

Furie v. Infowars, LLC
Case No. CV 18-1830-MWF (JPRx) (C.D. Cal. May 16, 2019)

Year	2019
Court	United States District Court for the Central District of California
Key Facts	Plaintiff Matt Furie is the creator of Pepe the Frog, a character featured in several comic books since at least 2003. By 2008, the Pepe character had become a meme that was widely shared online. Throughout 2015 and 2016, Pepe was often pictured as or alongside then-presidential candidate Donald J. Trump and other conservative political figures. In 2017, Jon Allen created a Make America Great Again (“MAGA”) poster featuring his own rendering of Pepe alongside Trump and other conservative and “alt-right” figures. Allen offered the MAGA poster to Free Speech Systems, LLC (“FSS”), which is the operating business of right wing media site Infowars, LLC (“Infowars”), to sell on its online stores. Neither FSS, nor Infowars, nor Allen obtained license from Furie to use the image or character of Pepe the Frog. Furie sued FSS and Infowars for copyright infringement.
Issue	Whether unlicensed use of a character that has been used frequently in memes constitutes infringement.
Holding	The court applied the Ninth Circuit’s two-step test for determining the first factor of fair use, the purpose and character of the use, which considers whether the use was commercial and transformative. First, the court found that the use of Pepe in the MAGA poster was undoubtedly commercial. Next, the court held there were numerous factual disputes as to whether the use of Pepe in the MAGA poster was transformative, including with respect to the changes that were made to Pepe’s physical appearance and the purpose of Pepe’s inclusion on the poster. Addressing the second factor, the nature of the copyrighted work, the court rejected the defendants’ arguments that the “meme-ification” of Pepe the Frog destroyed or diminished Furie’s copyright interest in the character. The court noted that no matter how popular a character may become, its copyright owner is still entitled to guard against unauthorized uses. The court held that disputed issues of fact prevented it from ruling on the third factor, the amount and substantiality of the work used. Likewise, the court found that the parties had raised disputed issues of fact on the fourth fair use factor, the effect of the use on the potential market for or value of the work. While plaintiff argued that defendants’ use harmed the market for his work by associating it with the alt-right, defendants argued that Pepe’s association with political conservatives increased its popularity. Lastly, the court rejected the defendants’ argument that a controversial defendant should not have his or her fair use defense decided by a jury because of First Amendment protection for political speech. The court denied the defendants’ motion for summary judgment on fair use.
Tags	Ninth Circuit; Internet/Digitization; Review/Commentary; Painting/Drawing/Graphic
Outcome	Fair use not found, preliminary ruling

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