privilege log. The district court did not abuse its discretion. *See* 8th Cir. R. 47B; *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 704 (8th Cir. 2018).

to refer to all costs properly awardable under the relevant substantive statute”).

The Committee cannot recover attorney’s fees because it is not a prevailing party. Under the Copyright Act, only prevailing parties may be awarded a reasonable attorney’s fee. 17 U.S.C. § 505 (“the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”). See *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 645-46 (7th Cir. 2001) (holding that attorney’s fees are available only for prevailing parties under the Copyright Act); *UMG Recs., Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1035 (9th Cir. 2013) (same).

As for the Congressman: By the Copyright Act, the district court, “in its discretion,” “may” award “recovery of full costs” and award a prevailing party “a reasonable attorney’s fee” as “part of the costs.” 17 U.S.C. § 505. The district court here, in its discretion, denied attorney’s fees to both parties. The Congressman does not allege an abuse of discretion, acknowledging that the district court had no obligation to award him costs or fees. This court affirms the decision not to award attorney’s fees. *Killer Joe Nevada, LLC v. Does 1-20*, 807 F.3d 908, 911 (8th Cir. 2015) (“A district court abuses its discretion” when it “commits a clear error of judgment.”), quoting *Fair Isaac Corp. v. Experian Info. Sols., Inc.*, 650 F.3d 1139, 1152 (8th Cir. 2011).

As to additional costs, the Defendants seek costs for multiple printer cartridges used before trial. The district court did not abuse its discretion by denying these costs. *See* 8th Cir. R. 47B.

* * * * *

The judgment is affirmed.

**ORDER ON COSTS AND ATTORNEY FEES,
U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
(FEBRUARY 22, 2023)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LANEY MARIE GRINER and SAM GRINER,

Plaintiffs,

v.

STEVEN ARNOLD KING and KING FOR
CONGRESS,

Defendants.

No. 21-CV-4024-CJW-MAR

Before: C.J. WILLIAMS,
United States District Judge.

I. Introduction

This matter is before the Court on defendants' motion for attorney's fees filed within their bill of costs (replacement) (Doc. 139) and plaintiffs' motion for attorney's fees (Doc. 141). Both parties resisted each others' motions.¹ (Docs. 149; 151). Both parties

¹ Defendants did not timely file their resistance (Doc. 151) in vio-

replied. (Docs. 156; 157). For the following reasons, the Court denies both parties' motions for attorney's fees, but grants-in-part and denies-in-part both parties' motions for costs.

II. Background

This case involves alleged infringements of a copyrighted photographic work and an unauthorized use of a person's likeness. The Court will discuss additional facts and law as they become necessary to its analysis.

A. Factual Background

Plaintiffs Laney Marie Griner ("Laney") and Sam Griner ("Sam") are individuals residing in Jacksonville, Florida. (Doc. 16, at 2). Plaintiff Laney owns the registered copyright in a photograph of plaintiff Sam (the "Subject Photograph") that formed the basis of a popular Internet meme titled "Success Kid." (Doc. 79-2, at 1-2). Plaintiff Laney licensed the Subject Photograph commercially to advertisers Vitamin Water and Virgin Mobile, among others. (*Id.*, at 2).

Defendant Steven King ("King") is a former Congressman. (Doc. 80-3, at 5). Defendant King for Congress ("Committee") is a campaign committee for defendant Steve King that owns and operates a website at www.steveking.com ("the website"), and posts

lation of LR 7(e). On Friday, December 2, 2022, plaintiffs filed their motion for attorney's fees. (Doc. 141). LR 7(e) prescribes that defendants resisting this motion must file a resistance within 14 days after service of the motion. Defendants' resistance was due on Friday, December 16, 2022. They however, filed their resistance only on Monday, December 19, 2022.

various videos and pictures on the website to raise money from political donors for defendant King's campaign. (*Id.*, at 2, 5). Defendant Committee owns or controls the Facebook Page, a Twitter account, a Flickr account, a Winred page, and their own website. (Doc. 79-3, at 115).

During defendant King's campaign in 2020, defendant Committee used an independent contractor named Michael Stevens to create and circulate memes throughout social media. (Doc. 80-3, at 6). Defendant King, Jeff King (the Campaign Manager), and Michael Stevens, are "involved in making or editing the Steve King pages[.]" (Doc. 79-3, at 115-16). Michael Stevens created a Meme Action Post ("the Post") incorporating part of the Subject Photograph. (Doc. 80-3, at 3, 6). The Post places the image of plaintiff Sam on a different background than that of the Photograph. (*Id.*, at 3). The Post was displayed on a Winred, Inc. server and on defendant Committee's Facebook Page. (Docs. 80-3, at 3, 4, and 6; 79-3, at 3, 106).

B. Procedural History

On December 30, 2020, plaintiffs filed a complaint against defendants Steven King, Committee, Winred, Inc., and Does 1–10 in the United States District Court for the District of Columbia. (Doc. 1). On April 7, 2021, plaintiffs filed an amended complaint naming the same defendants but including more factual allegations against all defendants. (Docs. 16; 17-1). On May 3, 2021, plaintiffs voluntarily dismissed claims against Winred, Inc. (Doc. 28). On May 17, 2021, the remaining defendants filed a first motion to dismiss for lack of personal jurisdiction and failure to state a claim, as well as a motion to transfer case. (Doc. 29).

On June 2, 2021, both parties moved to transfer this matter to the Northern District of Iowa. (Doc. 32). On June 21, 2021, the case was so transferred. (Doc. 34).

On July 21, 2021, defendants filed a second motion to dismiss for failure to state a claim. (Doc. 43). The Court denied that motion. (Doc. 57). Plaintiffs and defendants then filed cross motions for summary judgment. (Docs. 79; 80). The Court denied these motions as well. (Docs. 86; 96).

On October 3, 2022, defendants extended an offer of judgment to plaintiffs under Rule 68 of the Federal Rules of Civil Procedure. (Doc. 139-3, at 39, 41, 44-45). Plaintiffs did not accept.

A jury trial was held on this matter between November 14, 2022, and November 18, 2022. (Docs. 121; 122; 123; 125; 128). The jury granted a verdict in favor of plaintiff, finding that defendant Committee committed innocent infringement of the Success Kid Photograph. (Doc. 130, at 3). The Court thus entered judgment in favor of Laney Griner for \$750. (Doc. 131).

The parties filed post-trial motions and timely resisted each other's motions.

III. Attorney's Fees

A. Defendants' Motion for Attorney's Fees

Defendants move for costs and fees of this action under Rule 68 of the Federal Rules of Civil Procedure. (Doc. 139-2, at 2). For the following reasons, the Court finds that defendants are not entitled to attorney's fees. Although Rule 68 of the Federal Rules of Civil Procedure entitles defendants to a consideration of

attorney's fees under the Copyright Act, that award of attorney's fees is still subject to the Court's discretion as guided by several factors. In this case, those factors do not support an award of attorney's fees to defendants.

1. The Effect of An Offer of Judgment on Attorney's Fees

Rule 68 of the Federal Rules of Civil Procedure provides:

- (a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
- (b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
- (c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days-before the date set

for a hearing to determine the extent of liability.

- (d) **Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Fed. R. Civ. P. 68.

“[A]ll costs properly awardable in an action are to be considered within the scope of Rule 68 ‘costs.’” *Marek v. Chesny*, 473 U.S. 1, 9 (1985). “Thus, absent congressional expressions to the contrary, where the underlying statute defines ‘costs’ to include attorney’s fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.” *Id.* The *Marek* Court then concluded that because the underlying statute “awarded attorney’s fees ‘as part of the costs,’” such fees are “subject to the cost-shifting provision of Rule 68.” *Id.*

The Court of Appeals for the Eighth Circuit has held that when “a plaintiff . . . refuses an offer of judgment under Rule 68 and later fails to receive a more favorable judgment[,]” attorney’s fees “are awardable to defendants . . . only if the underlying statute awards such fees.” *O’Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989). There, the court followed the First Circuit’s reasoning in *Crossman v. Marcoccio*, 806 F.2d 329 (1st Cir. 1986), and held “a plaintiff who refuses an offer of judgment under Rule 68 and later fails to receive a more favorable judgment must pay the defendant’s post-offer costs.” *O’Brien*, 873 F.2d at 1120; *Pittari v. Am. Eagle Airlines, Inc.*, 468 F.3d 1056, 1064 (8th Cir. 2006). The *O’Brien* court

further held “attorney’s fees are awardable to defendants in such cases only if the underlying statute awards such fees.” *O’Brien*, 873 F.2d at 1120; see *Borup v. CJS Sols. Grp., L.L.C.*, 333 F.R.D. 142, 148 (D. Minn. 2019).

Turning to the Copyright Act, the question becomes when or whether a plaintiff who prevails in a copyright suit for less than a defendant’s Rule 68 offer must pay that defendant’s attorney’s fees under Section 505. Section 505 provides that in a copyright action:

[T]he court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except where otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.

17 U.S.C. § 505.

It is true Section 505 defines attorney’s fees as part of the costs. The question under *Marek* and its progeny, however, is whether “congressional expressions to the contrary” indicate when or whether attorney’s fees are not part of the costs. *Marek*, 473 U.S. at 9. In finding this, the Court must give full effect to each word of the statute. *Liu v. Sec. & Exch. Comm’n*, 140 S. Ct. 1936, 1948 (2020) (“[C]ourts must give effect, if possible, to every clause and word of a statute.”) (citation omitted).

Here, under Section 505, the Court may provide “recovery of full costs by or against any party” subject to exceptions inapplicable here, but may only provide “reasonable attorney’s fees to the prevailing party[.]”

17 U.S.C. § 505 (emphasis added). To give full effect to every word of the statute, the Court thus finds that Section 505 permits attorney’s fees only to prevailing parties, not every party.² Thus, the Court holds a plaintiff who prevails in a copyright suit for less than a defendant’s Rule 68 offer must pay that defendant’s attorney’s fees under Section 505 only if that defendant was a prevailing party.

Contrary to defendants’ argument, Rule 68 does not override the Court’s discretion in awarding attorney’s fees in copyright disputes.³ (Doc. 139-2, at 5) (citing *Perkins*, 138 F.3d at 338). To give full effect to every word of the statute, the Court also notes Section 505 permits only reasonable attorney’s fees. See 17 U.S.C. § 505 (“[T]he court may also award a reasonable attorney’s fee. . . .”) (emphasis added). The Supreme Court held in *Fogerty v. Fantasy, Inc.* that the text of Section 505 grants the Court discretion in awarding attorney’s fees. 510 U.S. 517, 524 n.11 (1994) (noting that “the plain language of § 505” indicates that “district courts are to use their discretion in awarding attorney’s fees and costs to the prevailing party”); *id.*, at 533 (“The word ‘may’ clearly connotes discretion.”). As a result, the application of Rule 68

² This finding is in concert with many, but not all Courts of Appeals. *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., Inc.*, 298 F.3d 1238, 1246 n.6 (11th Cir. 2002) (collecting cases).

³ Defendants’ citation to *Perkins* is misplaced: *Perkins* did not hold that a court has no discretion to follow the mandatory language of Rule 68, but instead stated there is “no discretion in the district court to do anything other than enter judgment once an offer of judgment has been accepted.” *Perkins*, 138 F.3d at 338. Here, plaintiffs did not accept the offer of judgment.

does not override the Court’s discretion to award attorney’s fees. Thus, the Court turns to whether defendants are properly entitled to attorney’s fees under Section 505 of the Copyright Act.

2. Copyright Claim

a. Applicable Law

“[I]t is the general rule in this country that unless Congress provides otherwise, parties are to bear their own attorney’s fees.” *Fogerty*, 510 U.S. at 533 (citation omitted). In a copyright action, a district court “in its discretion may . . . award a reasonable attorney’s fee to the prevailing party.” 17 U.S.C. § 505; *Killer Joe Nev., L.L.C. v. Does 1-20*, 807 F.3d 908, 911 (8th Cir. 2015). “In copyright infringement cases, generally, the prevailing party is one who succeeds on a significant issue in the litigation that achieves some of the benefits the party sought in bringing suit.” *Christopher & Banks Corp. v. Dillard’s, Inc.*, 805 F. Supp. 2d 693, 696-97 (S.D. Iowa 2011) (quoting *Thoroughbred Software Int’l, Inc. v. Dice Corp.*, 488 F.3d 352, 362 (6th Cir. 2007) (further citations omitted). Accordingly, “a party’s success on a claim that is purely technical or de minimis does not qualify him as a prevailing party.” *Id.* (citation omitted).

In copyright litigation, however, attorney’s fees are not awarded to the prevailing party automatically or as a matter of course. *See Fogerty*, 510 U.S. at 533 (noting no presumption for fee awards in Copyright Act claims). Instead, the Court “should give substantial weight to the objective reasonableness of the losing party’s position” and then retains discretion to make an award “even when the losing party advanced a rea-

sonable claim or defense.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 199-200 (2016). The Court must exercise this discretion “in an evenhanded manner by considering factors such as whether the lawsuit was frivolous or unreasonable, the losing litigant’s motivations, the need in a particular case to compensate or deter, and the purposes of the Copyright Act.” *Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1014 (8th Cir. 2006) (citing *Fogerty*, 510 U.S. at 534, n.19); *Killer Joe Nev.*, 807 F.3d at 911; *Designworks Homes, Inc. v. Thomson Sailors Homes, L.L.C.*, 9 F.4th 961, 964 (8th Cir. 2021).

While “one of the goals of the Copyright Act is to discourage infringement, . . . the Copyright Act[’s purposes] are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement.” *Fogerty*, 510 U.S. at 526. Instead, “copyright law ultimately serves the purpose of enriching the general public through access to creative works[.]” *Id.*, at 527. As a result, “defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Id.* In other words, the Court must view all the circumstances of the case in light of the Copyright Act’s “two subsidiary aims: encouraging and rewarding authors’ creations while also enabling others to build on that work.” *Ferman v. Jenlis, Inc.*, No. 16-CV-00074, 2016 WL 7187888, at *1 (S.D. Iowa Dec. 5, 2016) (citing *Kirtsaeng*, 579 U.S. at 204).

b. Analysis

Here, defendant King is a prevailing party with regard to the copyright infringement claim because he succeeded in a significant issue in the litigation—his personal liability. Defendant Committee seeks to assert that it is a prevailing party chiefly on the strength of the low damages the jury awarded against it and its rhetoric concerning copyright trolls. (Doc. 139-2, at 6). The Court disagrees. However defendants cast this outcome in practical terms, defendant Committee did not prevail with regard to the copyright infringement claim: they were found liable for copyright infringement, even if it was innocent copyright infringement. Thus, defendant Committee is not a prevailing party.

In any event, even if the Court found that both defendants were prevailing parties, the Court would not award attorney’s fees to either. Defendants primarily argue that Rule 68 entitles them to a mandatory award of attorney’s fees, without any analysis of the requisite factors. (Docs. 139-2). Plaintiffs resisted, offering an analysis of the factors. (Doc. 149). In its reply, defendants make overtures to these factors. (Doc. 157).

The Court first considers the objective reasonableness of plaintiffs’ claims. *Kirtsaeng*, 579 U.S. at 199. Plaintiffs assert without argument that their positions both factually and legally were not “objectively unreasonable.” (Doc. 149, at 12). The Court agrees. In *Designworks Homes, Inc. v. Thomson Sailors Homes, L.L.C.*, a court ruling on attorney’s fees found copyright claims objectively unreasonable when plaintiffs “produced no direct or circumstantial evidence” of access and substantial similarity. *Designworks*

Homes, Inc. v. Thomson Sailors Homes, L.L.C., No. 18-0189-CV-W, 2019 WL 7593366, at *2 (W.D. Mo. Dec. 13, 2019), *aff'd* 9 F.4th 961, 964 (8th Cir. 2021). Here in contrast, the jury, following the law of copyright infringement, found that defendant Committee had committed copyright infringement in the way plaintiffs described. (Doc. 130). Moreover, the Court denied directed verdict in favor of defendant King, ruling that a reasonable jury could find defendant King was vicariously liable for defendant Committee's infringement. Thus, these claims were objectively reasonable.

Giving substantial deference to this objective reasonableness, the Court turns to the other factors. Keeping in mind the Copyright Act's ultimate purpose to enrich the general public through access to creative works through both rewarding labor and clarifying the boundaries of copyright, the Court must consider "whether the lawsuit was frivolous or unreasonable, the losing litigant's motivations, the need in a particular case to compensate or deter, and the purposes of the Copyright Act." *Killer Joe Nev., LLC*, 807 F.3d at 911 (quoting *Action Tapes, Inc.*, 462 F.3d at 1014); *Fogerty*, 510 U.S. at 527, 534 n.19.

As a preliminary matter, the Courts finds plaintiffs' copyright claims against both parties were not frivolous. As the Court noted earlier, a reasonable jury could have found defendant King was personally liable for copyright infringement. And, the jury did find defendant Committee liable for copyright infringement.

Turning to plaintiffs' motivations, defendants appear to assert in its reply plaintiffs' motivations justify an award of attorney's fees to defendants be-

cause there was no business rationale to sue defendants. (Doc. 157, at 2). Defendants assert plaintiffs could only maintain the positive return on investment for this litigation due to their fee-arrangements with counsel and plaintiffs' lack of involvement in the litigation (*Id.*, at 3), but these are not grounds on which to rest fees or discern motivations. The purposes of the Copyright Act do not turn on the arrangement of the parties with their counsel.

Defendants also appear to assert—presumably relating to plaintiffs' motivations—that plaintiffs could have chosen to not litigate, because the only actual damages were \$20, and because the Committee issued a public apology. (Doc. 157, at 3). Though these arguments appear to fit best under plaintiffs "motivations to sue," they fail in justifying the award of attorney's fees to defendants.

First, one purpose of the Copyright Act is to discourage infringement. *Fogerty*, 510 U.S. at 526. Although plaintiffs could have chosen not to litigate, plaintiffs had the choice to litigate under the statutory scheme, were "entitled to respond within the bounds of the law," and were "under no obligation to employ a minimum-impact litigation strategy." *Killer Joe Nev., L.L.C. v. Leaverton*, No. C 13-4036, 2014 WL 3547766, at *7 (N.D. Iowa July 17, 2014), *aff'd sub nom., Killer Joe Nev., LLC v. Does 1-20*, 807 F.3d 908 (8th Cir. 2015). As later explained in this Order, plaintiffs are not guaranteed that the attorney's fees "generated by [their] strategy of choice [will] be compensated." *Id.* But that is a different question from whether plaintiffs' litigation behavior would entitle defendants to attorney's fees.

Moreover, the fact of low actual damages is not grounds for awarding attorney's fees for defendants, because the Copyright Act provides statutory damages in cases of difficult-to-discern actual damages, which plaintiffs elected. That is, even if the damages were low, plaintiffs could earn damages from the fact of infringement.⁴ Nor does the public apology entitle defendants to attorney's fees; copyright liability and damages do not turn solely on intent, and defendant Committee was held liable for innocent infringement.

In resistance, plaintiffs asserted they enforced these claims with the motivation to protect plaintiff Laney's copyright from an unauthorized commercial use. (Doc. 149, at 12). Given the evidence at trial and the jury verdict, it is unclear whether plaintiffs would have enforced their claims for this kind of use were it not for defendants' identity. Even so, after considering the substantial weight to the objective reasonableness of plaintiffs' copyright claim and their choice to litigate under the statutory scheme, the Court finds plaintiffs' motivations do not weigh in favor of attorney's fees to defendants.

The Court also does not find a need to compensate defendants or deter plaintiffs or similarly situated plaintiffs in this case. First, defendants make no argument on compensation. (Doc. 139-2). Defendants appear to make something like an argument related to deterrence when it characterizes this litigation as a

⁴ Defendants further assert plaintiffs' settlement offers of five figures is more than the statutory maximum. (Doc. 133-2, at 8). This is incorrect: the Court instructed the jury that it could award up to \$30,000 for each work infringed, but if it found willful infringement, it could "award as much as \$150,000 for each work willfully infringed." (Doc. 126, at 43).

“fight against a copyright troll that routinely, successfully extorted more in litigation threats . . . than actual licensing or commercialization” and assert that the Court’s judgment benefits “troll victims.” (Doc. 133-2, at 8). But as applied to these facts, defendants’ analysis about whether plaintiffs’ behavior fits copyright troll behavior is mere supposition.⁵

Also, the results plaintiffs achieved here are in themselves sufficient to deter similarly situated plaintiffs from engaging in alleged trolling efforts. Though plaintiffs plausibly and properly alleged a reasonable claim of infringement against defendants, they did not materially benefit from victory. The jury found the infringement innocent and granted the minimum amount of statutory damages permitted by the Court’s instructions, an amount far below the costs plaintiffs incurred. Moreover, any rational litigant facing these facts would be aware that the combination of defendant Committee’s take down of the infringing Post and the short duration of the infringement would point more to innocent infringement than willful infringement. Considering this evidence, rational copyright holders could have easily reduced their fee demands or settled this case before trial.

As for the purposes of the Copyright Act, the Court finds that attorney’s fees in favor of defendants would not further serve the purposes of copyright law. Again, the Court must view all the circumstances of

⁵ The Court has dealt with previous businesses that aggressively licensed architectural businesses at scale. *Design Basics, L.L.C. v. Spahn & Rose Lumber Co.*, No. 19-CV-1015, 2021 WL 493415, at *1 (N.D. Iowa Feb. 10, 2021), on reconsideration in part, No. 19-CV-1015, 2021 WL 7186126 (N.D. Iowa May 11, 2021).

the case in light of the Copyright Act’s “two subsidiary aims: encouraging and rewarding authors’ creations while also enabling others to build on that work.” *Ferman*, 2016 WL 7187888, at *1 (citing *Kirtsaeng*, 579 U.S. at 204). Here, plaintiffs leveled a meritorious copyright infringement claim and defendants leveled well-established copyright defenses and earned a finding of innocent infringement. Adhering to the general rule that parties “bear their own attorney’s fees” will strike an appropriate balance between these goals. *Fogerty*, 510 U.S. at 533; *Ferman*, 2016 WL 7187888, at *3.

For these reasons, then, giving substantial weight to the objective reasonableness of plaintiffs’ claims and considering the factors prescribed by *Fogerty*, the Court denies any award of attorney’s fees to defendants on the copyright claim. The Court thus does not make any factual finding regarding a reasonable amount of attorney’s fees.

3. Invasion of Privacy Claim

Defendants appear to seek attorney’s fees out of plaintiff Sam Griner’s invasion-of-privacy claim. (Doc. 139-2, at 10). To the extent defendants make this request, the Court denies it.

The Court heard the Iowa invasion-of-privacy claims through its supplemental jurisdiction. Thus, the *Erie* doctrine also applies. *See Felder v. Casey*, 487 U.S. 131, 151 (1988) (“Under *Erie R. Co. v. Tompkins*, 304 U.S. 64, . . . when a federal court exercises diversity or pendent jurisdiction over state-law claims, ‘the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a

State court.” (citing *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945)). Because rules governing the right to attorney’s fees are substantive for Erie purposes, the Court applies state law. *Woods Masonry, Inc. v. Monumental Gen. Cas. Ins.*, 198 F. Supp. 2d 1016,1039 (N.D. Iowa Apr. 23, 2002) (collecting cases). In a diversity case “where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney’s fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.” *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 259 n.31 (1975) (citation omitted); *Lamb Eng’g & Const. Co. v. Neb. Pub. Power Dist.*, 103 F.3d 1422, 1434 (8th Cir. 1997) (collecting cases); *Liquid Cap. Exch., Inc. v. BDC Grp., Inc.*, No. 20-CV-89, 2022 WL 15045058, at *3 (N.D. Iowa Oct. 26, 2022).

Under Iowa law, “[a]bsent express statutory authorization, each party to a lawsuit ordinarily bears its own attorney fees.” *Lee v. State*, 906 N.W.2d 186, 197 (Iowa 2018) (citations omitted); *Smith v. Iowa State Univ. of Sci. & Tech.*, 885 N.W.2d 620, 623 (Iowa 2016). Here, neither party points to any statute or contractual provision that permits the recovery of attorney’s fees out of Iowa invasion-of-privacy claims. Because attorney’s fees are not “properly awardable” for this claim, *Marek*, 473 U.S. at 9, Rule 68 does not entitle defendants to post-offer attorney’s fees arising out of the invasion-of-privacy claim. For that reason, the Court denies defendants’ motion for attorney’s fees arising out of the state-law claims.

B. Plaintiffs' Motion for Attorney's Fees

Plaintiffs also move for attorney's fees. (Doc. 141-1, at 2). Defendants resist. (Doc. 151). As a preliminary matter, the Court finds plaintiff Laney is a prevailing party because the jury entered a verdict in her favor with respect to defendant Committee. (Doc. 130). However, exercising its statutorily-granted discretion, the Court denies attorney's fees.

Again, the Court "should give substantial weight to the objective reasonableness of the losing party's position" and then retains discretion to make an award "even when the losing party advanced a reasonable claim or defense." *Kirtsaeng*, 579 U.S. at 199-200. The Court must exercise this discretion "in an evenhanded manner by considering factors such as whether the lawsuit was frivolous or unreasonable, the losing litigant's motivations, the need in a particular case to compensate or deter, and the purposes of the Copyright Act." *Action Tapes*, 462 F.3d at 1014 (citing *Fogerty*, 510 U.S. at 534, n. 19); *Killer Joe Nev.*, 807 F.3d at 911; *Designworks Homes*, 9 F.4th at 964.

The Court first finds defendants' positions objectively reasonable, contrary to plaintiffs' argument. (Doc. 141-1, at 6). Specifically, defendants offered credible defenses against the claim of copyright infringement; at the close of evidence, the Court granted plaintiffs' motion for a directed verdict on the affirmative defense of implied license, but denied plaintiffs' motion for directed verdict as to the other affirmative defenses finding that a reasonable jury could find plaintiff Laney had abandoned her copyright or that defendants' use was fair use. (Doc. 145, at 288). That the jury later rejected these defenses (Doc. 130) does not make them objectively unreasonable.

Giving substantial weight to this finding of objective reasonableness, the Court turns to the other factors. Plaintiffs assert the factors of “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case), and the need in particular circumstances to advance considerations of compensation and deterrence” support an award of attorney’s fees. (Doc. 141-1, at 3). For the reasons the Court found defendants’ arguments reasonable, it finds they were not frivolous. (Doc. 141-1, at 5).

Plaintiffs make several arguments citing its victory over defendants’ affirmative defenses as a justification for attorney’s fees.⁶ (Doc. 141-1, at 5-6). At trial, defendants withdrew their implied licenses defense and the jury rejected their abandonment and fair use defenses. (Doc. 130). But because “it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible . . . defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Fogerty*, 510 U.S. at 527. Thus, the Court rejects plaintiffs’ arguments that its victory entitles it to attorney’s fees.

Plaintiffs next argue their own claims were both legally and factually reasonable (Doc. 141-1, at 6). In response, defendants resist, arguing again that plain-

⁶ The Court rejects plaintiffs’ argument that the low amount of damages awarded here favor large attorney’s fees. (Doc. 141-1, at 4-5) (citing *Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 610 (7th Cir. 2002). That argument contemplated “real, and especially a willful, infringement.” (*Id.*). But here, the jury found the infringement innocent. (Doc. 130).

tiffs' focus and costs accrued in litigating this case should not entitle them to attorney's fees. (Doc. 151, at 6) (citing *Pearson Educ., Inc. v. Almgren*, 685 F.3d 691, 696 (8th Cir. 2012)). The Court agrees with defendants. Though it does not read *Pearson* to starkly warn copyright holders from fully litigating their claims against accused infringers, *Pearson* does appropriately note that a full litigation of claims does not guarantee the compensation of attorney's fees. (Doc. 151, at 7). Thus, although plaintiffs' claims were reasonable enough to survive summary judgment and directed verdict, the reasonableness of their own claims are not relevant or supportive to their claim of attorney's fees.

Plaintiffs also accuse defendants of unreasonable settlement positions as a justification for attorney's fees because those unreasonable settlement positions increased the costs of litigating. (Doc. 141-1, at 8)⁷. Plaintiffs also state defendants purportedly continued litigating to punish plaintiff Laney for complaining about defendant Committee's use of her son's image. (Doc. 141-1, at 2). The Court does not find these accusations persuasive: the jury found the infringement innocent, defendants removed the infringing photograph, and defendants made a public apology. To the extent plaintiffs again assert defendants multiplied the costs of the litigation through unreasonable and untenable affirmative defenses, the Court

⁷ Plaintiffs disparage defendants' delay in presenting a Rule 68 offer far less than the costs and attorney's fees borne at the time. (Doc. 141-1, at 7). But defendants did not delay. The parties must make a Rule 68 offer at least 14 days before trial. Fed. R. Civ. P. 68(a). Defendants made this offer in a timely manner, on October 3, 2022, when trial was scheduled in November.

already rejected attorney's fees on the basis of defendants' affirmative defenses, for the reasons stated earlier.

Moreover, plaintiffs' citation to *Studio A Entertainment, Inc. v. Action DVD* for the proposition that settlement behavior can give rise to attorney's fees is unavailing on its face. (Doc. 141-1, at 7) (citing *Studio A Ent., Inc. v. Action DVD*, 658 F. Supp. 2d 851, 855 (N.D. Ohio 2009)). There, the court instructed that fees would deter others from bad faith settlement behavior where liability is conceded and the amount of damages are prescribed by statute. Here, in contrast, defendants had not conceded liability at the time of the settlement negotiations.

Plaintiffs assert their motivation in filing suit against defendants "was proper and aligned with the Copyright Act." (Doc. 141-1, at 5). Specifically, they assert that they intended to "protect the integrity of her original artistic works (and by extension her ability to license that work)." (*Id.*). Though this is not one of the factors listed by *Fogerty*, the Court notes that it corresponds to one of the purposes of the Copyright Act. Even so, the Court finds it is outweighed by considerations of defendants' motivations: the jury found defendant Committee's infringement to be innocent. As a result, the Court finds this factor does not favor attorney's fees.

Turning to questions of compensation and deterrence, plaintiffs argue that allowing plaintiff Laney to recover her fees furthers the purpose of copyright law by rewarding her for pursuing her right under the Act and encouraging and rewarding authors' creations. (Doc. 141-1, at 8). Specifically, plaintiffs assert that the lack of fee awards will eat at

monies plaintiff Laney can invest in her future photography. (*Id.*). But plaintiffs do not show in the record that plaintiff Laney is working on future photographs or selling other photographs. Although the Court is not negatively commenting on her artistic endeavors, her mere assertion that she seeks funds to invest in her future photography is not a ground on which to award her attorney's fees.⁸

Plaintiffs assert defendant Committee must be deterred because it was "acting on behalf of a United States Congressman who voted on important copyright legislation yet created no policies to respect copyright in promoting his candidacy." (Doc. 141-1, at 8). The Court, however, derives no additional deterrence value from awarding attorney's fees in this scenario. The difference between awarding fees against a former Congressman and awarding fees against private citizens who also created no policies to respect copyright would be tantamount to punishing the Congressman for his vote and position, potentially running afoul of the Speech and Debate Clause.

Plaintiffs also assert defendants must be deterred from "a strategy of unreasonable settlement offers and 'scorched earth' defense tactics" to increase the cost of enforcing copyright interests. (Doc. 141-1, at 8). But the Court disagrees that defendants' Rule 68 offer of \$15,000 was unreasonable, certainly in view of the jury verdict for low damages.⁹ Moreover, as noted

⁸ Plaintiffs' focus on plaintiffs' relative financial resources is also unavailing. (Doc. 141-1, at 8). Even if the Court could consider the parties' relative financial resources, both parties put forward evidence showing relatively low wealth.

⁹ Again, the low amount of damages awarded, even on a claim

above, the jury found defendant Committee's infringement to be innocent. (Doc. 130). Although innocent infringement is still infringement, the Court finds an award of attorney's fees would not further deter defendants from copyright infringement in this case.

As for the purposes of the Copyright Act, the Court finds that attorney's fees in favor of plaintiffs would not further serve the purposes of copyright law. Again, the Court must view all the circumstances of the case in light of the Copyright Act's "two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work." *Ferman*, 2016 WL 7187888, at *1 (citing *Kirtsaeng*, 579 U.S. at 204). Here, plaintiffs leveled a meritorious copyright infringement claim and defendants leveled well-established copyright defenses and earned a finding of innocent infringement. Adhering to the general rule that parties "bear their own attorney's fees" will strike an appropriate balance between these goals. *Fogerty*, 510 U.S. at 533; *Ferman*, 2016 WL 7187888, at *3.

For these reasons, the Court denies plaintiffs' motion for attorney's fees. The Court thus does not make any factual finding regarding a reasonable amount of attorney's fees.

IV. Recovering Costs

Both parties also request the Court tax costs in their favor. Title 17, United States Code Section 505 provides that in a copyright suit, "the court in its dis-

for statutory damages, indicates that rational parties would have crafted a resolution to this matter before trial.

cretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof.” 17 U.S.C. § 505. Because defendants made a Rule 68 Offer that plaintiffs did not accept, the Court conducts a different analysis for costs incurred before the offer and costs incurred after the offer. The Court first analyzes parties’ entitlement to post-offer costs, and then analyzes parties’ entitlement to pre-offer costs.

A. Post-Offer Costs

Defendants assert they are entitled to costs under Rule 68 because they made an offer to plaintiffs, unaccepted, that was in excess of the amount the jury awarded plaintiff Laney at trial. (Doc. 139-2, at 5). Plaintiffs resist, arguing that the Rule 68 offer of \$15,000 “included all costs and fees incurred and did not seem to be a reasonable offer at the time it was made.” (Doc. 149, at 7). Plaintiffs further assert this argument depends on the Court’s ruling: if the Court awarded plaintiffs’ attorney’s fees, then they will have beaten the Rule 68 offer. (*Id.*).

As noted above, the Court denied plaintiffs’ motions for attorney’s fees. Thus, plaintiffs did not beat defendants’ Rule 68 offer. For that reason, defendants are entitled to “costs incurred after the offer was made.” Fed. R. Civ. P. 68(d). Rule 68 does not entitle defendants to pre-offer costs, and defendants do not make any arguments to that extent. (Doc. 139-2, at 10). And again, defendants are not entitled to attorney’s fees, characterized as “post-offer non-traditional costs.” (Doc. 139-2, at 10). Thus, the Court turns only to the amount defendants claim for their post-offer traditional costs, in an amount of \$4,495.69. (Docs.

139, at 1; 139-2, at 14). Plaintiffs challenge these costs as well. (Doc. 149, at 12-13).

1. Applicable Law

Under Rule 68, if a plaintiff rejects a defendant's offer of judgment, and if the judgment finally obtained by the plaintiff is not more favorable than the offer, the plaintiff must pay the costs incurred by the defendant after the offer was made. *Perkins*, 138 F.3d at 338; *see, e.g., O'Brien*, 873 F.2d at 1120 (holding "a plaintiff who refuses an offer of judgment under Rule 68 and later fails to receive a more favorable judgment must pay the defendant's post-offer costs").

Title 28, United States Code, Section 1920 states that the following six expenses are taxable as costs:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this [T]itle [28, United States Code, Section 1923];
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of

this [T]itle [28, United States Code, Section 1828].

The Court of Appeals for the Eighth Circuit has not spoken on whether Rule 68 entitles defendants to costs beyond those enumerated in Title 28, United States Code, Section 1920. Other courts, however, have ruled that it does not, unless the substantive law applicable to that cause of action expands the general Section 1920 definition. *See Parkes v. Hall*, 906 F.2d 658, 660 (11th Cir. 1990) (“The rule we derive from the foregoing cases is that the costs which are subject to the cost-shifting provisions of Rule 68 are those enumerated in 28 U.S.C. § 1920, unless the substantive law applicable to the particular cause of action expands the general § 1920 definition.”); *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1278 n.7. (10th Cir. 2011) (same); *Zackaroff v. Koch Transfer Co.*, 862 F.2d 1263, 1265 (6th Cir. 1988); *Denny v. Westfield State Coll.*, 880 F.2d 1465, 1471 (1st Cir. 1989); *Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987); *Phillips v. Bartoo*, 161 F.R.D. 352, 354 (N.D. Ill. 1995). Despite the operation of Rule 68, then, defendants are only entitled to fees permitted by Section 1920.

In general, “[a] prevailing party is presumptively entitled to recover all of its costs.” *Thompson v. Wal-Mart Stores, Inc.*, 472 F.3d 515, 517 (8th Cir. 2006) (internal quotation marks and citation omitted); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 579 F.3d 894, 897 (8th Cir. 2009). But the Court bears the responsibility to determine which fees are taxable under Section 1920. “Section 1920 imposes ‘rigid controls on cost-shifting in federal courts,’ and ‘absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant’s . . . costs, federal courts are

bound by the limitations set out in’ [S]ection 1920.” *Nicholson v. Biomet, Inc.*, 537 F. Supp. 3d 990, 1036 (N.D. Iowa 2021), *aff’d*, 46 F.4th 757 (8th Cir. 2022) (internal citations omitted) (alterations in original). “If Section 1920 does not discuss a subject that could encompass the requested fees, the Court does not permit recovery of those fees.” *Liquid Cap. Exch., Inc.*, 2022 WL 15045058, at *12 (citing *Nicholson*, at 537 F. Supp. 3d at 1036).

2. Defendants’ Post-Offer Costs

Defendants claim \$4,495.69 in Post-Offer Costs. (Doc. 139-2, at 9, 10). These comprise multiple charges for purchasing Ink, purchasing Exhibit Materials, and an estimate of the trial transcript from the court reporter after the conclusion of trial. (Doc. 139-3, at 10, 14, 19, and 51). Even though defendants are entitled to post-offer costs under Rule 68, the Court finds that their requested costs are not properly taxable under Section 1920.

a. Trial Transcript Estimate

Trial transcripts are properly awardable under Section 1920(2) if they are “necessarily obtained for use in the case[.]” 28 U.S.C. § 1902(2). Contrary to plaintiffs’ argument (Doc. 149, at 14-15), trial transcripts may be “necessarily obtained for use in the case” even if procured for purposes of post-trial motions or appeal. *Baker v. John Morrell & Co.*, 263 F. Supp. 2d 1161, 1207-08 (N.D. Iowa 2003), *aff’d*, 382 F.3d 816 (8th Cir. 2004) (citing *McDowell v. Safeway Stores, Inc.*, 758 F.2d 1293 (8th Cir. 1985) (per curiam)); *see also Parada v. Anoka Cnty.*, 555 F. Supp. 3d 663, 687 (D. Minn. 2021), *aff’d*, 54 F.4th 1016 (8th

Cir. 2022). Courts focus on various factors in determining whether a transcript was necessary for use in a particular case, including:

[T]he length of the trial, the complexity of the issues, whether the transcript would minimize disagreement over the testimony of the witnesses, whether portions of the transcript were freely introduced in later hearings, whether the case was tried to the court or before a jury, and whether proposed findings of fact were required.

Baker, 263 F. Supp. 2d at 1207-08 (citing Charles Alan Wright, et al., 10 Federal Practice & Procedure: Civil 2d § 2677, at 438-43 (1998) (footnotes omitted)).

The jury trial was four days, but the relative lack of complexity and few legal issues argued and raised by defendants in post-trial motions counsels against finding the trial transcript was “necessarily obtained.” Further, defendants do not provide any further clarification in the pleadings on the amount they paid for these trial transcripts, or if they ever indeed paid for these transcripts.¹⁰ Due to this lack of information, on the pleadings before the Court, the Court cannot determine whether defendants “obtained” the trial transcripts for use in the case, let alone “necessarily obtained” those transcripts. Thus, the Court cannot tax the cost of these transcripts.

¹⁰ On its own investigation and consultation with the Court Reporter, the Court found defendants ordered copy fees at 90 cents a page. This sums up to 1,065 pages, or \$958.50. (Docs. 143, at 296; 144, at 322; 145, at 333; 146, at 106; 147, at 8). That amount is less than defendants’ request. (Doc. 139-3, at 51).

b. Copying Costs

With regard to defendants' costs for ink for printing, plaintiffs argue defendants "have provided no detail sufficient for the Court to evaluate the claimed printing costs." (Doc. 149, at 13). Plaintiffs specifically argue that defendants have not shown "how many pages they printed, how those pages were necessarily obtained for use in the case, or how said printing justifies full payment for multiple printer cartridges." (*Id.*). Defendants explain "[c]opy and preparation fees are expressly taxable, and most courts generally ask that copy fees be correlated to copy fees in the geographic region." (Doc. 157, at 6). Defendants state they expended these printer-cartridges "to create the multiple binders for the . . . exhibits that were necessary for trial." (Doc. 139-2, at 9-10).

As a preliminary matter, the Court notes defendants initially appeared to be asserting printing costs under Section 1920(3), not copying costs under Section 1920(4). (Doc. 139-2, at 10). The printing costs, unlike the copying costs, are statutorily not limited to cases "necessarily obtained for use in the case." 28 U.S.C. § 1920(3)-(4). Defendants, however, later characterize their fees as copying rather than printing. (Doc. 157, at 6). The Court thus holds defendants to their argument and construes defendants as asserting copying fees under Section 1920(4).

Defendants thus must show the copies were "necessarily obtained for use in the case." 28 U.S.C. § 1920(4). "Amounts sought for copy expenses must be documented or itemized in such a way that the Court can meaningfully evaluate the request." *Finan v. Good Earth Tools, Inc.*, No. 06-CV-878, 2008 WL

1805639, at *11 (E.D. Mo. Apr. 21, 2008), *aff'd*, 565 F.3d 1076 (8th Cir. 2009) (citation omitted); *McLelland v. Ridge Tool Co.*, 350 F. Supp. 3d 773, 779 (W.D. Ark. 2018).

Here, defendants assert they incurred the ink costs “to create the multiple binders for the . . . exhibits that were necessary for trial.” (Doc. 139-2, at 9-10); see (Docs. 139-3, at 10, 14, and 19). Other than stating that defendants incurred these expenses to build the exhibits, the Court cannot determine whether these expenditures were necessarily obtained. There is no indication of how much ink defendants originally had, or how much extra ink defendants incurred, or how much of the ink here defendants used. On this record, it is entirely possible defendants used only a single cartridge and kept the rest for use for future litigation against different parties. *See Finan*, 2008 WL 1805639, at *11 (denying an award of “inadequately documented” photocopy costs). Thus, for this reason the Court will not tax these costs for defendants.

3. Plaintiffs’ Post-Offer Costs

The Court denied plaintiffs’ motions for attorney’s fees. Thus, plaintiffs did not beat defendants’ Rule 68 offer. As a result, relevantly here, plaintiffs themselves are not entitled to post-offer costs from defendants. Fed. R. Civ. P. 68. “[A] party who fails to accept an offer of judgment within ten days and thereafter recovers a less favorable result may not recover her own post-offer costs (including attorney’s fees), even where they would otherwise be available, and also must pay the offeror’s post-offer costs.” *B.L. Through Lax v. District of Columbia*, 517 F. Supp. 2d 57, 60

(D.D.C. 2007) (citing *Marek*, 473 U.S. at 10); *Boisson v. Banian Ltd.*, 221 F.R.D. 378, 382 (E.D.N.Y. 2004).

The offer of judgment was dated on October 3, 2022. (Doc. 139-3, at 39, 41). Thus, plaintiffs are not entitled to costs accrued after October 3, 2022. It appears plaintiffs' only post-October 3, 2022, costs are the \$4,738.58 for Mr. Clark's attendance at trial. (Doc. 132-1, at 3). The Court, therefore, will not award plaintiffs these post-offer costs.

B. Pre-Offer Costs

The Court now turns to the pre-offer costs that both parties assert.

1. Applicable Law

Under Federal Rule of Civil Procedure 54(d)(1), the Court should tax costs in favor of a prevailing party. Again, there is a presumption in favor of taxing costs in favor of the moving party, but only if these costs are enumerated under Section 1920. *Stanley v. Cottrell, Inc.*, 784 F.3d 454, 464 (8th Cir. 2015) (citing 28 U.S.C. § 1920); *Craftsmen Limousine*, 579 F.3d at 897. "Section 1920 imposes 'rigid controls on cost-shifting in federal courts,' and 'absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's . . . costs, federal courts are bound by the limitations set out in' [S]ection 1920." *Nicholson*, 537 F. Supp. 3d at 1036 (alterations in original) (citation omitted). If Section 1920 does not discuss a subject that could encompass the requested fees, the Court does not permit recovery of those fees. *Liquid Cap. Exch., Inc.*, 2022 WL 15045058, at *12 (citation omitted).

2. Defendants' Pre-Offer Costs

Defendants assert \$4,103.50 from a deposition transcript of Laney Griner on April 29, 2022 (Doc. 139-3, at 2) and \$2,585.00 for a video record of that deposition (*Id.*, at 5). These fall under “[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case” under Section 1920(2). 28 U.S.C. § 1920(2). Though plaintiffs assert defendants cannot charge for both (Doc. 149, at 14), the Eighth Circuit has held otherwise. *Stanley*, 784 F.3d at 467 (“[Section] 1920(2) permits taxation of costs for both printed and electronically recorded transcripts of the same deposition as long as each transcript is necessarily obtained for use in a case.”). “But ‘[b]efore awarding such costs, the court should determine that transcripts were not obtained primarily for the convenience of parties but were necessary for use in the case.’” *Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 431 (8th Cir. 2017) (alteration in original) (citing *McDowell*, 758 F.2d at 1294); *see e.g., E.E.O.C. v. CRST Van Expedited, Inc.*, No. 97-CV-95, 2010 WL 520564, at *6 (N.D. Iowa Feb. 9, 2010), vacated on other grounds sub nom., 670 F.3d 897 (8th Cir. 2012).

Plaintiffs here assert defendants are not entitled to video deposition recording expenses because they did not use video testimony at trial and thus the video depositions were not a necessary expense for this case. (Doc. 149, at 13). Defendants do not address this argument in their reply. (Doc. 157). In their motions, defendants offer no indication of why it needed both stenographic transcripts and video records, or why the stenographic transcripts would have been insufficient for trial or for appeal. In fact, as plaintiffs note, defendants did not use video testimony at trial even as

defendants relied upon the stenographic transcripts in their questioning. For that reason, the Court finds, based on this record, that the video depositions were not necessary to the case, while the stenographic transcripts were necessary. It thus denies the video costs but grants the stenographic transcripts costs: \$4,103.50 (Doc. 139-3 at 2).

3. Plaintiffs' Pre-Offer Costs

Plaintiffs assert the following pre-offer costs: \$402 for the filing fee (Doc. 132-1, at 1); and \$4,283.65 in fees for transcripts of necessary depositions of witnesses who testified at trial in this case, which consists of \$2,224.20 for the transcript of Mrs. Griner's deposition and \$421.65 for the transcript of Samuel Griner's deposition (Doc.132-2, at 5-6); \$531.45 for the deposition transcript of Jeff King, the designated Rule 30(b)(6) deponent of King for Congress (*Id.*, at 8); and \$1,106.35 for the deposition of Steven King, who was also a witness for King for Congress. (*Id.*, at 9).

Under Federal Rule of Civil Procedure 54(d)(1), the Court should tax costs in favor of a prevailing party. The \$402 incurred in the filing fees falls under "fees of the clerk and marshal[.]" 28 U.S.C. § 1920(1). As for the transcripts, the Court finds these deposition transcripts "necessarily obtained for use in the case[.]" as each witness testified at trial. *Id.* § 1920(4).

Thus, the Court awards these costs to plaintiffs.

V. Conclusion

The Court denies both parties' motions for attorney's fees, but grants-in-part and denies-in-part both parties' motions for costs. (Docs. 139, 141.) Defendants

App.50a

are awarded \$4,103.50 in costs. Plaintiffs are awarded \$4,283.65.

IT IS SO ORDERED this 22nd day of February, 2023.

/s/ C.J. Williams
United States District Judge
Northern District of Iowa

**ORDER DENYING MOTIONS TO AMEND
JUDGMENT, U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
(FEBRUARY 22, 2023)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LANEY MARIE GRINER and SAM GRINER,

Plaintiffs,

v.

STEVEN ARNOLD KING and KING FOR
CONGRESS,

Defendants.

No. 21-CV-4024-CJW-MAR

Before: C.J. WILLIAMS,
United States District Judge.

I. INTRODUCTION

This matter is before the Court on defendants' motions to amend judgment (Docs. 133; 140), defendants' motion to amend/replace pre-existing motions (Doc. 137), and plaintiffs' motion to amend judgment (Doc. 142).¹ Both parties timely resisted each other's motions. (Docs. 148; 152). For the following reasons, the Court **grants** defendants' motion to amend/replace

pre-existing motions (Doc. 137) but **denies** defendants' motions to amend judgment (Docs. 133; 140) and **denies** plaintiffs' motion to amend judgment (Doc. 142).

II. BACKGROUND

This case involves alleged infringements of a copyrighted photographic work and an unauthorized use of a person's likeness. The Court will discuss additional facts and law as they become necessary to its analysis.

A. Factual Background

Plaintiff Laney Griner ("Laney") owns the registered copyright in a photograph (the "Subject Photograph") of plaintiff Sam Griner ("Sam"). (Doc. 79-2, at 1-2). The Subject Photograph formed the basis of a popular Internet meme titled "Success Kid." (*Id.*). Plaintiff Laney licensed the Subject Photograph commercially to advertisers Vitamin Water and Virgin Mobile, among others. (*Id.*).

Defendant Steven King ("King") is a former Congressman. (Doc. 80-3, at 5). Defendant King for Congress ("Committee") is a campaign committee for defendant King that owned and operated a website at www.steveking.com ("the website") and posted various videos and pictures on the website to raise money from political donors for defendant King's campaign. (*Id.*, at 2, 5). Defendant Committee owned or controlled the Facebook Page, a Twitter account, a Flickr account, a Winred page, and their own website. (Doc. 79-3, at 115).

During defendant King’s campaign in 2020, defendant Committee used an independent contractor named Michael Stevens to create and circulate memes throughout social media. (Doc. 80-3, at 6). Defendant King, Jeff King (the Campaign Manager), and Michael Stevens were “involved in making or editing the Steve King pages[.]” (Doc. 79-3, at 115). Michael Stevens created a Meme Action Post (“the Post”) incorporating part of the Subject Photograph. (Doc. 80-3, at 3). The Post placed the image of plaintiff Sam on a different background than that of the Subject Photograph. (*Id.*). The Post was displayed on a Winred, Inc. server and on defendant Committee’s Facebook Page. (Docs. 80-3, at 3, 4, and 6; 79-3, at 3, 106).

B. Procedural History

On December 30, 2020, plaintiffs filed a complaint against defendants King, Committee, Winred, Inc., and Does 1–10 in the United States District Court for the District of Columbia. (Doc. 1). On April 7, 2021, plaintiffs filed an amended complaint naming the same defendants but including more factual allegations against all defendants. (Docs. 16; 17-1). On May 3, 2021, plaintiffs voluntarily dismissed claims against Winred, Inc. (Doc. 28). On May 17, 2021, the remaining defendants filed a first motion to dismiss for lack of personal jurisdiction and failure to state a claim, as well as a motion to transfer the case in the alternative. (Doc. 29). On June 2, 2021, both parties moved to transfer this matter to the Northern District of Iowa. (Doc. 32). On June 21, 2021, the case was so transferred. (Doc. 33). On July 21, 2021, defendants filed a second motion to dismiss for failure to state a claim. (Doc. 43). The Court denied that motion. (Doc. 57). Plaintiffs and defendants then filed cross motions

for summary judgment. (Docs. 79; 80). The Court denied these motions as well. (Docs. 86; 96).

A jury trial was held on this matter between November 14, 2022, and November 18, 2022. (Docs. 121; 122; 123; 125; 128). The jury granted a verdict in favor of plaintiff Laney, finding that defendant Committee committed innocent infringement of the Success Kid Photograph and awarding plaintiff Laney \$750. (Doc. 130, at 3). The Court then entered judgment in favor of plaintiff Laney for \$750. (Doc. 131).

III. MOTION TO REPLACE PREEXISTING MOTIONS

Defendants move to amend/replace pre-existing motions including Declaration of J. Wright (Doc. 135), the first motion to amend judgment and award for bill of costs (Doc. 133), and the Bill of Costs (Doc. 134). (Doc. 137). Despite the title, no change was proposed to the Declaration of J. Wright. (Doc. 135). The first motion to amend judgment and award for bill of costs (Doc. 133) and the Bill of Costs (Doc. 134) have been replaced in the record by the amended motion to amend judgment (Doc. 140) and Bill of Costs (Doc. 139).

Under LR 7(d)(8), the moving party need not file a brief “[t]o amend or supplement a motion, brief, or other document[.]” LR 7(d)(8). Though plaintiffs filed a resistance (Doc. 149) to defendants’ motion to amend/replace pre-existing motions (Doc. 137), that resistance instead addresses the merits of defendants’ motion to tax cost and for an award of attorneys’ fees (Doc. 149, at 1). Thus, the Court construes defendants’ motion to replace preexisting motions as unresisted. After a review of the motions, the Court finds the

motion to amend judgment as contained in Doc. 133 is identical to the motion to amend in Doc. 140. As a result, the Court **grants** defendants' motion to amend/replace pre-existing motions. (Doc. 137).

The Court now turns to defendants' motion to amend judgment (Doc. 140) and plaintiffs' motion to amend judgment (Doc. 142).

IV. DEFENDANTS' MOTION TO AMEND JUDGMENT

Defendants move under Rule 59(e) for the Court to exercise its discretion under Title 17, United States Code Section 504 to lower the \$750 statutory minimum to \$200 due to the jury's finding of innocent infringement. (Docs. 133-2, at 1-4; 140-1, at 1)2. Plaintiffs resist, asserting that defendants waived their right to ask for a lower damages award and that the motion lacks any factual support. (Doc. 148). For the follow reasons, the Court **denies** defendants' motion.

A. Rule 59(e) Standard

Federal Rule of Civil Procedure 59(e) enables parties to submit a motion to alter or amend a judgment within 28 days of the judgment's entry. "A district court has broad discretion in determining whether to grant or deny a motion to alter or amend judgment pursuant to Rule 59(e)[.]" *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006).

The Eighth Circuit Court of Appeals has explained that, under Rule 59(e), a court may alter or amend a judgment only if it finds a "manifest" error of law or fact in its ruling. *Nicholson v. Biomet, Inc.*, 537 F.

Supp. 3d 990, 1029–30 (N.D. Iowa 2021), *aff'd*, 46 F.4th 757 (8th Cir. 2022), *reh'g denied*, No. 21-2263, 2022 WL 5239545 (8th Cir. Oct. 6, 2022) (citing *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (further citations omitted)). The Eighth Circuit Court of Appeals has more fully explained the standard under Rule 59(e):

Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court's power to correct its own mistakes in the time period immediately following entry of judgment. Rule 59(e) motions serve a limited function of correcting manifest errors of law or fact or to present newly discovered evidence. Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.

Id. (citing *Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (internal quotations omitted) (citations omitted)).

B. Discussion

Defendants do not assert any manifest error of law or fact by the Court. Instead, defendants assert that the jury was correct in finding that the infringement was innocent and that the Court was correct in providing an instruction that did not cite the possibility of an award less than \$750.00. (Doc. 140-1, at 2). Defendants then state that the Court in its discretion may reduce the award of statutory damages “to a sum of not less than \$200.” (Doc. 140-1, at 2). Plaintiffs resist, arguing that the jury has final say

over the amount of statutory damages awarded, including with findings of willful or innocent infringement and that defendants waived any argument that the jury should have been allowed to reduce the damages to \$200. (Doc. 148). In reply, defendants assert that the Court has equitable discretion to reduce the damages. (Doc. 159).

In relevant part, Section 504(c)(2) provides:

In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.

17 U.S.C. § 504(c)(2).

Despite the plain text of the statute, however, courts have ruled that under the Seventh Amendment of the United States Constitution, the jury decides the amount of statutory damages under Section 504(c). “[T]he Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself.” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998); *Cass Cnty. Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 644 (8th Cir. 1996); *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 969 (8th Cir. 2005). Thus, as a general matter, “[t]he right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to [a] copyright owner.” *Pearson Educ., Inc. v. Almgren*, 685 F.3d 691, 694 (8th Cir. 2012)

(quoting *Feltner*, 523 U.S. at 353) (alteration in original); *Bar-Meir v. N. Am. Die Casting Ass'n*, 55 F. App'x 389, 391 (8th Cir. 2003).³

Here, the Court instructed the jury that if it found that the infringement was willful, it could increase the damages up to \$150,000. (Doc. 126, at 43). The Court did not instruct the jury that it could reduce the damages to \$200 were it to find innocent infringement. (*Id.*). Defendants, however, never requested such an instruction, nor did they object to the Court's statutory damages instructions on this ground. (*See, e.g.*, Docs. 117, 122, 123, 125, 126). Thus, they waived any argument that the jury should have been instructed that they could have reduced the damages further. To the extent defendants ask for a remittitur because "the remedy is equitable in nature" (Doc. 159, at 2), the Court of Appeals for the Eighth Circuit characterized the remedy of statutory damages as "legal in character[.]" not equitable. *Cass Cnty. Music Co.*, 88 F.3d at 642; *Taylor Corp.*, 403 F.3d at 969. Statutory damages, thus, are not equitable remedies. *Id.*

Even if the Court had the power to reduce these damages to \$200, it would not do so. Though defendants offered reasons why a jury would have awarded statutory damages in an amount lower than \$750 (Doc. 159, at 2-4), there is no guarantee the jury would have reduced the award below \$750, let alone to \$200. As the Court instructed, the purpose of a statutory damage "is not only to compensate the plaintiff for her losses, which may be hard to prove, but also to penalize the infringer and deter future violations of the copyright laws." (Doc. 126, at 43). Here, the Court could only speculate whether the jury would have found an amount less than \$750 sufficient or necessary "to

compensate plaintiff for her losses” or to penalize defendants and deter future violations of the copyright laws.

For these reasons, then, the Court **denies** defendants’ motion to amend the judgment.

V. PLAINTIFFS’ MOTION TO AMEND JUDGMENT

Plaintiffs also move under Rule 59(e) to amend the judgment. (Doc. 142). Here, plaintiffs assert the Court should amend the judgment because plaintiffs are entitled to judgment as a matter of law that Steven King is directly liable for the Committee’s infringement. (Doc. 142-1, at 2). Defendants resist, reciting the law of vicarious liability. (Doc. 152). Plaintiffs timely replied. (Doc. 155). For the following reasons, the Court **denies** plaintiffs’ motion to amend the judgment.

A. The Proper Standard to Analyze This Motion

Again, under Rule 59(e), a court may alter or amend a judgment only if it finds a “manifest” error of law or fact in its ruling. *Nicholson*, 537 F. Supp. 3d at 1029–30. Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court’s power to correct its own mistakes in the time period immediately following entry of judgment.” *Id.* (quoting *Innovative Home Health Care, Inc.*, 141 F.3d at 1286).

Here, plaintiffs do not argue any error by the Court. Plaintiffs instead argue that defendants failed to present evidence rebutting the proposition that defendant Committee acted as an agent of defendant King and, thus, move the Court to find defendant King

liable for that infringement and that it was an error as a matter of law to find defendant King was not liable for the acts of defendant Committee. (Doc. 142-1, at 2). Plaintiffs' arguments concern the evidence presented at trial and sound in evidence and judgment as a matter of law. Thus, instead of a Rule 59(e) motion, the Court construes plaintiffs' motion as a renewed motion for judgment as a matter of law under Rule 50(b).

B. Rule 50(b) Standard

Rule 50 of the Federal Rules of Civil Procedure establishes the standard for a court to grant a motion for judgment as a matter of law. It provides, in pertinent part:

(a) Judgment as a Matter of Law.

- (1) **In General.** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: resolve the issue against the party; and grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
- (2) **Motion.** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

- (1) allow judgment on the verdict, if the jury returned a verdict;
- (2) order a new trial; or
- (3) direct the entry of judgment as a matter of law.

FED. R. CIV. P. 50(a)–(b). In ruling on a motion under Rule 50, a court must draw all reasonable inferences in favor of the nonmoving party. *Roberson v. AFC Enters., Inc.*, 602 F.3d 931, 933 (8th Cir. 2010); *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 900 (8th Cir. 2006). A court must deny a motion for judgment as a matter of law if it concludes that reasonable jurors could draw different conclusions based on the evidence. *Roberson*, 602 F.3d at 933-34. A court must also “give the prevailing party the benefit of all favorable inferences which may reasonably be drawn from the facts[.]” *Neely v. Am. Fam. Mut. Ins. Co.*, 930 F. Supp. 360, 368 (N.D. Iowa 1996) (quoting *Minneapolis Cmty. Dev. Agency v. Lake Calhoun Assocs.*,

928 F.2d 299, 301 (8th Cir. 1991)). “Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.” *Phillips v. Collings*, 256 F.3d 843, 847 (8th Cir. 2001) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000)).

In other words, a court ruling on a renewed motion for a judgment as a matter of law, must

- (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Stlts v. Am. Pop Corn Co., 815 F.3d 409, 418 (8th Cir. 2016) (quoting *Jones v. Edwards*, 770 F.2d 739, 740 (8th Cir. 1985)) (additional citation omitted). In drawing all reasonable inferences in favor of the nonmoving party, a court must “not make credibility determinations or weigh the evidence.” *Meyers v. Starke*, 420 F.3d 738, 741 (8th Cir. 2005) (citation omitted).

The Eighth Circuit has repeatedly stated that “[j]udgment as a matter of law is appropriate only when the record contains ‘no proof beyond speculation to support the verdict.’” *Am. Bank of St. Paul v. TD Bank, N.A.*, 713 F.3d 455, 462 (8th Cir. 2013) (quoting *Wilson v. Brinker Int’l, Inc.*, 382 F.3d 765, 770 (8th Cir. 2004)) (additional citations omitted). In sum, judgment as a matter of law “is appropriate ‘when all the evidence points one way and is susceptible of no

reasonable inferences sustaining the position of the non-moving party.” *Hortica-Florists’ Mut. Ins. Co. v. Pittman Nursery Corp.*, 729 F.3d 846, 854 (8th Cir. 2013) (quoting *Ehrhardt v. Penn Mut. Life Ins. Co.*, 21 F.3d 266, 269 (8th Cir. 1994)). On the other hand, “[a] mere scintilla of evidence is inadequate to support a verdict,’ and judgment as a matter of law is appropriate when the record contains no proof beyond speculation to support the verdict.” *Clark v. Kan. City Mo. Sch. Dist.*, 375 F.3d 698, 701 (8th Cir. 2004) (quoting *Larson v. Miller*, 76 F.3d 1446, 1452 (8th Cir. 1996)); *Nicholson*, 537 F. Supp. 3d at 1006–08.

C. Analysis

After the close of evidence, the Court denied defendants’ motion for directed verdict, finding that in the light most favorable to plaintiffs, there was sufficient evidence by which a reasonable jury could conclude that Committee was acting as an agent for King and at his direction and under his control. (Doc. 145, at 282). The jury then found that defendant Committee infringed on plaintiff Laney’s copyright in the Photograph but that defendant Steven King did not infringe on plaintiff Laney’s copyright either vicariously or by acting through an agent. (Doc. 130, at 2). Plaintiffs now request judgment as a matter of law against defendant King by way of direct liability from defendant Committee’s infringement. (Doc. 142-1). Plaintiffs specifically argue that defendant King was directly liable for defendant Committee’s infringement because defendant Committee “acted with actual authority in infringing Mrs. Griner’s photograph a part of Mr. King’s fundraising campaign[.]” (Doc. 142-1, at 2). Defendants resist, asserting that the evidence does not show that defendant King vicariously

infringed the copyright.⁴ (Doc. 152). For the following reasons, the Court **denies** plaintiffs' motion.

As the Court instructed the jury, defendant Committee "only has actual authority to take actions that are designated or implied in the principal's manifestations to the agent, and to take acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act." (Doc. 126, at 24). Plaintiffs argue that the undisputed evidence presented at trial left no question that defendant Committee acted with actual authority to do "what it did-create fundraising ads and promotional material for King." (Doc. 142-1, at 2).

It is the jury's responsibility to determine what evidence and testimony to believe and what evidence and testimony to not believe. *Nicholson*, 537 F. Supp. 3d at 1009; *see also Curtis v. Elecs. & Space Corp.*, 113 F.3d 1498, 1502 (8th Cir. 1997). It is also the jury's responsibility to consider the totality of the evidence and make its decision based on all the evidence that is presented to it. *Nicholson*, 537 F. Supp. 3d at 1009. At trial, two witnesses testified to the separation between defendant King and defendant Committee. Jeff King testified that the purpose of King for Congress was to raise funds for King's congressional campaigns. (Doc. 144, at 132). He further testified that he ultimately reported to defendant King. (*Id.*, at 133). Nevertheless, Jeff King was responsible for all fundraising for the campaign and had the ultimate authority within the committee for fundraising, including ads and online solicitations for campaign money. (*Id.*, at 133-34). Jeff King further testified that

he, in his role as campaign manager, had ultimate responsibility for approving the online ads. (*Id.*, at 134, ⁵ 135.). Moreover, Jeff King testified that he was “not sure that [he] had conversations with [Steve King]” right away about how to respond to the cease-and-desist letter. (*Id.*, at 142).

Defendant King testified that “[t]here were times [they] would go weeks during a campaign without having a discussion because most of the times things were going well enough [they] didn’t need to.” (Doc. 145, at 223). King further testified that defendant Committee managed the communications and that there were press releases that King did not see. (*Id.*, at 223-24). He also testified that much of the fundraising was between Jeff King and Michael Stevens, without defendant King’s input. (*Id.*, at 244). He had not given any instructions or guidance regarding the use of photographs or other copyright-protected material in his advertisement. (*Id.*, at 244-45). Moreover, he testified that whether defendant Committee sought permission to use photographs for campaign activities would have been outside his purview. (*Id.*, at 246-47).

This is a close call. However, at this stage and under this motion, viewing the testimony in the light most favorable to the nonmoving party, a reasonable jury could conclude that defendant King did not make manifestations to defendant Committee concerning fundraising. That is not to say no reasonable jury could find otherwise. Again, the Court denied defendants’ motion for directed verdict on this ground because it found that a reasonable jury could find that defendant King was liable for defendant Committee’s copyright infringement. (Doc. 145, at 282). This, how-

ever, is not a case where “all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the non-moving party.” *Hortica-Florists’ Mut. Ins. Co.*, 729 F.3d at 854 (citation omitted).

As a final note, the Court disagrees with plaintiffs’ assertion that the jury “seemingly ignored the law that was given to it” when it found defendant King not liable for copyright infringement. (Doc. 142-1, at 3). This jury was selected in part by plaintiffs and listened attentively to evidence for three days. After, the jurors drew upon their experiences and observations and determined, as a group, that liability against defendant King was inappropriate. Other than plaintiffs’ own beliefs that the jurors got it wrong, there is nothing in the record or in the jurors’ conduct that indicates they ignored the law.

VI. CONCLUSION

For these reasons, the Court **grants** defendants’ motion to amend/replace preexisting motions (Doc. 137), but **denies** defendants’ motions to amend judgment (Docs. 133; 140), and **denies** plaintiffs’ motion to amend judgment (Doc. 142).

IT IS SO ORDERED this 18th day of January, 2023.

/s/ C.J. Williams

United States District Judge
Northern District of Iowa 13

**ORDER, U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF IOWA
(AUGUST 9, 2022)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LANEY MARIE GRINER and SAM GRINER,

Plaintiffs,

v.

STEVEN ARNOLD KING and KING FOR
CONGRESS,

Defendants.

No. 21-CV-4024 CJW-MAR

Before: C.J. WILLIAMS,
United States District Judge.

I. Introduction

This matter is before the Court on plaintiffs' motion for partial summary judgment (Doc. 79) and defendants' motion for summary judgment (Doc. 80). For the following reasons, the Court denies plaintiffs' motion for partial summary judgment (Doc. 79) and denies-in-part and grants-in-part defendants' motion for summary judgment (Doc. 80).

II. Background

This case involves alleged infringements of a copyrighted photographic work and an unauthorized use of a person's likeness. The Court will discuss additional facts and law as they become necessary to its analysis.

A. Factual Background

Plaintiffs Laney Marie Griner ("Laney") and Sam Griner ("Sam") are individuals residing in Jacksonville, Florida. (*Id.*, at 2). Plaintiff Laney owns the registered copyright in a photograph of plaintiff Sam (the "Subject Photograph") that formed the basis of a popular Internet meme titled "Success Kid." (Doc. 79-2, at 1-2). Plaintiff Laney licensed the Subject Photograph commercially to advertisers Vitamin Water and Virgin Mobile, among others. (*Id.*).

Defendant Steven King ("King") is a former Congressman. (Doc. 80-3, at 5). Defendant King for Congress ("Committee") is a campaign committee for defendant Steve King that owns and operates a website at www.steveking.com ("the website"), and posts various videos and pictures on the website to raise money from political donors for defendant King's campaign. (*Id.*, at 2, 5). Defendant Committee owns or controls the Facebook Page, a Twitter account, a Flickr account, a Winred page, and their own website. (Doc. 79-3, at 115).

During Defendant King's campaign in 2020, defendant Committee used an independent contractor named Michael Stevens to create and circulate memes throughout social media. (Doc. 80-3, at 6). Defendant King, Jeff King (the Campaign Manager), and Michael

Stevens, are “involved in making or editing the Steve King pages[.]” (Doc. 79-3, at 116). Michael Stevens created a Meme Action Post (“the Post”) incorporating part of the Subject Photograph. (Doc. 80-3, at 3). The Post places the image of plaintiff Sam on a different background than that of the Photograph. (*Id.*). The Post was displayed on a Winred, Inc. server and on defendant Committee’s Facebook Page. (Docs. 80-3, at 3, 4, and 6; 79-3, at 3, at 106).

B. Procedural History

On December 30, 2020, plaintiffs filed a complaint against defendants Steven King, Committee, Winred, Inc., and Does 1-10 in the United States District Court for the District of Columbia. (Doc. 1). On April 7, 2021, plaintiffs filed an amended complaint naming the same defendants but including more factual allegations against all defendants. (Docs. 16; 17-1). On May 3, 2021, plaintiffs voluntarily dismissed claims against Winred, Inc. (Doc. 28). On May 17, 2021, the remaining defendants filed a first motion to dismiss for lack of personal jurisdiction and failure to state a claim, as well as a motion to transfer case. (Doc. 29). On June 2, 2021, both parties moved to transfer this matter to the Northern District of Iowa. (Doc. 32). On June 23, 2021, the case was so transferred. (Doc. 34). On July 21, 2021, defendants filed a second motion to dismiss for failure to state a claim. (Doc. 43). The Court denied that motion. (Doc. 57). Plaintiffs and defendants then filed cross motions for summary judgment. (Docs. 79; 80).

III. Applicable Law

A. Summary Judgment

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When asserting that a fact is undisputed or is genuinely disputed, a party must support the assertion by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials.” Fed. R. Civ. P. 56(c)(1)(A); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Alternatively, a party may show that “the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(B). More specifically, “[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2).

A fact is “material” if it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted). “An issue of material fact is genuine if it has a real basis in the record.” *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992). It is also genuine “when a reasonable jury could return a verdict for the nonmoving party on the question.” *Wood v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (internal quotation marks omitted). Evidence that presents only “some metaphysical doubt as to the material facts,”

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), or evidence that is “merely colorable” or “not significantly probative,” *Anderson*, 477 U.S. at 249-50, does not make an issue of fact genuine. In sum, a genuine issue of material fact requires “sufficient evidence supporting the claimed factual dispute” that it “require[s] a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Id.*, at 249 (citation and internal quotation marks omitted).

The party moving for summary judgment bears “the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue.” *Hartnagel*, 953 F.2d at 395. The opposing party may not then simply point to allegations made in her complaint but must identify and provide evidence of “specific facts creating a triable controversy.” *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1085 (8th Cir. 1999) (internal quotation marks omitted). When considering a motion for summary judgment, “[t]he court need consider only the cited materials, but it may consider other materials in the record.” Fed. R. Civ. P. 56(c)(3). Even so, the moving party does not meet its burden by simply providing a massive record, and the Court “will not sort through a voluminous record in an effort to find support for the plaintiff’s allegations.” *Howard v. Columbia Pub. Sch. Dist.*, 363 F.3d 797, 800 (8th Cir. 2004).

The moving party’s burden of production turns on its burden of persuasion at trial. If the moving party bears the burden of persuasion on the relevant issue at trial, it must support its motion with credible evidence available under Rule 56(c) that would entitle it

to a directed verdict if not challenged at trial. *Celotex Corp.*, 477 U.S. at 331; *Firemen's Fund Ins. Co. v. Thien*, 8 F.3d 1307, 1310 (8th Cir. 1993). But, if the moving party does not bear the burden of persuasion at trial, it has two options to satisfy its Rule 56 burden of production. First, it may submit affirmative evidence that negates an essential element of the nonmoving party's claim. *Celotex Corp.*, 477 U.S. at 331 (1986); *see also Bedford v. Doe*, 880 F.3d 993, 996 (8th Cir. 2018). Second, it may show that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Celotex Corp.*, 477 U.S. at 331 (1986); *see also Bedford*, 880 F.3d at 996.

Once the moving party meets its burden of production, the nonmoving party must go beyond the pleadings and show by depositions, affidavits, or other evidence "specific facts which create a genuine issue for trial." *See Mosley v. City of Northwoods*, 415 F.3d 908, 910 (8th Cir. 2005) (internal citation and quotation marks omitted). In determining whether a genuine issue of material fact exists, courts must view the evidence in the light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences that can be drawn from the facts. *Tolan v. Cotton*, 572 U.S. 650, 651 (2014); *Matsushita*, 475 U.S. at 587-88 (citation omitted); *see also Reed v. City of St. Charles*, 561 F.3d 788, 790 (8th Cir. 2009). A court does "not weigh the evidence or attempt to determine the credibility of the witnesses." *Kammueler v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004). Rather, a "court's function is to determine whether a dispute about a material fact is

genuine.” *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996).

B. Copyright Infringement

To prove copyright infringement, a plaintiff must show: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *see also Taylor Corp. v. Four Seasons Greetings, L.L.C.*, 403 F.3d 958, 962-63 (8th Cir. 2005). The Court of Appeals for the Eighth Circuit addresses the ownership of a valid copyright before determining whether that copyright was infringed. *See Taylor Corp.*, 403 F.3d at 964; *Nucor Corp. v. Tennessee Forging Steel Serv., Inc.*, 476 F.2d 386, 389, 391-92 (8th Cir. 1973).

IV. Plaintiffs’ Motion for Partial Summary Judgment

Plaintiffs seek partial summary judgment on their claim for copyright infringement against defendants King and Committee. (Doc. 79-1, at 6). Plaintiffs, however, fail to meet their initial burden to show that they are entitled to judgment as a matter of law, because the question of substantial similarity in this dispute is a close question of fact. The Court therefore denies this motion.

Plaintiffs assert that plaintiff Laney owns a valid copyright in the Subject Photograph. (Doc. 79-1, at 9). Plaintiffs argue that plaintiff Laney is entitled to a presumption of an ownership of valid copyright in the Subject Photograph because plaintiff Laney registered the Subject Photograph in February 2012, within five years after its first publication. (*Id.*, at 10). Plaintiffs

further argue that even absent the presumption, plaintiff Laney holds a valid copyright because she has authorship in the Subject Photograph and the Subject Photograph satisfies the “minimal standard” of originality requirement of copyright. (*Id.*). Plaintiffs then assert that defendants “admit that they copied [plaintiff Laney Griner’s] Subject Photograph.” (*Id.*, at 11). Plaintiffs further assert that this copying “satisfies both prongs of the Eighth Circuit’s substantial similarity test.” (*Id.*). Plaintiffs finally assert that defendants’ Affirmative Defenses fail. (*Id.*, at 12). In all cases, plaintiffs do not differentiate between the liability of defendant King or defendant Committee.

Defendants resist, arguing first that “[defendant] Steve King is not an agent of King for Congress for purposes of the infringing acts.” (Doc. 83, at 2). Specifically, defendants assert that King cannot be an agent “because none of the acts, other than an approval of an apology, can be ascribed to King.” (*Id.*). Defendants then assert a defense of “unclean hands,” asserting that plaintiff Laney Griner created the memes despite her saying that she did not create the memes. (*Id.*, at 4).

A. Copyright in the Photograph

As a preliminary matter, the Court finds that plaintiff Laney owns a valid copyright in the Subject Photograph. Specifically, the Court finds that plaintiffs have copyright in the specific image of Sam Griner in the Subject Photograph. Plaintiffs, however, have copyright only in the image of the Subject Photo, not in any image of Sam Griner that was taken at that location or that time.

As the Court noted in its previous Order, in the context of photographs, the image of a subject and the subject itself may both receive copyright protection, based on the originality of the photograph. *Mannion v. Coors Brewing Co.*, 377 F. Supp.2d 444, 452 (S.D.N.Y. 2005). A photograph may be original in three respects that are not mutually exclusive. *Id.* There may be originality in rendition, which resides “in such specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc.” *Id.* (internal quotations omitted). To the extent a photograph is original in this way, “copyright protects not what is depicted, but rather how it is depicted.” *Id.* (emphasis in original). There may be originality in timing, in which case the image that exhibits the originality, but not the underlying subject, qualifies for copyright protection. *Id.* at 453. There may also be originality in the creation of the subject if the author created “the scene or subject to be photographed.” *Id.* (internal quotations omitted). In this case, a photograph may be original to the extent that the photographer created “the scene.” *Id.* For example, electing and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, makes a photograph to be an original work of art. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

When “a photograph is original [by] rendition or timing, copyright protects the image but does not prevent others from photographing the same object or

scene.” *Mannion*, 377 F. Supp.2d at 454. “By contrast, to the extent that a photograph is original in the creation of the subject, copyright extends also to that subject.” *Id.* “Thus, an artist who arranges and then photographs a scene often will have the right to prevent others from duplicating that scene in a photograph or other medium.” *Id.*

Here, plaintiff Laney never asserts that she “arranged and then photographed” the scene, so she would not be entitled to originality “in the creation of the subject.” Plaintiffs do assert, however, that Laney Griner took “a photograph of her son . . . on August 26, 2007 (the ‘Subject Photograph’)[.]” (Doc. 79-2, at 1). The Court finds that this is sufficient to find originality in timing. Therefore, the Court finds that plaintiff Laney is entitled to copyright protection in the image of the Subject Photograph.

B. Substantial Similarity

Plaintiffs’ motion, however, fails on the issue of substantial similarity. Plaintiffs argue that there is “no real dispute that [d]efendants copied the Subject Photograph[.]” (Doc. 79-1, at 11). Plaintiffs assert that defendants “admit that they copied Mrs. Griner’s Subject Photograph.” (Docs. 79-1, at 11; 79-2, at 2; 79-3, at 114). Plaintiffs then assert that defendants’ Post was “substantially similar” to the Subject Photograph under the law of the Eighth Circuit. (*Id.*). Though defendants do not resist this argument, the Court finds that plaintiffs fail to meet their initial burden to show that no reasonable jury would find that there was no substantial similarity between the Subject Photograph and the Post.

A court can properly determine substantial similarity as a matter of law. *See Nelson v PRN Prods., Inc.*, 873 F.2d 1141, 1142 (8th Cir. 1989). Because substantial similarity “is a close question of fact, however, summary judgment has traditionally been frowned upon.” *Benchmark Homes, Inc. v. Legacy Home Builders, L.L.C.*, No. 8:03CV527, 2006 WL 994566, at *3 (D. Neb. Jan. 27, 2006) (cleaned up)). When substantial similarity is the sole issue, summary judgment is appropriate “if the works are so dissimilar that ‘reasonable minds could not differ as to the absence of substantial similarity in expression.’” *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 121 (8th Cir. 1987); *Design Basics, LLC v. Spahn & Rose Lumber Co.*, No. 19-CV1015-CJW-MAR, 2021 WL 493415, at *7 (N.D. Iowa Feb. 10, 2021).

The Eighth Circuit Court of Appeals uses a two-step process to determine whether two works are substantially similar. *Hartman*, 833 F.2d at 120. The two-step process considers the substantial similarity “not only of the general ideas but of the expressions of those ideas as well.” *Id.* First, “similarity of ideas is analyzed extrinsically, focusing on objective similarities in the details of the works.” *Id.* The extrinsic test depends on objective criteria, such as “the type of artwork involved, the materials used, the subject matter, and the setting for the subject.” *Nelson*, 873 F.2d at 1143 (citation omitted). Second, “if there is substantial similarity in ideas, similarity of expression is evaluated using an intrinsic test depending on the response of the ordinary, reasonable person to the forms of expression.” *Hartman*, 833 F.2d at 120. “Infringement of expression occurs only when

the total concept and feel of the works in question are substantially similar.” *Id.*

As plaintiffs note (Doc. 79-1, at 11), defendants do admit to copying the Subject Photograph. Specifically, “[d]efendant believes that Michael Stevens acquired the Subject Photograph from a Meme website, most likely ImgFlip or StickPNG.” (Doc. 79-3, at 116). Defendants do not challenge this assertion. Therefore, the Court turns to whether this use was “substantially similar” to the original image.

The Court must first consider whether objective similarities in the details of the works show that the Subject Photograph and the Post are “substantially similar” in idea. If reasonable minds can differ on the absence of this issue, the Court cannot grant summary judgment. Again, the comparison here is between the image of Sam Griner holding sand on a beach and the Post that features the same image of Sam Griner, but in front of the Capitol. Here, a jury studying the Subject Photograph and the Post would find one very prominent similarity—namely, plaintiff Sam Griner’s once-youthful but grimacing visage with a hand raised that could be viewed as either holding something in his fist or raising his fist. Both works use the same visage at the same time, wearing the same clothing, in the same pose. (Doc. 1, at 4, 6). Further, both works feature that visage in the foreground. (*Id.*).

Reasonable minds, however, could also identify important differences between these works. The subject in the Subject Photograph is to the left of center, while the subject in the Post is to the right of center. (*Id.*). The subject in the Subject Photograph is larger in relation to the entire work than is the subject in the Post. (*Id.*). The backgrounds are entirely different,

which could lead to different perceptions of Sam Griner's pose and grimace. (*Id.*). The Post includes text, where the Subject Photograph does not. (*Id.*). Altogether, a reasonable jury could find that these differences render the Post not "substantially similar" in ideas to the Subject Photograph.

If that jury found the Post was substantially similar in ideas to the Subject Photograph, that reasonable jury could find they were substantially similar in expression: the essence of the Subject Photograph is a boy with a fist grimacing, which is replicated in the Post. On the other hand, a reasonable jury could find that the photographs are dissimilar in expression because the background provides context which alters the perception of Sam Griner's pose and expression.

In the end, the Court finds that this is a very close call, not a certainty. Reasonable minds can differ on those questions, based on the record before the Court. Based on the record as cited by plaintiffs, the Court would not grant directed verdict on this question even if this evidence was not challenged. Therefore, plaintiffs have failed to show that no reasonable jury could find that the Subject Photograph and the Post are not "substantially similar" in ideas to the Subject Photograph. The Court, thus, will not find as a matter of law that the Subject Photograph and the Post are "substantially similar in ideas."

For these reasons, the Court denies plaintiffs' motion for summary judgment of copyright infringement.¹

¹ Because the Court does not grant summary judgment that the

V. Defendants' Motion for Summary Judgment

The Court grants-in-part and denies-in-part defendants' motion for summary judgment on both claims. (Doc. 80). Specifically, the Court grants defendants' motion for summary judgment on the copyright infringement claim against defendant King. The Court denies summary judgment on the copyright infringement claim against defendant Committee. The Court furthermore denies summary judgment on the invasion-of-privacy claim against both defendants.

A. Copyright Infringement Claims

Again, to show copyright infringement, plaintiffs must first prove "ownership of a valid copyright," and second, "copying of original elements of the work." *Infogroup, Inc. v. Database, LLC*, 956 F.3d 1063, 1066 (8th Cir. 2020) (citing *Mulcahy v. Cheetah Learning, LLC*, 386 F.3d 849, 852 (8th Cir. 2004)). Defendants, as the party without the burden of proof at trial, must show affirmative evidence that negates an essential element of the nonmoving party's claim, or that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Celotex Corp.*, 477 U.S. at 331 (1986); *see also Bedford*, 880 F.3d at 996.

Defendants argue that defendant King is not an infringer. (Doc. 80-4, at 11-12). Defendants then argue

Post is substantially similar to the Subject Photograph, it does not reach plaintiffs' arguments that defendants' affirmative defenses fail (Doc. 79-1, at 12-16). *See Teter v. Glass Onion, Inc.*, 723 F. Supp.2d 1138, 1146 (W.D. Mo. 2010). Similarly, it does not reach the arguments in defendants' resistance that concern defendant King's personal liability, nor the arguments that concern "unclean hands." (Doc. 83, at 3-5).

that the Subject Photograph lacks sufficient authorship by Laney Griner to be copyrightable and that plaintiffs granted an implied license to use the work. (*Id.*, at 12 & 14). Defendants also argue Laney Griner abandoned her copyright in the Subject Photograph and that Laney Griner bears and fails to meet the burden of proving that defendants used an unlawful copy. (*Id.*, at 19 & 20). Finally, defendants argue that even if the Court were to find copyright infringement as a matter of law, defendants' use of the Subject Photograph amounted to fair use. (*Id.*, at 22).

1. Defendant King's Personal Liability

Defendants assert that defendant King cannot be liable for the acts of defendant Committee merely by acting as a member or as a manager. (Doc. 80-4, at 12). Defendants further assert that defendant King's only act in relationship to the acts of the Complaint involved his approval of apology language. (*Id.*). Plaintiffs assert that defendant King uploaded the Subject Photograph himself to his Twitter account. (Doc. 82, at 7). Plaintiffs also assert that defendant Committee was acting as King's agent when it posted the Subject Photograph without authorization. (*Id.*). For the following reasons, the Court grants summary judgment in favor of defendant King on this ground.

The Court finds that defendants meet their initial burden to show that defendant King was not personally liable for infringement. To show copyright infringement, plaintiffs must prove "ownership of a valid copyright," and second, "copying of original elements of the work." *Infogroup, Inc.*, 956 F.3d at 1066. Defendants asserted that "the only available evidence indicates that King had no association with

any act of liability mentioned in the complaint,” and that “King’s only act in relationship to the acts of the Complaint involved his approval of apology language.” (Doc. 80-4, at 12) (citing to Doc. 80-1, at 70-84). When deposed, defendant King stated he could not recall seeing the Post before—specifically, he had “seen the face” of Sam Griner, but did not “recall the Capitol in the backdrop.” (Doc. 80-1, at 84). Furthermore, defendant King did not discuss whether he posted the image, only his reaction to the notice letter and the drafting of the apology. (*Id.*, at 83). Defendant King later stated that his personal involvement in the Post was zero. (*Id.*, at 84). Separately, in an email exchange concerning the approval of apology language, no mention is made of defendant King uploading the Post, only that nobody knew the image was copyrighted. (*Id.*, at 71-77).

The Court does not reach plaintiffs’ argument that defendant Committee was acting as King’s agent when it posted the Subject Photograph without authorization (Doc. 82, at 7), because plaintiffs never pled this theory in the operative amended complaint. (Doc. 16). At this stage, plaintiffs may not amend their complaint without defendants’ written consent or the Court’s permission. Fed. R. Civ. P. 15(a)(2). In such circumstances, a district court may reject a plaintiff’s legal theory. *See Singleton v. Arkansas Hous. Authorities Prop. & Cas. Self-Insured Fund, Inc.*, 934 F.3d 830, 837 (8th Cir. 2019) (citing *Northern States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1057 (8th Cir. 2004); see also Fed. R. Civ. P. 8(a)).

Here, plaintiffs alleged “that Defendants, and each of them, infringed the Subject Photograph by publishing and displaying the Infringing Photograph

to the public, including without limitation, on www.steveking.com without authorization or consent.” (Doc. 16, at 7). In resisting defendants’ motion to dismiss (Doc. 43), plaintiffs asserted that “[t]he complaint alleges that King violated Plaintiffs’ rights in his individual capacity, not as an agent for his campaign committee. Nowhere do Plaintiffs allege that King acted solely through King for Congress; King’s liability is based on his own actions as alleged in the [operative complaint].” (Doc. 45, at 7). Nor did plaintiffs seek to amend their complaint to plead this new theory. For these reasons, the Court does not consider this theory further.

Plaintiffs fail to show a genuine dispute of material fact as to whether defendant King uploaded the Post. Plaintiffs assert that defendant King uploaded the Post on his Twitter Page, and therefore bears personal liability. (Doc. 82, at 9). Plaintiffs, however, do not show this in the record. (Doc. 79-2, at 2). To be sure, the Statement of Undisputed Material Facts states that defendants King and Committee copied the Subject Photograph and posted the image of Sam Griner as part of a fundraising campaign on their Facebook page, Twitter account, King for Congress website and Winred.com. (Doc. 79-2, at 2) (citing Doc. 79-3, at 6, 101-104, 113-115 (Griner Decl., ¶ 9; Exhibits I, J and L (King for Congress Supplemental Interrogatory Responses, Resp. to Int. Nos. 1, 3 and 5))). But the evidence says otherwise. The Griner Declaration only indicates that Laney Griner saw the Post. (Doc. 79-3, at 8). Exhibit I only indicates that defendant Committee uploaded the Post on WinRed. (Doc. 79-3, at 104). Exhibit J indicates that defendant King’s Facebook Page, @KingforCongress, displayed

the Post. (Doc. 79-3, at 106). This was posted under Steve King's name, but not necessarily by Steve King himself, given the Twitter handle beneath. (*Id.*). Furthermore, Exhibit L, the King for Congress Supplemental Interrogatory Responses, contains answers by defendant Committee, not defendant King. (*Id.*, at 111–17).

For these reasons, plaintiffs fail to show any genuine dispute of material fact as to whether defendant King himself is not liable for copyright infringement. Therefore, defendant King is entitled to judgment of noninfringement as a matter of law.

2. Copyright in the Photograph

Defendants argue that plaintiff Laney does not have copyright in the Subject Photograph. (Doc. 80-4, at 12). Specifically, defendants argue that at best only Sam Griner has copyright in the photograph because only plaintiff Sam Griner made the decisions to pose himself. (*Id.*, at 12-14).² Plaintiffs resist, pointing to plaintiff Laney's 2012 copyright registration, and otherwise asserting that there is "no authority supporting the argument that a photographer in the right place at the right time is not the author of her work." (Doc. 82, at 10). For the following reasons, the Court rejects defendants' argument, and therefore denies summary judgment on this ground.

² To the extent that defendants argue that both Laney Griner and Sam Griner have copyright in the photograph as co-authors, this is irrelevant. Even if that were true, both Laney and Sam would have the exclusive rights in copyright promised in 17 U.S.C. § 106.

As explained above, the Court has already found that plaintiff Laney Griner has copyright in the image of the Subject Photograph. Furthermore, plaintiff Laney's copyright registration constitutes prima facie evidence of the validity of the copyright. The Photograph was first taken on August 26, 2007. (Doc. 80-3, at 4). Its copyright registration is dated February 22, 2012. (Doc. 79-3, at 80). Under Title 17, United States Code Section 410(c), "the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate" and "[t]he evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court."

Defendants' argument that Sam Griner was the only one acting with purpose sounds in originality-in-subject, but this argument is irrelevant. (Doc. 80-4, at 12). Because the Court has found that the Subject Photograph is original in timing, the purpose behind setting the scene does not matter. When a photograph is original by rendition or timing, copyright protects the image. *Mannion*, 377 F. Supp.2d at 453.

Defendants also assert that only Sam can be the author, not Laney. (Doc. 80-4, at 13). Defendants assert that the Supreme Court "award[ed] a copyright to the subject of the photograph rather than the photographer" in *Burrow-Giles Lithographic Co. v. Sarony*. (Doc. 80-4, at 13) (citing 111 U.S. 53, 54 (1884)). To be sure, defendants correctly note that a subject can be a co-author of a photograph, including "by selecting and arranging the subject matter, deciding on the composition and camera angles of the photograph, and

determining the lighting as well as when to take the photograph.” *Brod v. Gen. Pub. Grp., Inc.*, 32 F. App’x 231, 234 (9th Cir. 2002). This, however, does not mean that plaintiff Laney cannot be an author.

Therefore, defendants fail to meet their burden to show that Laney Griner is not entitled to copyright in the Subject Photograph. This is not a ground on which to grant judgment as a matter of law.

3. Copyright Abandonment

Defendants argue that plaintiff Laney abandoned her copyright in the Subject Photograph when she greeted infringements of her copyright with public excitement. (Doc. 80-4, at 19-20). Plaintiffs resist this argument, asserting that plaintiff Laney had registered her copyright and already negotiated and granted licenses for commercial uses of the Subject Photograph. (Doc. 82, at 17). For the following reasons, the Court finds that it is a triable issue of fact as to whether plaintiff Laney abandoned copyright in the Subject Photograph. Therefore, the Court will not grant judgment of noninfringement as a matter of law on this ground.

Courts have repeatedly held that an owner may abandon a copyright. The Eighth Circuit Court of Appeals has not held that an abandonment doctrine exists, but its component districts have held that copyright can be abandoned if there is both (1) an intent by the copyright owner to surrender the rights and (2) an overt act showing that intent. *Johnson v. Salomon*, No. 4-73 Civ 536, 1977 WL 22758, at *30 (D. Minn. May 25, 1977); *Sw. Bell Tel. Co. v. Nationwide Indep. Directory Serv.*, 371 F. Supp. 900, 906 (W.D. Ark. 1974); *Rouse v. Walter & Assocs., L.L.C.*, 513 F.

Supp.2d 1041, 1069 (S.D. Iowa 2007). The alleged infringer bears the burden to show that the copyright owner abandoned the copyright interest. *Doc's Dream, LLC v. Dolores Press, Inc.*, No. CV 15-2857-R, 2018 WL 11311292, at *3 (C.D. Cal. Mar. 1, 2018), *aff'd*, 766 F. App'x 467 (9th Cir. 2019).

Because copyright abandonment requires an overt act showing intent to surrender its rights, mere inaction cannot show an intent to surrender rights. *Johnson*, 1977 WL 22758, at *30. Allowing the public to make copies of the works alone is insufficient; instead, the dispositive issue is whether that act manifests the copyright holder's intent to abandon the copyright. *Doc's Dream, LLC*, 2018 WL 11311292, at *3.

Public statements can show an intent to abandon the copyright. *See, e.g., Melchizedek v. Holt*, 792 F. Supp.2d 1042, 1045, 1048 (D. Ariz. 2011); *Malibu Media, LLC v. Doe*, 381 F. Supp.3d 343, 353 (M.D. Pa. 2018). Courts have held, however, that conflicting public statements create a genuine dispute of material fact on the issue of copyright abandonment. *Furie v. Infowars, LLC*, 401 F. Supp.3d 952, 966 (C.D. Cal. 2019); *Marya v. Warner/Chappell Music, Inc.*, 131 F. Supp.3d 975 (C.D. Cal. 2015). Whether a plaintiff abandoned its copyright turns on the intent as shown by how the plaintiff's public statements should be interpreted. *Furie*, 401 F. Supp.3d at 966. At this stage, however, the Court can neither determine a plaintiff's intent nor place weight on the plaintiff's competing public statements. *Id.*

Here, defendants point to certain of plaintiff Laney's statements, for example: "[m]y picture was just out there for anyone to take and manipulate. I

realized at that point, there was no getting this picture back, the Internet had it.” (Docs. 80, at 14; 80-1, at 25). Defendants interpret this as an assertion by Laney that she had placed her picture “out there” with permission for anyone to take it, but it could also be interpreted as a lamentation that her photo was “out there” and people were taking it without her permission. Within that same record, other public statements indicate Laney did not voluntarily place the photograph into the public domain. For example, plaintiff Laney asserted on a Twitter reply: “[i]f someone wants to advertise with Success Kid, then pay me.” (Doc. 80-1, at 112). She clarified on a Facebook reply: “There’s nothing I could or would try to do when the poster isn’t trying to profit from it or promote something dangerous.” (*Id.*, at 263).

Furthermore, as plaintiffs argue (Doc. 82, at 17), the cited record indicates that plaintiff Laney required licenses for commercial uses of the Subject Photograph from, at minimum, Jump In, a private use from an author, and a nuts company. (Doc. 82-1, at 61-85.) Plaintiffs also licensed the work pro bono. (*Id.*, at 71). And even when unsure of the eventual pricing for a license, plaintiffs sought to control the use of the Subject Photograph. (*Id.*, at 73, 75, 81). Furthermore, plaintiffs have engaged in settlement talks with various unauthorized users of the Subject Photograph. (*See, e.g., id.*, at 88, 113). Plaintiffs’ cited record thus shows that there is a genuine dispute of material fact as to whether plaintiffs abandoned their copyright.

For these reasons, copyright abandonment is not a ground on which to grant summary judgment of noninfringement.

4. Burden of Proof to Show Unauthorized Use

The Court rejects defendants' argument that plaintiff must show that defendants' use was unauthorized. Defendants assert that plaintiffs, to show infringement, must prove that the copying was unauthorized. (Doc. 80-4, at 20-21) (reciting Doc. 47, at 2). Plaintiffs assert that defendants instead bear the burden to prove authorization. (Doc. 82, at 18). For the same reasons that the Court rejected defendants' argument in its motion to dismiss (Doc. 57), the Court rejects this argument here.

The Supreme Court has held that to establish copyright infringement, "two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc.*, 499 U.S. at 361. The Supreme Court has also held that anyone "who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute or who makes a fair use of the work is not an infringer of the copyright with respect to such use." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

The Court of Appeals for the Eighth Circuit does not require the plaintiff to prove that the use or copying was "unauthorized." Instead, the elements of copyright infringement of the reproduction right are (1) ownership of a valid copyright and (2) copying of original elements of the copyrighted work. *Warner Bros. Ent., Inc. v. X One X Prods.*, 644 F.3d 584, 595 (8th Cir. 2011) ("The elements of copyright infringement are (1) ownership of a valid copyright and (2) copying of original elements of the copyrighted work."); *Taylor Corp.*, 403 F.3d at 962-63 ("To prevail on its copyright

infringement claim, Taylor must prove ownership of a valid copyright and copying of original elements of the work.”); *Mulcahy*, 386 F.3d at 852 (“Two elements are required to establish copyright infringement, ownership of a valid copyright and copying of original elements of the work.”).

To be sure, the Eighth Circuit has held out as an example, but not a requirement, that the potential violation of the copyright owner’s reproduction right be “unauthorized.” *MPAY Inc. v. Erie Custom Comput. Applications, Inc.*, 970 F.3d 1010, 1016 (8th Cir. 2020) (“To demonstrate copyright infringement, MPAY must show that it owned a valid copyright and that Appellees violated MPAY’s copyright ‘by, for example, unauthorized reproduction and distribution of the copyrighted work.’”); *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 830 (8th Cir. 1992) (placing the burden of showing that reproduction and distribution was authorized on the accused infringer, not the copyright holder). Furthermore, the *MPAY* court examined the question of whether the accused infringers could demonstrate that their copying was authorized by agreement; it recognized that when the accused infringers “demonstrated that their copying, disclosure, and possession of the source code were authorized” by agreement, the plaintiff did not show “a likelihood of success on the merits of its copyright-infringement[.]” *MPAY Inc.*, 970 F.3d at 1019. The Court thus reads *MPAY* to place the burden of showing that the use was “authorized” on the accused infringers.

Under this precedent, “unauthorized” reproduction and distribution of the copyrighted work is not necessary to find a violation of plaintiffs’ exclusive reproduction right. Therefore, the Court will not

require plaintiffs to prove that defendants' copying of the Photograph was unauthorized. As defendants offer no other evidence to show that plaintiff cannot meet their burden of proof of copyright infringement, the Court cannot find that no reasonable jury would not find copyright infringement.

5. Implied License

Defendants argue that plaintiffs granted an implied license to the Internet or to Image Mass-Production Websites to use the Subject Photograph. (Doc. 80-4, at 14). Plaintiffs resist, arguing that the circumstances do not give rise to an implied license to defendants. (Doc. 82, at 12). For the following reasons, the Court finds that defendants have failed to show an implied license as a matter of law. Therefore, the Court denies defendants' motion for summary judgment of noninfringement on this ground.

Generally, a court can find an implied license "where the copyright holder engages in conduct from which [the] other [party] may properly infer that the owner consents to his use." *Field v. Google, Inc.*, 412 F. Supp.2d 1106, 1116 (D.Nev.2006) (quoting *De Forest Radio Tel. & Tel. Co. v. United States*, 273 U.S. 236, 241 (1927) (internal quotations omitted)) (alterations in original). Silence or lack of objection may also be the equivalent of a nonexclusive license, especially where the plaintiff knows of the defendant's use and encourages it. *See e.g., Kennedy v. Gish, Sherwood & Friends, Inc.*, 143 F. Supp.3d 898, 908 (E.D. Mo. 2015).

The Eighth Circuit has not provided a test on implied licenses, but other circuits have. "[T]he alleged infringers have the burden of establishing an implied

license.” *Atkins v. Fischer*, 331 F.3d 988, 992 (D.C. Cir. 2003). In *Bitmanagement Software GmbH v. United States*, the court held that “[w]hen the totality of the parties’ conduct indicates an intent to grant such permission, the result is a legal nonexclusive license.” 989 F.3d 938, 947 (Fed. Cir. 2021) (quoting *Lulirama Ltd. v. Access Broad. Servs., Inc.*, 128 F.3d 872, 879 (5th Cir. 1997)). “As noted, an implied-in-fact license may be found only ‘upon a meeting of the minds’ that ‘is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.’” *Bitmanagement Software GmbH*, 989 F.3d at 948 (quoting *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998)).

District courts in this Circuit apply similar analysis. In *Kennedy*, the court found an implied license when it examined email exchanges between the parties which made it clear that the accused infringer had begun infringing absent prior consent or payment, but that the copyright owner “never instructed” the accused infringer to stop. 143 F. Supp.3d at 908. The *Duncan* court found no implied license when the parties’ prior communications gave no indication of consent or encouragement to use the copyright holder’s works. *Duncan v. Blackbird Prods. Grp., LLC*, No. 17-03404-CV, 2021 WL 7042880 *8 (W.D. Mo. March 03, 2021). Here, defendants have not shown any prior communication with plaintiffs indicating a tacit understanding that defendants could use the Subject Photograph. Meanwhile, plaintiffs

have already shown prior licensing behavior for use as an advertisement. (Doc. 82-1, at 68–79).³

Defendants argue that plaintiffs granted an implied license to classes of users, so that any user within those classes could use the Subject Photograph without prior communication or a prior meeting of the minds with plaintiffs. (Doc. 80-4, at 15) (citing *Field*, 412 F. Supp.2d at 1116). The Court disagrees. As noted, an implied-in-fact license may be found only “upon a meeting of the minds” that “is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.” *Bitmanagement Software GmbH*, 989 F.3d at 948. The *Bitmanagement* Court accepted as plausible for a meeting of the minds several communications between the plaintiff and the defendant. *Id.* Here, defendants did not show any facts suggesting a

³ Defendants’ reliance on the *Nelson-Salabes* test fails as well. (Doc. 80-4, at 14). That test, usually analyzed in the context of architectural works, identifies three factors to find an implied nonexclusive license: (1) whether the parties were engaged in a short-term discrete transaction as opposed to an ongoing relationship; (2) whether the creator utilized written contracts providing that copyrighted materials could only be used with the creator’s future involvement or express permission; and (3) whether the creator’s conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator’s involvement or consent was permissible. *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 516 (4th Cir. 2002). Even under this test, nothing in the record shows that plaintiffs and defendants engaged in any communication concerning the use of the Subject Photograph before defendants posted the advertisement, let alone any contemplation of an ongoing relationship, even though that same record shows previous licensing attempts with other people. (Doc. 82-1, at 68–79).

meeting of the minds between plaintiffs and defendants.

Defendants claim that the *Field* court found an implied license where a single accused infringer could reasonably interpret the copyright owner's conduct as the grant of a license to web crawlers, in general. (Doc., 80-4, at 15). That case does not support defendants' position. In *Field*, the court managed a dispute between a web site owner and Google's search engine. *Field*, 412 F. Supp.2d at 1110. The website owner put copyrighted material on his pages. *Id.* He knew he could instruct Google not to "cache" his website through use of a "no-archive" meta-tag, but he did not use that tag. *Id.* at 1114. Google then displayed cached links to his pages, and the copyrighted materials within, and in response, Field sued Google for copyright infringement in displaying those pages. *Id.* at 1110-14. The Field court found, however, that Field had implicitly licensed the work to Google, by choosing not to include the no-archive meta-tag that barred Google from caching his work. *Id.* at 1116. In doing so, the Field court applied the standard that "[a]n implied license can be found where the copyright holder engages in conduct "from which [the] other [party] may properly infer that the owner consents to his use." *Id.*

Field, therefore, does not stand for the proposition that the owner of a work can implicitly license her work to a whole class of users without a prior meeting of the minds. It did not find an implicit license to all web-crawlers. Instead, it found a meeting of the minds between the owner and Google specifically: that the copyright owner's conduct was "reasonably interpreted as the grant of a license to Google for that

use” when he knew “how Google would use the copyrighted works he placed on those pages,” and knew “that he could prevent such use[.]” *Id.* (emphasis added).

Furthermore, even were the Court to adopt defendants’ legal theory, it would find that theory unsupported by the facts. In defendants’ telling, plaintiff Laney Griner purportedly never used written contracts with social media users, and social media users knew that their uses of the Subject Photograph were permissible. (Doc. 80-4, at 16). This is factually erroneous, as the record shows that plaintiffs did require people who found them on social media to pay for use of the Subject Photograph in advertisements. (Doc. 82-1, at 68-79).

Defendants also argue that plaintiffs granted an implied license to image mass-production websites. (Doc. 80-4, at 11). Even if the Court followed this legal theory, defendants fail to show how this implied license to image mass-production websites would grant a license to defendants, who are not an image mass-production website.

For these reasons, the Court finds that the implied license theory is not a ground on which to grant summary judgment of noninfringement.

6. Fair Use

Defendants argue that this use constitutes fair use and is therefore not infringement. (Doc. 80-4, at 23). Plaintiffs resist, arguing that “[n]one of the ‘fair use’ factors . . . weigh in [d]efendants’ favor.” (Doc. 82, at 21). For the following reasons, the Court finds that

defendants do not meet their initial burden to show fair use.

Title 17, United State Code § 107, sets forth four non-exclusive factors that “shall” be considered in determining whether an otherwise infringing use is a non-infringing fair use. *Mulcahy*, 386 F.3d at 854. The Court must consider:

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

17 U.S.C. § 107. Though the Court must consider all of these factors together, the “effect of the use upon the potential market for or value of the copyrighted work” is “undoubtedly the single most important element of fair use.” *Mulcahy*, 386 F.3d at 854) (citing *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

Fair use is a mixed question of law and fact. *Mulcahy*, 386 F.3d, at 855. Therefore, the Court may resolve this question on summary judgment if “a reasonable trier of fact could reach only one conclusion.” *Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp.2d 980, 986 (D. Minn. 2003) (citing *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989)). Furthermore, the task of ascertaining a fair use “is not to be simplified with bright-line rules, for the statute, like the doctrine

it recognizes, calls for a case-by-case analysis.” *Id.*, at 987 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)).

As explained above, the Court has not granted judgment as a matter of law that defendants infringed on plaintiffs’ copyright in the Subject Photograph. It is not clear, therefore, that the Post is an “otherwise infringing work” for purposes of the fair use statute. Even if the Post constituted infringement of the copyright in the Subject Photograph, however, the Court would not grant judgment as a matter of law in favor of defendants on the ground of fair use.

a. Purpose and Character of the Use

The “purpose and character of the use” does not weigh in favor of a finding of fair use. The fact that a publication was commercial rather than nonprofit weighs against a finding of fair use. *Harper & Row*, 471 U.S.at 562. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price. *Id.* In determining whether the use was commercial, the Court is “to be guided by the examples given in the preamble to Section 107, and should look to whether the use of the copyrighted material was for ‘criticism, comment, news reporting, teaching, . . . scholarship, or research.’” *Antioch Co.*, 291 F. Supp.2d at 988 (collecting cases). This inquiry boils down to “whether and to what extent the new work is ‘transformative.’” *Id.* at 988 (citing *Campbell*, 510 U.S. at 579). A work is transformative if the factfinder finds “real, substantial condensation of the materials” and “intellectual labor and judgment” in

the creation of the work, rather than merely cutting out the essential parts of the original works. *Antioch Co.*, 291 F. Supp.2d at 988. To that end, if the use in question is “for the same intrinsic purpose” as the copyright holder’s use, that use weakens the claim of fair use. *Id.* (internal quotations omitted).

Defendants appear to argue solely that the purpose of this use was to counter an unpopular political cause’s lack of access to traditional media outlets by being interesting and catching attention through humorous appeals. (Doc. 80-4, at 22–23). Defendants, notably, make no claim in their motion that the use was “transformative.” (*Id.*). Plaintiffs argue that the purpose of the use was “purely commercial” because it was part of a fundraising appeal to benefit defendant King’s professional venture. (Doc. 82, at 22).

Here, defendants used the Subject Photograph to raise funds for defendant King. (Doc. 80-3, at 7). Furthermore, the Post included the request to “Fund Our Memes.” (*Id.*, at 6). Defendants show no facts asserting that the use was transformative. (Doc. 80-4, at 22-23). For these reasons, defendants fail to show that this factor weighs in their favor.

b. Nature of the Copyrighted Work

The “nature of the copyrighted work” does not weigh in favor of a finding of fair use. A work being “functional in nature” generally points in the direction of fair use. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021). Defendants assert that the Photograph, while ordinarily “worthy of protection” has accrued “functional aspects” that make it closer to less-protected types of copyrightable works. (Doc. 80-4, at 18). Plaintiffs dispute this. (Doc. 82, at 22). “This factor

recognizes that some types of works are closer to the core of intended copyright protection than others, so the scope of fair use is greater when informational as opposed to more creative works are involved.” *Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A.*, No. CIV. 12-528 RHK/JJK, 2013 WL 4666330, at *16 (D. Minn. Aug. 30, 2013) (internal quotations omitted). That court found works to be “factual or informational” when “[t]hey primarily communicate very technical information about the results of scientific research.” *Id.* Other examples of functional works include instructions on how to donate online and a summary of potentially applicable *European data laws*. *Campbell*, 510 U.S. at 586; *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

Here, the Court finds that the Subject Photograph is not functional. It includes no factual element. Defendants assert that “[b]ecause of the advent of the Meme as a way of conveying information and emotion, the Work has become a tool of sorts.” (Doc. 80-4, at 23). Regardless of whether this argument has any merit, however, it does not apply because the original work in question—the Subject Photograph—is not a meme.

c. Amount and Substantiality of the Portion Used

“The amount and substantiality of the portion used” does not weight in favor of a finding of fair use. This factor questions whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole . . . are reasonable in relation to the purpose of the copying.” *Campbell*, 510 U.S. at 587 . In considering this factor, the Court looks at “the quantity and value of the materials used,”

while noting that “the extent of permissible copying varies with the purpose and character of the use.” *Antioch Co.*, 291 F. Supp.2d at 995. Taking the “heart” of a work counsels against a finding of “fair use.” *Campbell*, 510 U.S.at 587.

Defendants assert that the photograph only used “Sam and his gesture[,]” which was the only part “necessary to convey the emotion associated with the meme.” (Doc. 80-4, at 23). Defendants acknowledge that this is the “heart” of the expression. (*Id.*, at 24). Defendants, however, assert that this “heart” of the Subject Photograph does not counsel against a finding of fair use, because it is the least creative portion of the work. (*Id.*). The Court rejects this argument: for the reasons above, the Court found originality in the Subject Photograph, including Sam Griner’s image.

d. Effect of the Use Upon the Market

The “effect of the use upon the potential market for or value of the copyrighted work” factor does not weigh in favor of a finding of fair use. Again, though the Court must consider all of these factors together, this factor is “undoubtedly the single most important element of fair use.” *Mulcahy*, 386 F.3d at 854 (citing *Harper & Row*, 471 U.S. at 566). Under this factor, a court must “consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.” *Campbell*, 510 U.S., at 590 (quoting Nimmer § 13.05[A] [4], p. 13-102.61) (citations omitted); *Antioch Co.*, 291 F. Supp.2d at 996. The Court “must take account not

only of harm to the original but also of harm to the market for derivative works.” *Id.* When the copyright holder “demonstrat[es] an intent to exploit that market” created by the work, the Eighth Circuit found “genuine issues of material fact” that precluded summary judgment. *Mulcahy*, 386 F.3d at 854.

Defendants assert that the money they raised from the Post is outweighed by the money plaintiffs received from the Subject Photograph in total. (Doc. 80-4, at 24). The Court construes this as an argument that defendants’ use of the Post caused very little market harm. As plaintiffs note, however, the Court must consider both the extent of market harm by the particular actions, and the extent of market harm by unrestricted and widespread conduct of the sort that defendants engaged in. (Doc. 82, at 23). Defendants have not shown any facts describing or marginalizing the extent of market harm, beyond asserting that “[t]here never was much of a market for the Work itself[.]” (Doc. 80-4, at 24). Their argument and the facts supporting it, even if unchallenged at trial, would not be sufficient for the Court to grant directed verdict. Therefore, defendants fail to meet their initial burden on this ground.

For all of these reasons, the Court denies summary judgment of noninfringement on the ground of fair use.

B. Invasion of Privacy Claim

Defendants assert that plaintiffs’ claim of invasion of privacy by attribution or appropriation is preempted by federal copyright law. (Doc. 80-4, at 22). Plaintiffs resist, arguing that Griner’s right to protect his persona from a false implication of his endorsement of

Steven King does not lie within the general scope of copyright and is thus not preempted. (Doc. 82, at 19–20). Plaintiffs also argue that Sam Griner has no copyright in the Subject Photograph, and therefore his state-law claim cannot be preempted by any federal copyright rights. (*Id.*, at 20). For the reasons discussed below, the Court finds that plaintiff Sam Griner’s misappropriation claim is not preempted by federal copyright law. The Court thus denies summary judgment in favor of defendants on this claim.

The Copyright Act provides the exclusive source of protection for “all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106” of the Copyright Act. *See* 17 U.S.C. § 301(a). Concomitantly, all non-equivalent rights are not preempted. *Ray v. ESPN, Inc.*, 783 F.3d 1140, 1142 (8th Cir. 2015). A state cause of action is preempted if: “(1) the work at issue is within the subject matter of copyright as defined in § [§] 102 and 103 of the Copyright Act, and (2) the state law created right is equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106[].” *Id.* (citing *Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 428 (8th Cir. 1993)); *Dryer v. Nat’l Football League*, 814 F.3d 938, 942 (8th Cir. 2016). If an extra element is “required, instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, then the right does not lie ‘within the general scope of copyright’ and there is no preemption.” *Nat’l Car Rental Sys., Inc.*, 991 F.2d at 431.

1. Subject Matter of Copyright

With regard to the “within the subject matter” requirement, the Copyright Act defines the subject matter of copyright generally as “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.* at § 101. In this Circuit, even when the work is based off of a plaintiff’s likeness, it will fall within the subject matter of copyright law. *Ray*, 783 F.3d at 1144; *but see Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001) (“A person’s name or likeness is not a work of authorship within the meaning of 17 U.S.C. § 102. This is true notwithstanding the fact that Appellants’ names and likenesses are embodied in a copyrightable photograph.”); *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) (“[T]he content of the right protected by the misappropriation tort does not fall into the subject matter of copyright.”).

Here, as the Court found earlier, the Subject Photograph possesses originality in timing⁴ and is “fixed in a tangible medium of expression” and could be “perceived, reproduced, or otherwise communicated.” *Id.*, at § 101. Furthermore, under this Circuit’s law, Sam Griner’s likeness cannot be detached from the

⁴ The Court did not decide whether the Photograph possess originality in rendition.

copyrighted work. Plaintiffs do not challenge defendants' use of Sam's likenesses or identities in any context other than the copyrighted Subject Photograph. *Dryer*, 814 F.3d at 942. Furthermore, nothing in the record shows that defendants posted images of Sam other than that embodied in the Photograph. The Subject Photograph, therefore, is within the subject matter of copyright law. *Id.*

2. Equivalence to the Exclusive Rights of Copyright Law

Plaintiff Sam's state-law claim, however, is not equivalent to the exclusive rights of copyright law. The Copyright Act gives copyright owners "exclusive rights to do and to authorize," among other things, the reproduction of "the copyrighted work in copies or phonorecords"; the preparation of "derivative works based upon the copyrighted work"; the distribution of "copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending"; and the display of certain "copyrighted work publicly." 17 U.S.C. § 106; *Ray*, 783 F.3d at 1144. If, however, the state-law cause of action requires an extra element "instead of or in addition to the acts of reproduction, performance, distribution or display," then "the right does not lie 'within the general scope of copyright' and there is no preemption." *Nat'l Car Rental Sys., Inc.*, 991 F.2d at 431.⁵

⁵ Contrary to plaintiffs' argument, the state-law rights can be equivalent even if the plaintiffs do not hold the copyright in the work at issue. *Dryer*, 814 F.3d at 943 (finding preemption when plaintiffs attempted to enforce their state-created right of publicity against a work copyrighted by defendant).

The Eighth Circuit has generated two tests to identify whether a state-law right is equivalent to the exclusive rights of copyright law. Defendants' preemption argument fails under either test.

In *Ray*, the court held that where the state-law rights have been "infringed by the mere act of reproduction, performance, distribution or display" of the work, they are equivalent to the exclusive rights within the general scope of copyright. 783 F.3d at 1144 (quoting *Nat'l Car Rental Sys., Inc.*, 991 F.2d at 431); *but see Downing*, 265 F.3d at 1005 ("Because the subject matter of the Appellants' statutory and common law right of publicity claims is their names and likenesses, which are not copyrightable, the claims are not equivalent to the exclusive rights contained in § 106."). In *Ray*, the court found that the state-law claim was merely an attempt to "prevent rebroadcast" of a copyrighted work, because there was no attempt to use the plaintiff's likeness or name in an advertisement without his permission to promote its products, and because plaintiff's likeness "could not be detached from the copyrighted performances that were contained in the films." *Ray*, 783 F.3d at 1144.

Here, plaintiffs' claim is for the branch of the "invasion of privacy" tort that prohibits the unauthorized use or misappropriation of Sam's likeness. (Doc. 82, at 19, n.7). Section 652A of the Restatement of Torts, adopted as Iowa law in *Winegard*, 260 N.W.2d at 822, states that the "right of privacy is invaded by . . . (b) appropriation of the other's name or likeness, as stated in § 652C." Restatement (Second) of Torts § 652A (Am. L. Inst. 1977). Section 652C in turn states that "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other

for invasion of his privacy.” *Id.*, at § 652C. The common form of this invasion is the appropriation and use of a plaintiff’s name or likeness to advertise a defendant’s business or product, or for some “similar commercial purpose.” *Id.* at § 652C cmt. b. The tort applies only when the name or likeness is published to appropriate “to the defendant’s benefit the commercial or other values associated with the name or the likeness[.]” *Id.* at § 652C cmt. d. It does not apply to an “incidental use” of a plaintiff’s name or likeness, such as a “mere mention” of his name or likeness, a reference to the plaintiff’s name or likeness while legitimately discussing “his public activities,” or a publication of his name or likeness for a purpose “other than taking advantage of the reputation, prestige, or other values associated with him.” *Id.*

In sum, the tort of misappropriation requires more than an attempt to prevent the reproduction or distribution of the work. It applies “only when the name or likeness is published to appropriate “to the defendant’s benefit the commercial or other values associated with the name or the likeness[.]” *Id.* For that reason, defendants fail to show federal preemption under Ray.

Later, in *Dryer v. Nat’l Football League*, the Eighth Circuit held that whether the federal copyright law preempts a state-law right turns on whether the state-law right challenges a commercial use of the work or a non-commercial use of the work. 814 F.3d 938, 943 (8th Cir. 2016). A right-of-publicity suit challenging the use of a copyrighted work in a commercial advertisement could have purposes unrelated to the aims of copyright law. *Id.* Meanwhile, if that suit “challenges the expressive, noncommercial use of a

copyrighted work,” it “asserts rights equivalent to ‘exclusive rights within the general scope of copyright’ and is preempted by copyright law.” *Id.* When deciding whether the speech was commercial speech that could not be preempted by the Copyright Act, the court applied three factors that govern whether speech is commercial rather than expressive: “(i) whether the communication is an advertisement, (ii) whether it refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech.” *Id.* (quoting *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999)).

Here, the Court finds that the Post is commercial for the following reasons. Though the Post itself only shows plaintiff Sam before the Capital beneath the text “Fund Our Memes,” it appears next to the words “King for Congress.” (Doc. 16, at 6). The Post itself does not refer specifically to defendant King or defendant Committee, but the Court gives this fact lesser weight, because the Post appears next to the words “King for Congress” and on websites controlled by defendant King and defendant Committee. (*Id.*). Finally, the speaker – defendant Committee – did have an economic motivation for the speech: to raise funds for defendant King. (*Id.*). Because the use of the copyrighted Subject Photograph was commercial in nature, the Copyright Act does not preempt plaintiffs’ claim under *Dryer*.

Plaintiffs’ resistance centers on tests adopted by other Circuits, which are not binding on this Court. (Doc. 82, at 20) (citing *Downing*, 265 F.3d 994; *Brown*, 201 F.3d 654 (holding that use of plaintiffs’ names and likenesses to sell recorded music and posters violated plaintiffs’ state law rights)). Because the Court

resolves this issue on the law of this Circuit, it does not reach plaintiffs' arguments here.

VI. Conclusion

For these reasons, the Court denies plaintiffs' motion for partial summary judgment (Doc. 79) and denies-in-part and grants-in-part defendants' motion for summary judgment (Doc. 80).

IT IS SO ORDERED this 9th day of August, 2022.

/s/ C.J. Williams
United States District Judge
Northern District of Iowa

**BENCH RULING, TRANSCRIPT EXCERPTS
(NOVEMBER 16, 2022)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LANEY MARIE GRINER AND SAM GRINER,

Plaintiffs,

v.

STEVEN ARNOLD KING AND
KING FOR CONGRESS,

Defendants.

No. 21-CV-4024

Volume 3 of 5

Before: The Hon. C.J. Williams, U.S. District Judge.

[November 16, 2022, Transcript, p. 835]

. . . infringement is not a basis for finding abandonment by itself. Although there's plenty of evidence of how she did consistently pursue infringement claims. I just don't think there's a scintilla of evidence that the jury could hang their hat for abandonment on.

And if you'd like, I can address all of them or we can address them in turn.

THE COURT: Let's go ahead and address all of them.

MR. DONIGER: Thank you.

Implied license—I mean, the elements of implied license are that she created it at the request of King for Congress, delivered it to King for Congress. I mean, the Court put together the draft jury instructions and is aware, there is—I don't see any way that a colorable argument could be made for implied license.

Finally, turning to fair use, there are four fair-use factors. The first fair-use factor is the nature and purpose of the use, *i.e.*, whether it was commercial or for educational or nonprofit purposes.

In this case, the Court has already found at the summary judgment stage that this was a commercial use. It was a use for raising funds to help Mr. King keep his job.

The courts have said that the fourth factor is the most important. And the fourth factor is the effect on the licensing market. And what you do is you universalize it. If everyone in the world did this, what would happen to the licensing market? And effectively, if anyone could use this for fundraising, fund—money generating purposes, it would kill the licensing market.

The other two factors—one of them is the substantiality of the work, *i.e.*, whether you've taken the heart of the work or something—just a small part of it.

If they had used, for example, the beach background from the photograph, where—I think

maybe that would have been a different question. But there's no question that Ms. Griner's capture of her son's—you know, position of her son is the heart of the photograph.

I just don't think—There's not a single factor that I think colorably weighs in favor of the defendants.

So I think—You know, I don't see a jury question on any of those. The Court obviously didn't rule on it at the summary judgment stage. And I think the evidence has only gotten stronger—far stronger for Ms. Griner's claims in opposition to the fair-use defense.

THE COURT: All right. Mr. Blankenship?

MR. BLANKENSHIP: I'd like to work in reverse order. Opposing counsel's right. The fourth factor tends to be the predominating factor and the most important factor.

But I think to say that the—that it affected the use and potential market of the copyrighted work, I think the evidence actually indicates that it enhanced the market for the copyrighted work. And I think a reasonable jury could find that.

The purpose and the character of the use. I'm—The jury would be quite reasonable to find that helping a political campaign is a purpose and character of use that's not blame worthy. So I don't think that there's—that it would be appropriate to take fair use away from the jury.

The—Under the standard for implied license adopted by this Court, I don't disagree with opposing counsel. I think that's probably right. I think we'll concede that.

But from the standpoint of abandonment, I think there was a good bit of evidence to indicate that this is the sort of—that a reasonable jury could find that Ms. Griner did abandon the work based on her many, many statements of letting stuff go or, “This is okay,” “This is fine.” I think that a reasonable jury could find that.

THE COURT: All right. I have to judge the affirmative defenses under the same standard. And that is in the light most favorable, in this case, to the defendant.

As for the implied license, that’s clearly not been established. That’s been conceded by the defendant. And that will not be provided as an option to the jury in the verdict form.

As to the other two affirmative defenses, it’s a close call, in my view, but I find—again, I have to view the evidence in the light most favorable to the defendant in this stage.

And in that light, I find that there is sufficient evidence that a reasonable jury could find from the evidence that one or both of those affirmative defenses may apply.

Whether they will or not is, again, a completely different question, but in the light most favorable to the defense, I find there is sufficient evidence to submit that.

So I am granting the plaintiffs’ motion for a directed verdict on the affirmative defense of implied license, denying it as to the other affirmative defenses.

And I'm going to amend the verdict form accordingly. And I will redistribute the revised version of that verdict form to counsel after hours tonight so you can see how that's going to look without that affirmative defense of implied license.

All right. What else do we need to talk about, Mr. Doniger?

MR. DONIGER: So I don't believe anything. Except can Your Honor please run through, then, what tomorrow morning looks like, what you anticipate tomorrow morning looks like from a timing perspective?

THE COURT: Certainly. So the jury will be here at 9:00. I'd ask the lawyers to be here at 8:30 again just in case something needs—I can't imagine what it would be at this point, but something may come up. So let's make sure we're here on time to address it before the jury comes in.

We will have the lectern out in the center of the well of the courtroom at that point. And then

RELEVANT STATUTORY PROVISIONS

Fed. R. Civ. P. 54— Judgment; Costs

(d) Costs; Attorney's Fees.

- (1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by

law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

Fed. R. Civ. P. 68—Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

17 U.S.C. § 501(a)

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

17 U.S.C. § 505

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.

**JOINT PROPOSED JURY INSTRUCTIONS,
U.S. DISTRICT COURT FOR THE NORTHERN
DISTRICT OF IOWA
(OCTOBER 28, 2022)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LANEY MARIE GRINER and SAM GRINER,

Plaintiffs,

v.

STEVEN ARNOLD KING and KING FOR
CONGRESS,

Defendants.

Case No.: 5:21-cv-04024-CJW-MAR

**DEFENDANTS' ALTERNATIVE VIEWS ON
JURY INSTRUCTIONS**

STATEMENT: Defense counsel would like to thank the Plaintiffs' counsel for ostensibly taking the lead and creating many of the documents that were submitted during the latter part of this week for the conclusion of the pre-trial cycle. Defense counsel were occupied in other federal litigation tasks this week, and had strained time limitations. Plaintiffs' counsels'

professionalism left an indelible mark on the undersigned.

This alternative view is submitted in contrast to the views of Plaintiffs' counsel.

Plaintiffs Laney Marie Griner and Sam Griner and Defendants Steven Arnold King and King for Congress hereby submit the following joint proposed jury instructions.

A. 17.25 Copyright—Affirmative Defense—Implied License

1. Plaintiffs' Proposed Implied License Instruction:

The defendants contends that they are not liable for copyright infringement because plaintiff Laney Griner granted them an implied license in the plaintiff's copyrighted work. The plaintiff cannot claim copyright infringement against a defendant who uses the plaintiff's copyrighted work if the plaintiff granted the defendant an implied license to use the work.

In order to show the existence of an implied license, the defendant has the burden of proving that:

1. the defendant requested that the plaintiff create a work;
2. the plaintiff made that particular work and delivered it to the defendant; and
3. the plaintiff intended that the defendant use the plaintiff's work.

If you find that the defendants have proved by a preponderance of the evidence that plaintiff Griner granted them an implied license to use the copyrighted work, your verdict should be for the defendants on Laney Griner's copyright infringement claim.

2. Defendants' Proposed Implied License Instruction:

A license is a contract giving someone permission to use the work. A license doesn't have to be in writing. Rather, as alleged here, a license can be implied from conduct. To establish this defense, [name of defendant] must prove each of the following by a preponderance of the evidence:

First, you must find that [name of plaintiff] created the work, or caused it to be created, at [name of defendant]'s request or the request of someone acting on [name of defendant]'s behalf.

Second, you must find that [name of plaintiff] delivered the work, or caused it to be delivered, to [name of defendant] or someone acting on [name of defendant]'s behalf.

And third, you must find that [name of plaintiff] intended that [name of defendant] [insert exclusive rights allegedly violated (i.e., copy, distribute, publicly display, publicly perform, or create derivative works based upon)] [his/her/its] copyrighted work. [Name of plaintiff]'s intent may be inferred from the work's nature or the circumstances surrounding the work's creation.

If you find that [name of defendant] has proved these elements by a preponderance of the evidence, your verdict must be for [name of defendant] on the

claim of copyright infringement if [name of defendant]'s use doesn't exceed the scope of the {sic} [his/her/its] license. [Name of defendant] can still commit copyright infringement if [he/she/it] exceeded the scope of the license.

Plaintiffs' position: Both parties agree to an instruction on Defendants' implied license defense. While the substance of the parties' competing instructions is not dramatically different, Plaintiff offers Ninth Circuit Model Instruction 17.25, as it follows the same format of the other instructions and is a simple and elegant statement of the law.

Defendants' position:

Defendants' implied license instruction again derives from general federal litigation guidance rather than that of the 9th Circuit. However, this Court should know that Defendant's "or caused it to be created" language is based on its requested alteration to federal law that permits license holders to stand in the shoes of licensors, and not based on the general federal guidance.

Respectfully submitted,

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App.120a

Dated: October 28, 2022

**BRIEF IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
(APRIL 15, 2022)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LANEY MARIE GRINER and SAM GRINER,

Plaintiffs,

v.

STEVEN ARNOLD KING and KING FOR
CONGRESS,

Defendants.

Docket No.5:21-cv-4024

INTRODUCTION

It wasn't supposed to be like this. A popular Internet celebrity sued America's most-maligned politician, Congressman King, to resuscitate the celebrity's fading brand. It began when King asked the key question: "Everyone seems to be using this meme; why sue me (*i.e.*, his campaign committee)?" The answer lay in the heart of copyright law: even the slightest use of the barest of creative works is technically a copyright infringement. Thirteen years of third-party uses, billions of them, actually; and Plaintiff Laney Griner demanded that King stop. King

asked the right question; the same question that copyright law observers have been asking since the inception of the Internet meme: When a copyright holder releases a work into the depths of the Internet with express, consistent approval, what right has the copyright-holder to pick-and-choose among the users concerning rightful uses? When the history of copyright law's slight infringements was explained to King, among his inflexible morals and black-and-white values, he wondered "this doesn't seem wrong; is this wrong?" He intuitively pondered the question that spawned academic fistfights for about a decade. The story begins at the turn of the millennium with one of the world's premier bands.

There is a gentility in intellectual property litigation that can usually be relied upon. Among the maxims that intellectual property plaintiffs obey is: do not sue end users. It may be because end users tend to be unattractive targets financially, or that a defendant's end user could easily become an end user for the plaintiff, or simply to avoid the bad public relations that comes from suing a non-business. The band Metallica may have changed music, but they also changed the public's sense of danger concerning minor copyright infringement. When Napster and Limewire in the early 2000s provided software for the exchange of digital music files, first centrally and then peer-to-peer, it was the greatest entre to copying since the blank tape. In a litigation environment where previously the lowest tier of copying-defendant was the flea-market bootleg music table, confused teenagers were summoned from their dormitory rooms into federal courts as defendants. Widespread in *terrorem* arrived to copyright infringement.

Metallica was calculating; they sued the largest platforms that they could; for centralized distribution platforms, they sued those platforms,²¹ but when the platforms provided peer-to-peer exchange software, they sued the only cognizable targets, the peers – with the platforms as an accessory. Metallica was cold, but not malicious. It has always been the case that the breadth of copyright liability was comically large in scope; commentators such as Nimmer famously pointed out that merely to clip a comic strip from the newspaper to post on an office breakroom refrigerator would result in liability. This level of absurdity never made precedent, although similar offenses oft drew from judges the phrase “*de minimis non curat lex.*” *Ringgold v. Black Entertainment TV, Inc.*, 126 F.3d 70, 71 (2nd Cir. 1997) (“A painting that briefly appeared on the set wall of a television show ruled copyright infringement”). The motivations were clear: aspects of the ‘hold-up problem²²’ made litigation concerning slight grievances against large targets profitable.

There is another motivation to sue for slight grievances: spite. Cathay Y. N. Smith. *Weaponizing Copyright*. Harvard Journal of Law & Technology, Volume 35, Number 1 (Fall 2021).²³

For instance, Harvey Weinstein’s team

²¹ <https://www.plagiarismtoday.com/2020/04/13/20-years-later-metallica-v-napster-inc/>

²² <https://www.sciencedirect.com/science/article/abs/pii/S1051137707000319#:~:text=The%20holdout%20problem%20represents%20a, outward%20expansion%20of%20land%20development.>

²³ [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916362.](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916362)

threatened Ronan Farrow with copyright infringement to try to stop him from publishing information about Weinstein's sexual misconducts. Dr. Drew filed copyright notices to take down a video compilation featuring dismissive statements he made about COVID-19. Slade Neighbors sued his ex-girlfriend for copyright infringement for disseminating his abusive text messages and emails. Netflix asserted copyright to remove negative comments about its controversial new film. Jehovah's Witnesses sued Faith Leaks for copyright infringement for leaking the organization's religious videos. Campo Santo copyright struck PewDiePie's Twitch channel to punish him for yelling a racist slur in a streaming video. Police officers played copyrighted music to complicate the ability of observers to record police conduct and share those recordings online. . . . All these stories have one thing in common: they all involve copyright owners using copyright to advance noncopyright interests. This Article refers to these actions as "weaponizing copyright."

Id. at 200 (This spite suit against King is detailed at pg. 222). The tactical ramifications of fair use make it such that a well-financed plaintiff can take a defendant throughout the extents of litigation before the defense becomes serviceable. Some cases are about damages, others about sending a message: You leave me alone. Copyright law is a perfect vehicle for such suits. When Dr. Drew sues a defendant for even the most minimalist of takings, say seconds from a three-hour show, he's technically correct. This Court may

have noticed that Defendants in this case have not wasted time arguing whether the copyright-Plaintiff's assertions of 'copying' lacked merit. Defendants' salvation principally lies elsewhere.

In an Internet with several billion copies of The Work changing hands throughout the world, and even a single website boasting thousands of versions of The Work with the ten most common versions having about 600,000 copies, the copyright-plaintiff saw King for Congress with a copy of The Work and then saw red.

This lawsuit is a ploy for attention. In a market that has had notorious trouble monetizing Internet products, the Success Kid Venture had its own troubles. The Success Kid Venture was never particularly lucrative, there was some licensing activity, some funding related to public relations work, and that's about it. By 2017, the Success Kid Venture was in the decline, so much so that the prime source of the Success Kid Venture made puns at its decline. By the early 2020s, there was a new hope, Non-Fungible Tokens (hereinafter, "NFT"). An NFT is a digital attempt to individualize an inherently fungible work to place the artificially-individualized NFT above the fungible replicants. Plaintiff Laney Griner must have marveled at how the artificial-individualization of the Side-eyed Chloe 'star' auctioned for six figures,²⁴ and simultaneously cursed her luck that the Success Kid Venture was in the wane. However, there was a beacon of hope; universal whipping boy Congressman Steve King recently utilized the Success Kid meme on a splash page to raise funds. The dying brand was

²⁴ <https://www.bbc.com/news/world-us-canada-58659667>

revived: Laney Griner blasted news of the Committee's use of success kid to media that wouldn't have touched the story absent the involvement of King: and the intersection between popular culture, NFTs, and politics encouraged even quality news outlets, *e.g.* WIRED, joined corporate media relics like the New York Times, Time, and Newsweek. Even with the greatest press that the Success Kid Venture has ever known, its NFT sold for the relatively paltry sum of approximately \$40,000.00.

This is a case of first impression in the Eighth Circuit. This Court has the capacity to shape public policy for the sincerest of reasons, that the issue has not been previously decided here. If this Court wondered where the public policy for such a holding might derive, it is tempting to consider that this is a novel problem. It is not. One of the great boons to injustice is to have more laws than the common citizen can know or obey. Madison knew when he penned his Federalist No. 62: that a plethora of laws "poisons the blessings of liberty." He, in turn, learned from Sir William Blackstone in his Commentaries on the Laws of England, who, in turn, marveled at Caligula's method of raising revenue by posting new laws in very small characters on high pillars to ensure that the laws were unreadable. The Soviet system would well adopt this principle, which was most popularly espoused as "show me the man and I'll show you the crime." In an environment where everyone is a law-breaker, prosecution was merely a matter of choosing the defendant. In an environment where memes have the capacity to make the bulk of society tort-feasors, everyone is in King's position; it is simply the case that Laney Griner chose King.

In a healthy legal environment wrongs are prosecuted on their merits, rather than the person allegedly committing them. Only with caution should this Court tread a path in the direction of mass-producing liability commensurate with popular culture norms when the complainant has participated in and encouraged the defendants' acts – or acts similar to them.

STATEMENT OF THE CASE

Steven A. King, the natural person ought never have been included in this case. Plaintiffs took extraordinary liberties when they signed pleadings indicating that he personally acted to infringe the Work of this action. He helped phrase an apology, which was his sole contribution to any use of the Work. The Work may lack sufficient authorship by Laney Griner; and Sam Griner is probably a co-author, if not the actual author. When Laney Griner begged social media to use her Work, she gave social media users an implied license; and if the 'social is considered too expansive, she certainly impliedly licensed the work the Image Mass-Production sites. Her statements and actions may go well-beyond that of an implied license; she may have abandoned her Work. There are so many rightful users, and Laney Griner has 'misplaced' her earlier contracts, so it is not supportable that King's Congressional Committee used an other-than-rightful copy at all. Notwithstanding the above, the Committee's use probably falls under the framework of 'fair use.'

ARGUMENT

I. Copyright Infringement Under Summary Judgment Framework

A. Copyright Law

The U.S. Constitution grants to Congress the authority to “promote the Progress of Science and Useful Arts.” U.S. Const. art. I, § 8, cl. 8; *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1097 (7th Cir. 2007)(noting that the strategy of seeking out infringement is “far removed from the goals of the Constitution’s intellectual property clause”). Copyright protection extends to “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). The owner of a copyright “has the exclusive rights to make copies of the copyrighted work.” *Id.* § 106. “Copying” encompasses any of the copyright owner’s exclusive statutory rights. *U-Haul Intern., Inc. v. WhenU.com, Inc.*, 279 F.Supp.2d 723, 729 (E.D.Va. 2003); 17 U.S.C. § 501(a). The exclusive rights of Title 17 include the sole rights of distribution, reproduction, public display, adaptation, public performance, and certain digital audio transmissions. 17 U.S.C. § 106.

To establish copyright infringement, a plaintiff must prove “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Copying may be established by direct evidence or, alternatively, by showing that the defendant had access to the copyrighted materials and that substantial similarity of ideas and expression existed between the alleged infringing

materials and the copyrighted materials. *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006).

B. Motion for Summary Judgment

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “An issue of fact is genuine when ‘a reasonable jury could return a verdict for the nonmoving party’ on the question.” *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A fact is material when it might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248. Although the record must be viewed in the light most favorable to the nonmoving party, “[a] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts in the record showing that there is a genuine issue for trial.” *Dryer v. Nat’l Football League*, 814 F.3d 938, 942 (8th Cir. 2016).

Procedurally, the moving party bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of genuine issue. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the record demonstrates that no genuine issue of fact is in dispute, the burden then shifts to the non-moving party, who must set forth affirmative evidence and specific facts showing a genuine dispute on that issue.” *Kennedy v. Gish, Sherwood & Friends, Inc.*, 143 F.Supp.3d 898, 904

(E.D. Mo. 2015). The nonmoving party must offer proof “such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. A plaintiff in a copyright infringement case does not raise a material issue of fact merely by listing the similarities between its work and the allegedly infringing work. *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120 (8th Cir. 1987).

II. Steve King, The Natural Person, Is Not An Infringer

The personal liability of representatives and members of a voluntary unincorporated association appears is based upon principles of agency. *Wilson & Co. v. United Packinghouse Workers*, 181 F. Supp. 809, 815-16 (N.D. Iowa 1960). Alternatively, under principles of vicarious liability, members may be liable for the acts of officers, agents, or members of the association when the membership knows of such acts and actively or passively approves them. Under Iowa’s version of the RUUNNA, a member or manager is not personally liable for a liability of an unincorporated nonprofit association solely because the member acts as a member or the manager acts as a manager. Iowa Code Chapter 501B.8(1).

In the motion to dismiss in this case, this Court noted that Plaintiffs survived the motion to dismiss, not because Plaintiffs claimed that King had some personal responsibility based on his supervisory role in the Committee, but rather because Plaintiffs asserted that King himself posted the Photograph. The Plaintiffs’ position was blatantly untenable, but Plaintiffs nevertheless asserted it. Discovery has completed and the only available evidence indicates that King had no

association with any act of liability mentioned in the complaint. King's only act in relationship to the acts of the Complaint involved his approval of apology language. App. at ¶ 20-27.

III. The Work Lacks Sufficient Authorship By Laney Griner to be Copyrightable

A. Authorship

Authorship is a *sine qua non* for any claim of copyright. Copyright protection subsists only in "original works of authorship." 17 U.S.C. § 102(a) (emphasis added). See *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980). Originality merely requires independent creation by the author and just a scintilla of creativity. *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 118 (D.D.C. 2004), *aff'd sub nom. Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005). Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992). Most aspects of photography authorship can be sorted into three broad categories: (1) originality in rendition, (2) originality in the creation of the subject, and (3) originality in timing. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 452 (S.D.N.Y. 2005)(J. Kaplan). Reliance on necessary choices would render the 'originality' aspect of copyright law to a meaningless abstraction.

B. When a Photographer Is the Author

“Given how originality in photographs has come to be understood in actual practice—*i.e.*, as tied to the photographer’s choices—the question of authorship has inevitably followed suit and defaulted towards recognizing the photographer as author, even though by no means is that solution the only one cognizable (nor even the one commanded by statute).” 1 Nimmer on Copyright § 2A.08 (2022).

C. When the Subject Is the Author

In on of the first Supreme Court pronouncements on the creative aspects of photography, the Supreme Court had no issue grappling with the elements of originality to award a copyright to the subject of a photograph rather than the photographer. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). Even when a photographer is an author on the slightest of premises, it may be the case that the subject is an author – even if not to the exclusion of the photographer. *See e.g., Brod v. General Pub. Group, Inc.*, 32 Fed. Appx. 231, 233–34 (9th Cir. 2002)(During the photo shoot, defendant selected the subject matter, positioned the props appropriately, and suggested camera angles and changes to be made “before [plaintiff] triggered the shutter). “One can exercise control over the content of a work without holding the camera.” *Gillespie v. AST Sportswear, Inc.*, 58 U.S.P.Q.2d 1134, 1139; 2001 U.S. Dist. LEXIS 1997 *19 (S.D.N.Y. 2001). In particular, it is held that one that controls the pose of a subject can be an author if the pose contributes to the expression of the idea of the creative work. *Robinson v. Buy-Rite Costume*

Jewelry, Inc., 2004 U.S. Dist. LEXIS 16675 (S.D.N.Y. 2004).

D. If Anyone Is an Author It Is Sam

The dominant creative expression of the Work is without a doubt the gesturing of Sam Griner. Laney Griner explains the obvious: her capture of the Sam Griner's gesturing was a "lucky chance." App. at ¶ 4. Sam Griner's activities were purposeful, and his own; after all, he was ignoring Laney Griner, and eating sand. App. at ¶ 42(l).

IV. Steve King Had an Implied License to Use the Work

A. Laney Griner Granted a Direct Implied License to the Internet to Use the Work

A nonexclusive license may be . . . implied from conduct." *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990). An implied license can be found where the copyright holder engages in conduct "from which [the] other [party] may properly infer that the owner consents to his use." *See De Forest Radio Tel. & Tel. Co. v. United States*, 273 U.S. 236, 241 (1927). "The touchstone for finding an implied license . . . is intent." *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 40 (1st Cir. 2003). We ask whether "the totality of the parties' conduct indicates an intent to grant such permission." 3 Nimmer on Copyright § 10.03[A][7], at 10-42 (2000). The test most commonly used in determining if an implied license exists in an arm's-length transaction with respect to most kinds of works asks whether the licensee requested the work, whether the creator made and delivered that work, and whether the

creator intended that the licensee would copy and make use of the work. *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 514 (4th Cir. 2002).²⁵ However, creating material at another's request is not the essence of a license; an owner's grant of permission to use the material is. *Midlevelu, Inc. v. ACI Info. Grp.*, 989 F.3d 1205, 1216 (11th Cir. 2021). When an owner's conduct "clearly" manifests "a consent to . . . use" of copyrighted material, the owner impliedly grants a nonexclusive license. *Id. citing De Forest*, 273 U.S. at 241. With an intensity that varies with the facts of the particular case, courts have deemed it useful to consider a number of more applicable factors, including:

(1) whether the parties were engaged in a short-term discrete transaction as opposed to an ongoing relationship; (2) whether the creator utilized written contracts . . . providing that copyrighted materials could only be used with the creator's future involvement or express permission; and (3) whether the creator's conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator's involvement or consent was permissible.

Nelson-Salabes, 284 F.3d at 516.

A prudent first step may involve determination of the "parties." Copyright law infrequently dealt with

²⁵ *Nelson-Salabes* factors have penetrated a good number of Circuits, and has a beachhead in this Circuit – principally in Minnesota. *Haddley v. Isanti County*, 2015 U.S. Dist. LEXIS 198182 * 24 (D. Minn)(Discussion of implied license)

mass transactions, but the Internet is changing the licensing landscape. Website ‘terms of use,’ for example, tend to be drafted to empower a class of users. Contract law tells us that a party to a contract can be either an identified person, or a class of persons. Restatement 2d of Contracts, § 29. Comment b explains: “An offer may create separate powers of acceptance in an unlimited number of persons, and the exercise of the power by one person may or may not extinguish the power of another.” Copyright licenses follow suit. *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006).

In *Field*, a website owner sued Google for posting archived copies of the site’s pages, which included copyrighted content. *Field*, 412 F. Supp. 2d at 1109-10. Google presented evidence that it is well known within the Internet industry that websites can be coded to tell search-engine web crawlers—automated programs that “crawl” the web to locate, copy, and archive webpages for a search-engine index—not to copy their webpages or display archived copies of the webpages on the search-engine index. *Id.* at 1110, 1112-13. Absent this affirmative instruction, a search engine infers permission to copy and archive the webpages. *Id.* at 1116. Yet the plaintiff had coded his website to allow web crawlers to copy and archive all its pages, and even admitted that he knew about the Google’s practices. *Id.* at 1113-14. Because Google could reasonably interpret the plaintiff’s conduct as the grant of a license to web crawlers for the archiving of copies of the website, Google succeeded on its implied-license defense. *Id.* at 1116.

1. The Parties Were Engaged in a Decade-long Ongoing Relationship

When Laney Griner transmitted communications across social media platforms, it would be a probable assumption that she is speaking to the same class of users that are empowered to use the social media system. When, for example, Laney Griner created a Success Kid fan page on Facebook and posted Second Generation Memes she was courting the users of Facebook. App at ¶ 77 (Indicating that the site was for “strangers.”). When Laney Griner linked to Knowyourmeme.com, bearing its myriad of links to create Second Generation Memes and generally use the Work, this was an invitation. App at ¶ 59. When Laney Griner transmitted her own Second Generation Memes across Twitter, Facebook, and Instagram while leaving url tags in the corner of the Memes, she was telling users where they could go to create their own meme. App at ¶ 63. She did her work well, according to the Plaintiffs’ own figures, it is the third most popular meme on memegenerator.net. App at ¶ 63 (See GAG000134).

2. Laney Griner Never Utilized Written Contracts with Social Media Users

Throughout her interaction with users of, Laney Griner never utilized a written contract.

3. Social Media Users Knew that their Uses of the Work Without Laney Griner’s Involvement or Consent Was Permissible

When, for example, Laney Griner created a Success Kid fan page on Facebook and posted Second

Generation Memes that she thought particularly clever, or unusual artistic works utilizing the Work she was demonstrating how to make Second Generation Memes, and putting users on notice that they too could make versions of the Work that she might post. App at ¶ 59. This is not merely theoretical, users did exactly that. ¶ 58(e). She greeted all of them with great acceptance. App at ¶ 58.

B. Laney Griner Granted an Implied License to Image Mass-Production Websites to Reproduce and Distribute the Work

There is a more finite class of parties to which Laney Griner granted an implied license, IMP sites. An IMP site is a service that retains hundreds and thousands of images that are in common circulation on the Internet, particularly Memes, and on request, the IMP site will furnish the user with a copy of the image on a wide array of products – or as a standalone image. Laney Griner visited these IMP sites, promoted them, utilized them to make and distribute Success Kid Memes, and was shown images of the Work derived from these IMP sites on a regular basis.

1. The Parties Were Engaged in a Decade-long Ongoing Relationship

Laney Griner engaged with the IMP sites on an ongoing basis. For example, when Laney Griner created a Success Kid Fan Site to promote the Success Kid Venture, she hyperlinked to a site Knowyourmeme.com, that in turn provided hyperlinks to multiple IMP sites for users to acquire copies of the Work. She testified that she first created the website when Sam Griner was young, and she had not been in many years. She had even had conversations with the

staff at Knowyourmeme.com for purposes of accuracy. Knowyourmeme.com links to the following websites that provide the Work to any user on demand.

<http://www.quickmeme.com/Success-Kid>
<https://imgflip.com/meme/Success-Kid>

Knowyourmeme additionally directly hyperlinks to sites that offer the best versions of the meme for download.

<https://www.ranker.com/list/the-very-best-of-the-success-kid-meme/kel-varnsen>
<https://pleated-jeans.com/2011/07/27/best-of-the-success-kid-meme-17-pics/>

Furthermore, knowyourmeme.com offers 213 versions of the Work in various forms from advertisements to political ads.

Laney Griner visited memegenerator.net and imgflip.com twice; we know this because beginning ten years ago she created and circulated a versions of the Work through Instagram, Facebook, and Twitter, respectively, tagged in subscript with the IMP that she used to create them. App at ¶ 63.

In addition to the IMPs that she visited to create and circulate versions of the Work, she was also exposed to myriad versions and quantities of the Work tagged with the IMP sites from which they originated. To all of these IMP-creations, she either expressly condoned them, silently viewed them, or in some cases, criticized the social media users that snitched on third party uses (*e.g.*, telling them to “chill”). App at 1 40.

2. Laney Griner Never Utilized Written Contracts with IMP Sites

Throughout her interaction with IMP sites, Laney Griner never utilized a written contract.

3. The IMP Sites Knew that their Uses, and the Users that Use IMP Sites Knew, that Use of the Work Without Laney Griner's Involvement or Consent Was Permissible

Laney Griner knew that IMPs were fabricating copies of the Work, and users of the IMPs were creating and circulated copies of the Work throughout the Internet, in unfathomable quantities and myriads of versions. Throughout the life of the Work Laney Griner was exposed to the Work tagged with the IMP sites from which they originated. In response to these IMP-creations, she either expressly condoned them, silently viewed them, or in some cases, chastized the social media users that alerted her to third party uses. App at 1 40.

In addition to her knowledge of third party uses, Laney Griner took a more active hand in the fabrication of copies using IMPs: she visited them personally, and used them to create her own versions of the Success Kid Meme. Laney Griner visited memegenerator.net, and then imgflip.com twice; we know this because ten years ago she began to create and circulate versions of the Work through Instagram, Facebook, and Twitter, respectively, tagged in subscript with the IMP that she used to create them. App at 1 63. In a particularly informative set of circumstances, in fact, the only instance in which Laney Griner recalls using formal channels with an Internet company to “take down” a

version of the Work, when presented with an “icky” version of the work she snitched on the user with Twitter. App at 162. This Second Generation Meme had a url tag (creatememe.chucklesnetwork.com) for the IMP site that the user visited to create the distasteful meme; but Laney Griner only sought recourse with Twitter against the end user. App at 162. She purposefully ignored the IMP sites because the Success Kid Venture depends on notoriety.

4. Conclusion

For all the world to see, Laney Griner condoned third party uses of Success Kid Memes, criticized those that alerted her to their presence, and even dabbled in the creation of her own Success Kid Memes on IMPs. Why would an IMP believe that it lacked the right to copy the Work, and allow end users to do the same? Under any test, Laney Griner granted an implied license to IMPs for their blatantly infringing services for their users.

V. Laney Griner Abandoned Her Copyright in the Work

As this Court noted, the Eighth Circuit has not held that an abandonment doctrine exists, but its component districts have held that copyright can be abandoned if there is both (1) an intent by the copyright owner to surrender the rights and (2) an overt act showing that intent. *Griner v. King*, 2021 U.S. Dist. LEXIS 215050, *17 (N.D.Iowa 2021). Although rare, the principle cause of abandonment occurs when a copyright holder makes statements as the free alienation of a copyrighted work, for example:

- In one case, the author of books and videos

about meditation techniques repeatedly made statements along the lines, “I don’t care about copyrights or any of that stuff, that doesn’t matter. Forget it, just take it” *Melchizedek v. Holt*, 792 F. Supp. 2d 1042, 1045, 1048 (D. Ariz. 2011).

- plaintiff [may have] abandoned the copyright to its pornographic videos by uploading them as part of its promotional strategy, “without executing any type of written agreement or [even] retaining a single record or which videos were uploaded to which tubesites. *Malibu Media, LLC v. Doe*, 381 F. Supp. 3d 343, 353 (M.D. Pa. 2018) (Treatise cited).

4 Nimmer on Copyright § 13.06. Griner’s statements may fit neatly into the bounds of Nimmer’s chapter someday.

- My picture was just out there for anyone to take and manipulate. I realized at that point, there was no getting this picture back, the Internet had it. App at ¶ 77

- I would contact people, insisting they remove [the Gesturing Toddler 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. App at ¶ 77

Furthermore, Laney Griner’s conduct which is open to view²⁶ leans in only one direction: the free alienation of

²⁶ Overt: open to view. <https://www.merriam-webster.com/dictionary/overt> (accessed April 15, 2022).

the Work. If this Court were looking for an overt act, it would be spoiled for choice. Viewing a barrage of uses of the Work from the archetypes of corporate American and a wide variety of politicians and political causes, and saying nothing is not overt; but when third parties are continually transmitting these uses to her over social media for her enjoyment or knowledge and she sits on her hands, this becomes an overt act. App at 1 42. Very rarely did Laney sit on her hands, though; these infringements were mostly greeted with excitement – and when transmitted by third parties in the guise of assistance-in-policing, they were more-often-than-not greeted with scorn. App at 1 40. Restaurants, political platforms, politicians, National Basketball Association, National Football League, medical seminar lectures, informational videos, medical offices, movie publicity pieces, universities, beard oil, anger support groups, Asian, the Disney, greeting cards, Readers' Digest, miscellaneous foreign uses that she claimed not to understand, works of art; she saw them all, publicly, and loved them, publicly. App at 1 42. She asked for more, publicly. App at 11 52-59. She recommended new genres for uses of the work, publicly. App at 11 52-54. She told the Internet how moving the experience was, publicly. App at 1 7.

When a copyright owner explains its motivation for the free-alimentation of a Work, chastises informants, is barraged with an unending, myriad array of uses upon which it positively comments, recommends new uses, and accepts a wide (and even bizarre) range of uses, it ought to be said to abandon its work.

VI. This Is a Case Where the Plaintiff Should Bear the Burden of Proof in Proving That Defendants Utilized an Unlawful Copy

This is not a case based on conventional infringement. In circumstances where a defendant could have rightful access to a copyrighted work, it is incumbent on the plaintiff to allege not only the basis of 'copying' but also the rationale for why 'rightful access' cannot be established. A Second Circuit line of caselaw is illustrative.

In *Bourne v. Walt Disney Co.*, a plaintiff-owner of several well-known Snow White songs brought suit against defendant-Disney to seek damages for distribution of the songs on videocassettes. 68 F.3d 621, 631 (2d Cir. 1995). When the district court charged the jury that the plaintiff, had the burden of proving that Disney's use of the compositions was unauthorized, the plaintiff appealed. *Id.* at 630-31. The Second Circuit affirmed the district court's instructions:

[plaintiff] is correct insofar as it contends that the possession of a license by an accused infringer traditionally has been characterized as a matter of affirmative defense. However, in most of the cases addressing the defense of license, the issue has been whether a license is held by the accused infringer. Since, in such cases, evidence of a license is readily available to the alleged licensee, it is sensible to place upon that party the burden of coming forward with evidence of a license.

Id. at 631. *Bourne*, like many infringement cases, involved infringement in derogation of licensed rights, and because tied to contractual performance, the plaintiff would be required to prove not only ‘copying’ but also contractual ‘breach.’

The next logical step would be to require that the pleadings match the eventual burden of proof. *See Yamashita v. Scholastic, Inc.*, 936 F.3d 98, 104 (2d Cir. 2019). In *Yamashita*, a copyright plaintiff sued a defendant for infringement notwithstanding the existence of a third-party contract from which the defendant alleged rights. *Id.* at 104-105. When the district court held that the plaintiff need plead facts not only of ‘copying’ but also of ‘contractual breach,’ the plaintiff appealed. *Id.* at 105. The Second Circuit affirmed the district court’s ruling stating that “to sustain such a complaint that alleges nothing but suspicions of infringement where a license has been granted is to invite transformation of the courts into an audit bureau for copyright licensing, an administrative function that we are hardly designed to serve.” *Id.* at 107.

Whereas the *Yamashita* plaintiff used broad allegations to obscure from the court the contractual language that was tied to the breach, Griner is attempting to obscure the fact that so many entities have rightful access to the Gesturing Toddler work that, it should be incumbent upon Griner to allege a basis for the Meme Action Post to be wrongful. Plaintiffs have implied that doing so is burdensome, but it is nonetheless commensurate with having given away rights for at least five years and to billions upon billions of uses.

VII. Plaintiff Sam Griner's State Law Privacy Claims Are Pre-Empted

When a state law right of privacy/publicity Plaintiff seeks recovery for attribution, and the sole basis of the claim is premised on the creative expression in a copyrighted work, that state law claim is pre-empted by copyright law. *See Edge in Coll. Preparation, LLC v. Peterson's Nelnet, LLC*, 2017 U.S. Dist. LEXIS 85711, *5, 2017 WL 2423510 (D. Neb. 2017) (“a state-law right in a work is equivalent to the right conferred by copyright if the state-law right is infringed merely by publication of the work”) citing *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987). This issue was directly addressed in *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616, 627 (D. Md. 2020).

But the rights protected by the unfair competition claims are not qualitatively different from those protected by the Copyright Act because the gravamen of both types of claims is the misappropriation of an original work. The same act which constitutes Brantley and Nickens' unfair competition claim and the rights protected by the Copyright Act is the “copying [of] the original video of the Running Man and/or copying an identical version of that video. . . .”. The claim for unfair competition is not “qualitatively different” from a claim for copyright infringement and does not describe behavior other than the alleged copying.

Id. (Citations omitted). The Eighth Circuit has recognized an analogous basis of preemption, from another

court in the Fourth Circuit, in recognizing that a wrestler's state-law claims for damages arising from the reproduction and distribution of films of his wrestling performances were pre-empted by the Copyright Act. *Ray v. ESPN, Inc.*, 783 F.3d 1140, 1143 (8th Cir. 2015) *citing* *Blood v. Titan Sports, Inc.*, No. 3:94-CV-307-P, 1997 U.S. Dist. LEXIS 24485, at *33-*34 (W.D.N.C. May 13, 1997).

VIII. Fair Use

17 U.S.C. § 107, sets forth four non-exclusive factors that “shall” be considered in determining whether an otherwise infringing use is a non-infringing fair use. The enumerated factors are:

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

Id. Though all four must be considered together, the fourth factor is undoubtedly the single most important element of fair use.” *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 854, (8th Cir. 2004).

E. Factor 1. Purpose and Character of the Use

The first factor probably weighs against a finding of fair use. However, this Court should consider that in circumstances wherein an unpopular political cause

or person may not have access to traditional media outlet, there is some utility in being interesting. Humorous appeals to popular culture, humor, and intelligence are a conservative's principal access to the populace. Naturally, this is ideally done with someone else's property.

F. Factor 2: The Nature of the Copyrighted Work.

Photographs are as worthy of protection as most other creative works. However, Defendant asks that this Court consider not only the nature of photographs, but this photograph in particular. Because of the advent of the Meme as a way of conveying information and emotion, the Work has become a tool of sorts. The creative aspects, and the purpose of Title 17 is to protect creativity, has become overshadowed by the functional aspects of the Work. In a sense, this particular image has functional aspects – making it akin to less-protected types of copyrightable works, such as software. This factor ought to weigh in favor of the Committee.

G. Factor 3: Amount and Substantiality of the Portion Used

The amount and substantiality of the portion of the Work used is more complicated. The amount used, Sam and his gesture, was only that necessary to convey the emotion associated with the meme. The case law teaches Courts to look for the “heart” of the expression; and admittedly, Sam Griner, with his gesture, is the heart. *See Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 544 (1985). However, this Work's heart is the least creative – in fact, none of it deriving from Laney Griner – aspect of the Work,

the Committee using a version that wholly sheds the more-creative (but less-interesting) scenery, beach, etc. The magazine had “published its article for profit,” taking “the heart” of “a soon-to-be published” work. Accordingly, while the ‘amount used’ probably weighs in favor of the Committee, the ‘substantiality’ is a closer call.

H. Factor 4: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The ‘effect of use’ factor, often cited as the most important factor, is perhaps the simplest factor of the four, and weighs heavily in favor of the Committee. *Mulcahy*, 386 F.3d at 854. The Committee’s use of the Work was a droplet in the ocean concerning the overall use of the Work. There never was much of a market for the Work itself; and Laney Griner’s exploitation of the media to acquire acclaim vastly outweighed the \$28.00 (or less) that the Committee received from the Work. ¶¶ 28, 68. Twenty or so dollars tells the story of precisely the number of people that would have been exposed to the Committee’s use of the Work had Laney Griner not amplified the stakes by orders of magnitude. Plaintiffs can pretend all they please concerning invasion rights of privacy; but running to some of the nation’s largest, oldest media outlets to complain tells the story. This was a boon; a timely, lucrative godsend to revive a decaying brand.

CONCLUSION

Defendants ask that this Court grant their motion for summary judgment.

App.149a

Respectfully submitted,

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/s/ Maj. Sean Chao
A 3rd Year Law Student at
District of Columbia Law School

Dated: April 15, 2022

**DEFENDANTS' UNDISPUTED FACTS
(APRIL 15, 2022)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

GRINER, LANEY MARIE, AND GRINER, SAM,

Plaintiff,

v.

KING, STEVEN A., AND KING FOR CONGRESS,

Defendants.

Docket No.5:21-cv-4024

DEFENDANTS' UNDISPUTED FACTS

I. Glossary

This Factual Background will rely on the following terms meant to clarify persons, places, and things, and will be discussed in greater particularity in the enumerated paragraphs.

- A. Laney Griner or Laney. Laney Griner is a Plaintiff in the above-captioned action and the purported sole copyright owner of the Work in dispute.
- B. Sam Griner or Sam. Sam Griner is a Plaintiff in the above-captioned action, the son of Laney Griner, and the purported owner of the likeness in dispute.

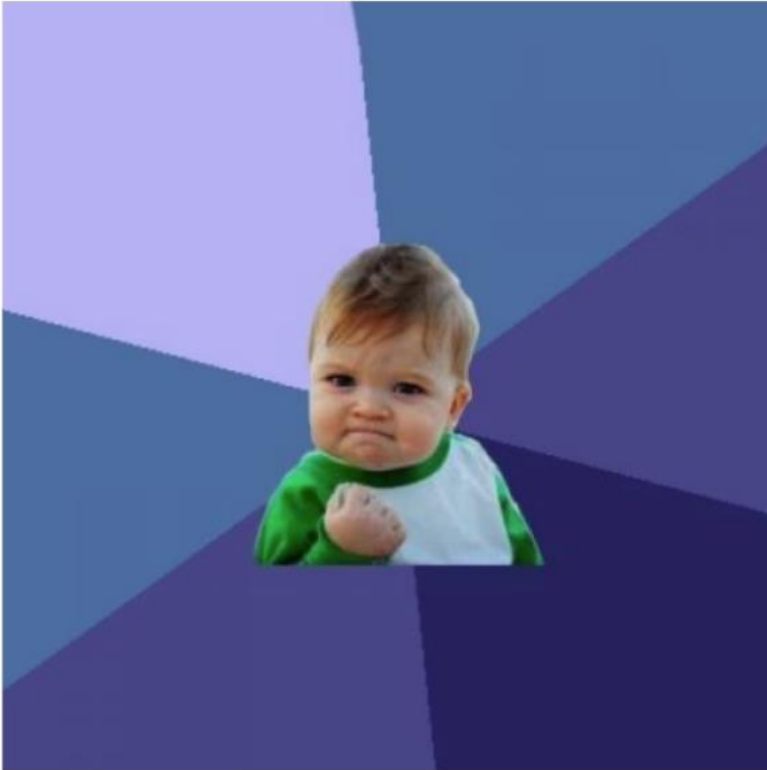
- C. Beach Image. The Beach Image is the particular photograph/image, and identical copies thereof, taken by Laney Griner on August 26, 2007. The Beach Image was the work that is the subject of Laney Griner's registered copyright.
- D. The First Generation Meme. The initial incarnation of the meme discussed in this case was derived from the Beach Image and was known as "I Hate Sandcastles" or "I'ma f-ck you up" and included messaging and sometimes superimposed elements upon the Beach Image.

Illustration 1. The Beach Image



- E. Second Generation Meme. The second incarnation of the meme discussed in this case was derived from the Beach Image and was known as "Success Kid." The "Success Kid" meme often included messaging concerning unexpected or trivial triumphs.

Illustration 2. The Second Generation Meme



- F. The Work or the Copyrighted Work. The “Work” is meant to subsume all uses of Sam Griner’s images that can be traced to elements of the Beach Image, including the Beach Image, the First Generation Meme (with any phrasing or additional visual elements), and the Second Generation Meme (with any phrasing or additional visual elements).
- G. The Success Kid Venture. The Success Kid Venture is meant to subsume all monies, services, appearances, and other activities

meant to commercialize the Work. Examples of such activities may include public appearances as “Success Kid” (paid or unpaid) at an Internet convention or a license agreement with Verizon.

- H. Meme Action Post. The Meme Action Post is the publication of the image of Illustration No. 3 by the Committee on Winred servers on January 27, 2020.

Illustration 3. The Alleged Infringement



- I. Steve King or King. King is the Congressman and natural person who is a Defendant in this action.
- J. The Committee. The Committee is the unincorporated association King for Congress, a Defendant in this action, that is registered with the Federal Election Commission for the election of Steve King and its employees and agents.
- K. Image Mass Production (“IMP”) Site. An Image Mass Production site is a website that caters to users seeking to create memes using

stock images as a blank canvas. Exemplary Meme Generation Production sites that Laney Griner used include Imflip.com and makeameme.org. Knowyourmeme, Ex. 8, lists many others.

II. Undisputed Facts

Creation of the Work

1. Plaintiff Laney Griner (“Laney” or “Laney Griner”) first took the iconic photographic image of her son Plaintiff Sam Griner (“Sam” or “Sam Griner”) at the beach eating sand on August 26, 2007 (the “Beach Image”). Ex. 1; Dep. of Laney Griner by M. Keith Blankenship 199:7-200:9; 123:1016.

2. Her husband surprised her with a new camera, a Nikon D40 SLR camera, at least partially from tax return proceeds. Ex. 2; Dep. of L. Griner, 200:18-201:14.

3. The Beach Image was one of a handful of photographs that she had taken that day. Ex. 3; Dep. of L. Griner, 200: 9-16.

4. She did not ask Sam to pose, or take any pains to pose him, or position him with any particularity against the scenery; in her own words she simply wanted a “candid” photograph and the Beach Image she “got by lucky chance.” Ex. 4; Dep. of L. Griner, 200: 9-25; 203: 23-205:24; 123:1016.

5. Laney immediately posted the image on image-sharing website Flickr. Ex. 5; Dep. of L. Griner 273:12-21.

6. She was alerted some months later that others had been copying and posting the Beach Image, and

she began to demand that the users cease copying the Beach Image. Ex. 6.

7. With Sam's fist raised, scowled lips, and glaring determination in his eyes, the first generation of the Meme was born: known colloquially as "I hate sandcastles" or "I'm going to f-ck you up" (the "First Generation Meme"). Ex. 7 and 8.

8. The First Generation Meme was almost a carbon-copy of the Beach Image, sometimes with an object artificially applied to the background, particularly a sandcastle. Ex. 8.

9. Initially Laney pled with Internet users, mostly directly but sometimes through formal channels, to take down the First Generation Meme. Ex. 9; Dep. of L. Griner 281:1 – 282:9.

10. The Internet had other ideas for the Beach Image, around a second generation meme saw Sam's image, separate and apart from the beach background, and encompassed in a blue/purple triangles (the "Second Generation Meme"). Ex. 8.

11. The Second Generation Meme was colloquially known as "Success Kid" and carried a new theme: the simple joys that derive from small or unexpected successes. Ex. 8 and 10.

12. Laney was much happier with this theme, and she entirely stopped requesting that any meme featuring Sam cease, or rather, she can neither cite nor recall any instance of requesting that a user cease the Work. Ex. 8, 10 and 11, Dep. of L. Griner, 281:1 – 282:20

Steve King and King for Congress

13. Steven A. King (“King”) is a Congressman from the Fifth and then the Fourth Congressional District of Iowa King for which he was elected in 2002 and served until January 2020. Ex. 12; Decl. S. King, par. 2.

14. In 2001, King registered an election committee, King For Congress, with the Federal Election Commission as a principal campaign committee (the “Committee”). Ex. 12; Decl. S. King, par. 6.

15. The Committee is an association formed in Iowa and maintains an office and staff in Wall Lake, IA 51455, its principal place of business. Ex. 12; Decl. S. King, par. 7.

16. The Committee supports the candidacy of King, whose district is in the state of Iowa. Ex. 12; Decl. S. King, par. 8.

17. The Committee employed Jeff King as the chief of staff who managed its day-to-day activities with broad discretion. Ex. 13, Dep. Steven A King by Michael Steger, Pg. 54: 15-16.

18. The Committee used an independent contractor, Michael Stevens, to assist in unconventional marketing, including the creation and circulation of Memes throughout social media. Ex. 14, Deposition S. King 44:1-15 and p 86:12-25 and Ex. 15, Deposition of Jeffrey King by Michael Steger, pg. 22:15 – 23:10; 37:11– 38:24.

19. On January 27 2020, a Winred, Inc. server displayed portions of the Work along with the text “Fund our Memes” (the “Meme Action Post”). Ex. 16.

20. Michael Stevens created the Meme Action Post from an image that he acquired, likely, from an Image Mass Production (“IMP”) website imgflip.com or IMP site stickPNG.com. Ex. 17.

21. On January 27, 2020, representatives of Laney Griner transmitted a ‘cease-and-desist letter’ (“Take Down Letter”) to the Election Committee to remove the Meme Action Post. Ex. 16

22. The letter demanded both that King refund any donors, and that he surrender the money to Laney Griner. Ex. 16

23. Within hours the Election Committee removed the Meme Action Post. Ex. 19.

24. On January 27, 2020 Committee employee Lindsay King transmitted a copy of the Take Down Letter to Michael Stevens, who removed the Action Meme Post immediately. Ex. 19; Ex. 20, Dep. J. King pg. 40, ln 10-22.

25. No individual within the Committee knew about the posting of the Action Meme Post, excepting Michael Stevens, until the Committee received the Take Down Letter. Ex. 19; Ex. 20.

26. Two days later, in response to the Take Down Letter, the Committee issued an apology on Social Media. Ex. 19.

27. Review of the apology language was Steve King’s first contact with any aspect of the Committee’s use of the Work in the Action Meme Post. Ex. 21, Dep. S. King, 63 ln 21 – p 64 ln 25; p 66, ln 23-25; pg. 72, ln 16-23.

28. Chief of Staff Jeff King asserts that he has nominative managerial control of campaign matters,

but, in fact, did not see Meme Action Post prior to its posting on Winred. Ex. 22, Dep. J. King pg. 34 ln 16 – pg 35 ln 24.

29. At the time of the Take Down Letter, the Committee was under the belief that \$21.00 was the total income attributable to the Meme Action Post, although no one presently involved recalls why and how they came to that conclusion. Ex. 19.

30. It is certain that no more than \$28.92 was raised through the Meme Action Post because that was the total ‘payout’ from Winred to the Committee the following day, which would subsume *all contributions of any kind* from Winred to the Committee. (Accordingly the monies attributable to the Meme Action Post is somewhere between \$0.00 and \$28.92 (USD)) Ex. 18.

31. Jeff King first saw the Meme Action Post subsequent to receiving the Take Down Letter. Ex. 23, Dep. J. King pg. 39, ln 20-24.

32. One of the few activities that Steve King insists upon express approval is any communication that purports to speak for him. Ex. 24. S. King, 18-25.

33. When the Committee removed the Meme Action Post, it did so as a matter of courtesy and without recourse to a legal conclusion from an attorney. Ex. 19.

The Work in Commerce: Licenses and “Licenses”

34. Laney first attempted to commercialize the Work at an unknown date shortly after the creation of the Work and prior to the copyright registration of the Work. Ex. 25, Dep. of L. Griner, 273: 10 – 274:5 and 291:16 – 292:7.

35. The image site, Flickr, where she first posted the Beach Image had a function that allowed a user to submit an image for license, from which the user would receive compensation. Ex. 25.

36. Laney explains that she initially used the Flickr submission function, but does not recall: whether she used contracts, to whom she licensed the image other than Vitamin Water and Verizon, the monies that she received from the Flickr uses, or the duration for which the Beach Image was available for mass-license. Ex.5. When asked in an interrogatory to submit the contracts for use of the Work, Plaintiff opted to answer by document production, and no Getty contract or amount, Vitamin Water contract or amount, or Verizon contract or amount, was disclosed. (The undersigned purposefully asked in both an interrogatory and Document Request to seek the existence of documents/contracts that might no longer be in the possession of Plaintiff).

37. Laney has entered into multiple licenses for exploitation of the Work.

38. It is more often than not that commercial enterprises use some version of the Work and Laney harangues them until they pay her to go away (or perhaps to avoid bad publicity) or that she simply ignores the use.

- a. An example of a post-hac license includes a Ryan Kittleson, Shapeways, contract for the production of three-dimensional versions of the Work. Ex. 26, Dep. of L. Griner 258:5–260: 23 (B25).
- b. An example of a post-hac license includes Virgin Media. Ex. 27.

The Work in Commerce: Use in Advertisements

39. Laney Griner only publicly-accessible statements concerning restrictions on the rightfulness of the use of the Work was aired in a one-to-one social media post to a stranger letting her know about the use of Sam’s Gesture Image in a social media post. Ex. 28, Dep. of L. Griner 221:12 – 223:18 (C14).

40. She began by chastising the stranger, “dude, you gots to chill²⁷” and then explained: “It’s only a copyright problem if someone uses [the Work] in ads,” and that Ex. 28.

41. Although this is her only public-accessible statement expressing any type of reservation, in deposition, she freely conceded that she did not mean what she said. Ex. 29, Dep. of L. Griner 224:9 – 226:9.

42. Laney allowed entities to publicly advertise with and commercialize the Work at no cost and without a license agreement, including:

- a. restaurants, Ex. 30, Dep. of L. Griner: 270:10-271:25 (B37) and Ex. 31, Dep. of L. Griner: 243:10-243:7 (B41);
- b. political platforms, Ex. 32, (A61 and A65);
- c. politicians, Ex. 33, (A63, A64, and C53)
- d. National Basketball Association games, Ex. 34, Dep. of L. Griner, 265: 12 – 266:2 (B30)
- e. National Football League marketing blasts, Ex. 35, 262:13 – 263:15. B28 (“No big deal”)

²⁷ Laney Griner, who normally writes with stellar grammar, was quoting a song here.

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- f. medical seminar lectures, Ex. 36, Dep. of L. Griner 236:18 – 237:3 (A29)
- g. informational videos, Ex. 37, Dep. of L. Griner 240:14 – 241:20 (A39),
- h. medical offices, Ex. 38, Dep. of L. Griner, 241:23-242:20 (A40-41),
- i. movie publicity pieces, Ex. 39 Dep. of L. Griner 243:25 – 244:7 (A42),
- j. Universities, Ex. 40, Dep. of L. Griner 245:2-22 (A44),
- k. beard oil, Ex. 41, Dep. of L. Griner 266:3-267:3 (B31),
- l. anger support groups, Ex. 42, Dep. of L. Griner 182:10-185:5 (B32),
- m. Asian restaurants, Ex. 43, Dep. of L. Griner 185-187:21 (B41),
- n. the Disney Corporation, Ex. 44, B43,
- o. greeting cards, Ex. 45, Dep. of L. Griner, 289:4 – 289:20 (No exhibit)
- p. Readers' Digest. Ex. 46, Dep. of L. Griner: 239:23-240-10 A37
- q. Miscellaneous Foreign uses that she does not understand, Ex. 47, Dep. of L. Griner 246:9 247:12 (A52) and *see* Ex. 43.
- r. Works of Art, Ex. 48, Dep. of L. Griner 235:1-20. (A03)(Resp: "Super Cool") Dep. of L. Griner, 247:13-248:9 (A55); 250:2-250:18 (B08); 251:19-253:18, 255:7-20 (B17).

43. For each of the uses of Par. 42, these are of particular interest in relation to this motion, because

for every one of them: (i) someone brought these to Laney's attention (ii) in a publicly-accessible social media forum and (iii) Laney expressly responded with indifference or affirmation.

44. For each of the social media posts/images of Par. 45, Laney Griner posted them through the account for which she signs commercial contracts LaneyMG or applies a hashtag to it that makes the posts/images searchable to any third party. (This is how our investigator found them).

45. The hashtag system utilizes "is a metadata tag that is prefaced by the pound sign or hash symbol, # (not to be confused with the pound currency sign). Hashtags are used on microblogging and photo-sharing services such as Twitter, Instagram and WeChat as a form of user-generated tagging that enables cross-referencing of content; that is, sharing a topic or theme." For example, a search within Instagram for the hashtag #bluesky returns all posts that have been tagged with that hashtag. After the initial hash symbol, a hashtag may include letters, digits, and underscores. <https://en.wikipedia.org/wiki/Hashtag>

The Work in Commerce: Political Use (Including Unauthorized Uses)

46. Until publicly objecting to the Committee's use of the Work, There is no public record/statement of Laney Griner ever objecting to a political use of the Work.

47. As part of Laney's attempt to maintain the Success Kid Venture in the public consciousness, she frequently injected Sam into political causes. Laney repeatedly blasted messages suggesting that "Success

Kid” run for president – even using a distinct hashtag, #forpresident, to allow Internet users to see all posts advocating ‘Success Kid for President.’ Ex. 49, Dep. of L. Griner 130:17131: 1 (C17, A64, B30, C18, and C56).

48. Sam officially endorsed Bernie Sanders for president.²⁸ Ex. 50, Dep. of L. Griner 218:2-23 (C54); 261:15-262:12 (B27).

49. Laney herself twice retransmitted an altered version of the Beach Image, taking the opportunity to: call President Trump a scumbag, and refer to Bernie Sanders as “Success Sanders.” Ex. 51 (C53, B27).

50. Laney allowed a version of the Work superimposing President Donald J. Trump’s face over Sam Griner’s face, and made that work search-indexable to social media. Dep. of L. Griner: 154:14155:16 and 190:14-192:13 (C53).

51. Sam’s Gesture Image was displayed in a video promoting homosexual rights from George Takai²⁹ Ex. 53, Dep. of L. Griner 248:10 – 249:11 (A61) and other homosexual rights advocacy groups. Ex. 54, Dep. of L. Griner 139:22-143:11. (A65).

²⁸ This seemed to be the one activity with which Laney consulted Sam. Otherwise, Sam testified that Laney had never consulted him, discussed with him, or in any way sought his feedback pursuant to any use of his image with a commercial venture, political cause, or social cause. CITE. When asked if he knew anything about Sanders, Sam gave a good-natured shrug. The undersigned didn’t further pursue the line of questioning.

²⁹ George Takai was the actor who portrayed Sulu in the original Star Trek television series and movies.

The Work in Commerce: Publicity Requests

52. Laney Griner at one point tried to institute a “Success Kid Day” and created a hashtag in furtherance of this, #Happysuccesskidday. Ex. 55, Dep. of L. Griner:109:10-110:4 (B06 and C10).

53. Laney Griner stated in social media that “Success Kid is part of a balanced internet diet.” Ex. 56, Dep. of L. Griner, 276:22-277:15 (C16).

54. Laney Griner tried to solicit a television show idea based off of “Success Kid.” Ex. 57, Dep. of L. Griner, 254:21-255:25 (C08).

The Work in Commerce: Encouraging the Masses Generally and Through Memes

55. In addition to the various forms of approval of political and corporate/commercial, Laney made express, public statements encouraging the use of the Work as memes throughout the Internet and media.

56. In another set of posts she was alerted to two uses of Sam’s Gesture Image, one directly shown to her and another linked. Said Laney: “Ha! These kind of uses are totally fine.” Ex. 58 Dep. of L. Griner, 235:21-236:25 (A06-07).

57. In that same post set: [For the record]: success kid would be nothing if no one shared memes. I have never and would never have issue with that. Ex. 58

58. And so the Internet responded, she receives an unending barrage of ‘Success Kid’ materials, in various forms, but mostly versions of the Second Generation Meme. She accepted them silently and with acclaim:

- a. To one user she responded with “Best Meme Yet!” Ex. 59, Dep. of L. Griner 261:15 – 262:12 (B27)
- b. Many of the uses “Thanks @kazghori! Best success meme yet.” Ex. 60, Dep. of L. Griner 278:6-278:24 C55.
- c. She received a Second Generation Meme with the phrase “Stay Strong.” *See* Ex. 58.
- d. One with Jeff Goldblum, which she joked with the hashtag #success(gold)man; Ex. 61, (B08).
- e. A happy fan who responded to one of Laney’s tweets with a bespoke, personal Second Generation Meme with the message “Tweeted About #Successkid, #Successmom @LaneyMG replies. Ex. 62, Dep. of L. Griner, 255:21-256:8 (1321).

59. Laney Griner created a “Success Kid” fan page in which she linked to knowyourmeme.org, Ex. 8. The Success Kid fan page is shown in Ex. 77. Dep. of L. Griner, 255:21-256:8 (1321)

60. Laney Griner knows that there are many Image Mass Production sites where end users can acquire copies of the Work. Ex.75, Dep. of L. Griner, 236:15-17.

61. It has never occurred to Laney Griner to ask an Image Mass Production site to cease using copies of the Work. Ex. 76, Dep. of L. Griner, 282:10-14.

62. Laney Griner could only recall a single instance in which she utilized a formal reporting process to take down unauthorized versions of the work, in 2012 with Twitter for a Second Generation

Meme describing a babysitter contacting an infant's genitals. Ex. 78, Dep. of L. Griner, 280:9-282:9.

63. Although at the start of her deposition, she claimed to have never created a Success Kid Meme, she later admitted when confronted with her examples, that Laney herself made at least four memes (unless, of course, someone else “dropped out of college and gave birth to Success Kid”).

- a. Ex. 63, Dep. of L. Griner, 202:7-203:22 (A57)
- b. Ex. 64, Dep. of L. Griner, 218:3-23(A64-C54, these are the same file)
- c. Ex. 65, Dep. of L. Griner, 267:8-22 (1333)
- d. Ex. 66, Dep. of L. Griner, 269:17-270:9 (1336).

Insincere Indignation

64. Laney Griner claimed that Sam's affiliation with Defendant Steve King harmed the “brand” of the Success Kid Venture, which she described as “positive and uplifting.” Ex. 67, Dep. of L. Griner, 50:24; 142:2.

65. Some of the “positive and uplifting” entities/activities with which she associated Sam's Gesture Image include: the HOT TOPIC novelty store³⁰ Ex. 68, Dep. of L. Griner, 268:13-269:16 (B35), ridiculing Asian features, Ex. 69, Dep. of L. Griner, 285:1-287:21 (B41), promoting the “health” benefits of marijuana³¹ Ex. 70, Dep. of L. Griner, 289:21-291:8 (E17), and the benefits of smoking marijuana to

³⁰ That would be Sam's image adjacent to the I AM KICK ASS shirt. B35.

³¹ According to the poster, which was probably tongue-and-cheek, asserted that marijuana “prob[ably] cures death.”

enhance one's . . . masturbation . . . experience,³² Ex. 71, Dep. of L. Griner, 289:21-291:8 (E18) and pairing of #successkid with #boobies after discussing the Success Kid Venture in a dark Internet corner known for its off-color humor Ex. 72, Dep. of L. Griner, 187:22-190:13 (B33).

66. By 2016, Sam Griner's notoriety began to fade to the degree that Laney Griner posted a pun stating: "Is Sammy now a has-meme?" Ex. 73, Dep. of L. Griner, 102:13-104:5 (A48).

67. When Laney Griner threatened to sue Steve King, she received more attention than she ever had, from well-wishers and from the corporate media. Ex. 74, Dep. of L. Griner 48:13-51:12 (A09, A16, A17, A18, A22, A23, A24, A25, A26, A27, C44, C45, C46, C47, C48)

68. Laney Griner, upon threatening to sue Steve King, also received attention from the following corporate media outlets.

<https://www.wired.com/story/success-kid-steve-king/>

<https://www.cnn.com/2020/01/29/politics/success-kid-steve-king-legal-trnd/index.html>

<https://time.com/5773061/success-kid-meme-steve-king/>

<https://www.cbsnews.com/news/success-kid-meme-mother-rep-steve-king-cease-and-desist-lawsuit/>

<https://www.washingtonpost.com/nation/2020>

³² The e-flyer actually uses the British slang term "fap."

0/01/28/king-meme-campaign/

<https://arstechnica.com/tech-policy/2020/02/success-kids-mom-wont-stand-for-steve-kings-meme-ad/?comments=1>

<https://www.chicagotribune.com/featured/sn-s-nyt-mother-success-kid-meme-demands-steve-kings-stop-using-20200128-gti5z4ox3nczlmalfqsusudexa-story.html>

<https://www.theverge.com/2020/1/28/21111805/iowa-republican-meme-lawsuit-success-kid-mom-steve-king>

<https://www.nytimes.com/2020/01/28/us/politics/steve-king-success-kid-meme.html>

69. The popularity of the Work has resulted in it being the third most utilized meme on meme-creator.net, Ex. 8, and resulted in Sam Griner being featured in at least three Internet conventions, ROFLcon (Boston), South-by-Southwest (in Austin), and a local Florida comic convention. Ex. 79. Dep. of L. Griner, 87:14 – 90:12.

70. Laney Griner auctioned off a Non-Fungible Token of the Beach Image that began in April 8, 2021 and closed on April 10, 2021 for a sale price of \$45,679.65. Ex. 80. Dep. of L. Griner, 195:20 – 198:18.