No. 23-____

IN THE

Supreme Court of the United States

RONALD RAGAN, JR.,

Petitioner,

v.

BERKSHIRE HATHAWAY AUTOMOTIVE, INC.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the correct standard of copyrightability is the Constitutional and statutory standard of originality as articulated in this Court's unanimous *Feist* decision or the Eighth Circuit's newfound "convey information" standard.[1]

[1] Insofar as the U.S. Constitution, the 1976 Copyright Act, and this Court in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), answer this question in favor of the originality standard, Petitioner submits that summary disposition on the merits under Rule 16.1 would be appropriate here.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption.

CORPORATE DISCLSOURE STATEMENT

Petitioner is a natural person.

RELATED PROCEEDINGS

The directly related proceedings are:

- *Ragan v. Berkshire Hathaway Automotive, Inc.*, No. 22-3355 (8th Cir. Feb. 2, 2024);
- *Ragan v. Berkshire Hathaway Automotive, Inc.*, No. 4:18-cv-01010-HFS (W.D. Mo. Oct. 11, 2022).

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Petitioner hereby petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion (A1-A6) is reported at 91 F.4th 1267.

The District Court's Rule 12(c) order (A7-A22) is unreported but is available at 2022 U.S. Dist. LEXIS 249015. The District Court order on reconsideration (A23-28) is unreported and does not appear to be listed in legal-research databases.

JURISDICTIONAL STATEMENT

The Eighth Circuit entered judgment on February 2, 2024. JUSTICE KAVANAUGH extended the time to petition for a writ of certiorari until July 1, 2024. No. 21A958. This Court has appellate jurisdiction. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY & CONSTIUTIONAL PROVISIONS

- Article I, Section 8, Clause 8, of the United States Constitution reads in pertinent part as follows:

  The Congress shall have Power […]

  To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]

- Section 102 of Title 17 of the United States Code reads in pertinent part as follows:

  § 102. Subject matter of copyright: In general

  (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

  (1) literary works;
  (2) musical works, including any accompanying words;
  (3) dramatic works, including any accompanying music;
  (4) pantomimes and choreographic works;
  (5) pictorial, graphic, and sculptural works;
  (6) motion pictures and other audiovisual works;
  (7) sound recordings; and
  (8) architectural works.

  […]

STATEMENT OF THE CASE

I. ORIGINALITY

This Petition asks: what is the appropriate standard of copyrightability?

The answer should be clear: originality. In *Feist*, this Court unanimously reiterated and reaffirmed that originality is the appropriate standard of copyrightability. *See generally Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). This originality standard, first articulated by this Court in the late-nineteenth century "remains the touchstone of copyright protection today." *Id.* at 347.

Feist made clear that originality had two, and "*only*" two, requirements.

First, originality means that the work is "independently created by the author (as opposed to copied from other works)." *Id.* at 345. As such, a work can be original even if it's "identical" to or "closely resembles other works." *Id.* at 345-346. So long as they're independently created, such works are still original. Originality does not mean "novelty" or uniqueness, it just means that a work was independently created. *Id.*

Second, originality requires that the author employed a "modicum of creativity" when creating the work. *Id.* at 346. Thus, *Feist*'s originality standard looks to the creative choices involved in creating the work. It asks whether any of the author's choices when creating a work reflect a human author exercising the "creative powers of the mind." *Id.* at 346. Originality means that the author's creative choices when making the work had any creativity—"some creative spark" or "no creativity whatsoever." *Feist*, 499 U.S. at 345. Under the *Feist* originality standard, even the slightest amount of creative choice will suffice. *Id.* ("some creative spark, no matter how crude, humble or obvious").

Feist was clear that originality has "only" two requirements.

It said so itself. *Id.* at 345 ("Original, as the term is used in copyright, ***means only*** that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." (emphasis added)). So, when the Eighth Circuit purported to add additional or alternative requirements to *Feist* test of originality, it contravened *Feist*.

Indeed, the Eighth Circuit Opinion below created a new "convey information" standard of copyrightability. *E.g.*, A4 ("does not convey information."); A4 ("conveys no information"); A5 ("did not convey adequate information"); A5 ("designed to record, not convey information"); A5 ("uncopyrightable because [they] fail to convey information"). That aberrant standard imposed an additional or alternative element to the copyrightability standard above and beyond *Feist*'s unequivocal statement that originality in copyright has two, and only two, requirements that a work must meet.

The Eighth Circuit's contrary decision should be corrected.

II. FACTS

Petitioner Ronald Ragan, Jr., worked for decades in the automotive sales industry as a car salesman. In an era where hardball pressure tactics in car sales were the norm, Mr. Ragan came to believe that treating potential car purchasers as "guests" would go a long way. Thus, Mr. Ragan created a carefully worded, elegant Guest Sheet that distilled lessons learned on the lot and captured creative insights from years of experience selling cars. A4. This Guest Sheet would help guide the sales process and train future salespersons. A4.

Mr. Ragan successfully registered his Guest Sheet with the U.S. Copyright Office. A1; A4. In 2000, Mr. Ragan learned that Van Tuyl Group, Inc., a privately-owned auto dealership, had copied and used his Guest Sheet without his permission. A1. Van Tuyl's insurer sued Mr. Ragan, seeking declaratory judgments but ultimately that lawsuit was dismissed for lack of personal jurisdiction. A1. Thereafter, Berkshire Hathaway Automotive (which had acquired Van Tuyl) promised to stop his Guest Sheet. After Mr. Ragan discovered that they were still using his sheet without his permission, he brought suit. A1.

III. PROCEEDINGS BELOW

The District Court granted Rule 12(c) judgment on the pleadings. A7-A22. It denied reconsideration. A23-23. The Eighth Circuit affirmed—but on much broader grounds that purported to set forth a requirement that a work must "convey information" as the standard of copyrightability. A1-A6. This Petition followed.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S ABERRANT "CONVEY INFORMATION" STANDARD OF COPYRIGHTABILITY DEPARTS FROM THIS COURT'S *FEIST* ORIGINALITY STANDARD AND FROM EVERY OTHER COURT OF APPEALS.

The Eighth Circuit's opinion purports to be applying this Court's *Feist* originality standard. A3. Yet, in truth, the Eighth Circuit's opinion is creating a newfound "convey information" requirement for copyrightability—requiring that a work "convey information" to be copyrightable. A5 ("did not convey adequate information"); A5 ("designed to record, not convey information"); A5 ("uncopyrightable because [they] fail to convey information"). The Eighth Circuit concludes that Petitioner's work is <u>*not*</u> copyrightable precisely <u>*because*</u> it determined that the work does "not convey, information." A5.

As such, the Eighth Circuit's Opinion adopted a "convey information" standard of copyrightability.

The Eighth Circuit Opinion nowhere limits this "convey information" standard of copyrightability to any particular types of work. A1-A6. Rather, the Eighth Circuit's Opinion sets forth this "convey information" standard for copyrightability, without any limit as to any particular kinds of work, as a general standard of copyrightability applicable to all works. The Eighth Circuit's adoption of this generally applicable "convey information" standard of copyrightability stands in contrast to the approach taken by the District Court, below, which had adopted a *sui generis* exception to copyrightability applicable to only *certain types* of works (*i.e.*, purported <u>*blank*</u> forms). *E.g.*, A22 ("Blank form rule as an exception to copyrightability"); A27 ("the 'blank form' exception to copyrightability").

Thus, the Eighth Circuit Opinion creates a generally applicable "convey information" standard for copyrightability, which requires a work "convey information" in order to be copyrightable. A5.

In turn, the Eighth Circuit's "convey information" standard of copyrightability creates a series of splits—both with the other Circuit's treatment of copyrightability and with this Court's *Feist* decision itself.

A. *Feist* originality

The Eighth Circuit's "convey information" standard of copyrightability conflicts with *Feist* and splits from those Circuits that properly apply *Feist*'s originality standard of copyrightability. The Eighth Circuit's split from this Court's Feist decision and Feist's progeny in the other Court of Appeals is manifest in three ways.

First, *Feist* never makes any mention of any "convey information" requirement whatsoever.

Indeed, *Feist* would've turned out differently under the Eighth Circuit's "convey information" standard of copyrightability. That's because neither *Feist* nor the statute imposes the Eighth Circuit's "convey information" requirement when setting forth the originality standard for copyrightability. No such "convey information" requirement is found under *Feist*'s originality standard. *See Feist*, 499 U.S. at 346 ("originality requires independent creation plus a modicum of creativity"). Nor is any such "convey information" requirement found in the statute. 17 U.S.C. § 102(a).

Instead, *Feist* made clear that originality was comprised of two, and *only* two, requirements. *See Feist*, 499 U.S. 340, 345 ("Original, as the term is used in copyright, **means *only*** that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." (emphasis added)). *Feist* explained the two, and only two, requirements of originality.

First, originality requires that the work "was independently created by the author (as opposed to copied from other works)[.]" *Id.*

Second, originality requires some "modicum of creativity" in the creation process. *See Feist,* 499 U.S. at 346. There must be some creative decision exhibiting the "creative powers of the mind." *Id.*; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1879) ("he to whom anything owes its origin"). The work must simply exhibit "*some* creative spark, 'no matter how crude, humble or obvious' it might be." *Feist*, 499 U.S. at 345. Thus, the modicum of creativity requirement asks whether an author's creative choices when creating the work have any creativity as opposed to "no creativity whatsoever." *Id.*

The Eighth Circuit Opinion deviates from this standard by trying to impose an additional requirement: a "convey information" requirement. A5. Yet, *Feist* was clear that originality has two, and only, two requirements: independent creation and some modicum of creativity. The Eighth Circuit Opinion tries to conflate its "convey information" requirement with the "degree of creativity" exhibited by a work. A4 ("The Guest Sheet still must exhibit some degree of creativity, which it fails to do, mainly because it does not convey information."). Yet, creativity and "convey information" aren't the same. Indeed, one only needs to consider the phonebooks at issue in in *Feist* itself to see why.

Perhaps the easiest way to see the conflict between *Feist*'s originality standard and the Eighth Circuit's "convey information" standard is to realize that the list of "names, towns, and telephone numbers" in *Feist* was not copyrightable *despite* the fact that the list conveyed ample information. At issue in *Feist*, the list of "1,309 names, towns, and telephone numbers from Rural's white pages" plainly *conveyed information*. *See Feist*, 499 U.S. at 361. Yet, this Court held it wasn't copyrightable, nonetheless. Why? Because conveyance of information is not par to the copyright originality standard.

Simply put, the Eighth Circuit's opinion below, "convey[ing] information" and being original are not interchangeable. Accordingly, when the Eighth Circuit required a work to "convey information"—it was demanding something other than what this Court required in *Feist* for originality.

Even though that phonebook list in *Feist* certainly conveyed information to the reader, the phonebook list wasn't copyrightable. Yet, under the Eighth Circuit's "convey information" standard, the list would've been copyrightable—namely, because the Eighth Circuit conflated conveyance of information with copyrightability. That *Feist* itself would've turned out differently under the Eighth Circuit's "convey information" standard makes the conflict between the Eighth Circuit's newfound standard and the *Feist* originality standard clear. *Feist*'s originality standard and the Eighth Circuit's "convey information" standard conflict. Thus, the decision below is at odds with a unanimous decision of this Court insofar as it purports to add additional requirements into the copyrightability standard.

Third, the Eighth Circuit's "convey information" standard splits from the other Courts of Appeals because the other Courts of Appeals use *Feist*'s originality standard and apply *Feist*'s two, and *only* two, requirements. *E.g.*, *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003) ("the Copyright Act will protect even the minimal quantum of originality — independent creation plus a modicum of creativity"); *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 787 (5th Cir. 1999) ("For a work to qualify for copyright protection, it must be original. And originality, as the term is used in copyright, requires both 'independent creation' and 'a modicum of creativity.'"); *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 519 (7th Cir. 2009) ("[O]riginality does not signify novelty; a work may be original even though it closely resembles other works. What is

required is 'independent creation plus a modicum of creativity.'"); *Greene v. Ablon*, 794 F.3d 133, 160 (1st. Cir. 2015) ("the originality requirement demands only 'a modicum of creativity'"); *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404, 1409 (11th Cir. 2015) ("Originality is not novelty. Instead, copyrightable originality requires ***only*** independent creation" by the author "plus a modicum of creativity.").

Unlike the Eighth Circuit, the Courts of Appeals apply the *Feist* originality standard as set forth in *Feist* determine copyrightability. *All* of them rely on *Feist*'s two requirements of originality. *None* of them reads *Feist* as also requiring that a work "convey information" in order to receive copyright protection, unlike the Eighth Circuit. Thus, the Eighth Circuit's "convey information" standard is at odds with the other Court's that apply the *Feist* originality standard. The other Courts of Appeals require two, and only two, requirements for copyrightability: independent creation and a modicum of creativity. *See Feist*, 499 U.S. 340, 345 ("Original, as the term is used in copyright, **means *only***[.]").

Thus, because the other Courts of Appeals faithfully adopt this Court's originality standard as set forth in *Feist*, the decision below splits from the other Courts of Appeals, just as it deviates from this Court's *Feist* decision itself.

Fourth, the Eighth Circuit's "convey information" standard also conflicts with the *methodology* of accessing copyrightability under the *Feist*'s originality standard. *Feist* examined *how* the work was created, examining the process of creative the work to determine whether (1) the work was independently created (as opposed to copied) and (2) whether there was *some* creative decision in the sense that the work stemmed from an author's mind. *Feist*, 499 U.S. at 346. Indeed, *Feist* examined the creative decisions (or lack thereof) in the creation process to determine whether there was some modicum of creativity involved. *See id.* at 361-364.

Feist's originality standard looks at how the work was created. It turns on the creative process, asking (1) was the work independently created (as opposed to copied) and (2) was there *some* creative decision, creative process. To do so, the *Feist* court did the following:

- *Feist* didn't just look at the content itself, but asked where the content came from—whether from an author's mind and creativity or from preexisting facts or sources. 499 U.S. at 361 ("data does not owe its origin to Rural").
- As for selection, *Feist* didn't just look at ***what*** content was included on the face of the work, but sought to discern ***why*** that content was included—whether through an expressive process or a process dictated by some necessity. *Id.* at 363 ("this selection was dictated by state law, not by Rural"—the phonebook company).
- As for arrangement, *Feist* didn't just jump to conclusion whether the ordering of the phonebook, determined that it was customary. *See Feist*, 499 U.S. at 363 ("alphabetical arrangement is universally observed in directories published by local exchange telephone companies.").

The key point is that in *Feist* none of this—the background details of creation; of whether there was copying; of how and why certain content is included; the industry norms—were apparent on the face of the phonebook listing itself. Rather, ***originality*** was determined by considerations on the details underlying the work.

By contrast, the Eighth Circuit's "convey information" standard determines copyrightability by simply looking at the work. A5 ("the copyrightability of the Guest Sheet can be determined by an examination of the Guest Sheet alone"). That's not what *Feist* said. Indeed, if one simply looks at phonebook listing it clearly conveys information to the reader, but it's not

copyrightable per *Feist* because of the background of how and why it was created. The two tests—this Court's and the Eighth Circuit's—deploy a different methodology.

If simply looking at the work to see if it "convey[ed] information" were the test of copyrightability (or originality), then the list of names, phone numbers, and addresses in Feist would've readily sufficed. In short, *Feist* is incompatible with the Eighth Circuit's approach below.

* * * *

Feist is incompatible with a "convey information" standard of copyrightability. And, the Eighth Circuit's application of a generally applicable "convey information" standard of copyrightability conflicts with and splits from those Courts of Appeals that applies *Feist*'s originality standard of copyrightability. That standard–the originality standard–imposes two, and *only* two, requirements. It does not require that a work "convey information." Under *Feist* conveying information is neither necessary nor sufficient for copyrightability.

B. Blank-Form Split

The Eighth Circuit Opinion cites *Utopia*, *Bibbero*, and *Kregos*, as the basis for its generally applicable "convey information" standard of copyrightability. *See Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., L.L.C.*, 596 F.3d 1313, 1323-1324 (11th Cir. 2010); *Bibbero Sys., Inc. v. Colwell Sys., Inc.*, 893 F.2d 1104, 1108 (9th Cir. 1990); *Kregos v. Associated Press*, 937 F.2d 700, 708 (2d Cir. 1991).

Yet notably *none* of these cases purported to be setting forth a general standard of copyrightability requiring that all works "convey information" as a precondition to copyright protection. Rather, those cases were applying a *sui generis* rule unique to a particular type of work—*i.e.*, Blank forms. Unlike the Eighth Circuit's Opinion articulating a generally-applicable standard of copyrightable, these other Circuit's all asked a threshold question (is the work a blank form?) before applying that *sui generis* standard only to that particular category of work.

Thus, there is a split between the Eighth Circuit's adoption of a generally-applicable "convey information" standard of copyrightability applicable to all works and the Eleventh, Ninth, and Second circuits *sui generis* "convey information" standard of copyrightability applicable only to works deemed to be blank forms.

Beyond that, *even if* the Eighth Circuit were *sub silentio* applying its "convey information" standard only to blank forms (without so indicating). then it would merely be entering an acknowledged and recognized Circuit split about how to apply the blank form rule. There's an acknowledged split.

Yet, even if it had, then the Eighth Circuit's Opinion is merely entering and deepening an expressly acknowledged and recognized Circuit split over how to apply this rule. See *Utopia*, 596 F.3d 1313, 1320 (11th Cir. 2010) ("The majority of circuits have rejected *Bibbero*'s bright-line approach.") (discussing the Circuit split in how court's apply the blank form rule); *see also* Lin

Weeks, "Media Law and Copyright Implications of Automated Journalism," 4 N.Y.U. J. Intell. Prop. & Ent. Law 67, 88 (2014) ("The circuits are split on how to treat so-called 'blank forms.'").

Indeed, the Eighth Circuit Opinion is not only entering this existing Circuit split but further exacerbating the split over how to deal with blank forms.

It does so in three ways.

First, the Eighth Circuit standard is in conflict with the Eleventh Circuit's *Utopia* standard. *See generally Utopia*, 596 F.3d 1313 (11th Cir. 2010). *Utopia* made expressly clear that it was **not** applying the Feist standard but rather a distinct "convey information standard." *See id.* at 1321 n.18 (2010) ("the 'convey information' standard--not a creativity in selection or arrangement standard--still governs blank forms and was not altered by the *Feist* decision"). By contrast, the Eighth Circuit purports to be applying *Feist*'s originality standard when applying its "convey information" standard. A4.

Moreover, medical necessity, rather than creative choices, dictated the medical forms in *Utopia*. *See Utopia*, 596 F.3d at 1324 n.22 ("It would not be 'possible to provide competent and adequate care'). However, the Eleventh Circuit has recognized that the creative decisions involved in creating sales techniques materials (like Mr. Ragan's Guest Sheet here) would be treated differently from cases involving forms dictated by medical necessity. *Cf. Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1302-1303 (11th Cir. 2008); *id.* at 1306 ("*Big League Sales* does not thereby cause the passage in which they are used to lose protection of its copyrightable elements — the original 'sequence of thoughts, choice of words, emphasis, and arrangement.'). After all, unlike medicine, sales are an art not a science–and copyright protects those original.

Thus, the Eighth Circuit standard conflicts with Utopia and the Eleventh Circuit's copyrightability standards.

Second, the Eighth Circuit's standard is also in conflict with the standard applied by the Ninth Circuit in *Bibbero*. *See Bibbero*, 893 F.3d 1104, 1108 (9th Cir. 1990).

Like *Utopia*, *Bibbero* explained that it was not applying an originality standard. *See Bibbero Sys. v. Colwell Sys.*, 893 F.2d 1104, 1108 n.3 (9th Cir. 1990). Indeed, leading copyright treatise author Professor Nimmer has explained that *Bibbero* is incompatible with *Feist* and §102(a)'s originality standard of copyright ability. See 1 NIMMER ON COPYRIGHT § 2A.08 [D][3](2024) ("It is submitted that *Bibbero* does not conform to copyright principles protecting original expression."). Indeed, rather than applying the statute's originality standard, §102(a), *Bibbero* applied an administrative regulation as the basis for its "convey information" standard. *See Bibbero*, 893 F.2d 1104, 1105 (citing 37 C.F.R. §202.1(c)). By contrast, the Eighth Circuit purports to be applying *Feist*'s originality standard when applying its "convey information" standard. A4.

Third, the Eighth Circuit's standard is also in conflict with the standard applied by the Second Circuit in *Kregos*.

Notably, like *Feist*, *Kregos* examined the creative choices made by "the creator of a baseball pitching form" to determine that that simple form was copyrightable. *See Kregos*, 937 F.2d at 701. It didn't just look at the work and ask whether the work "convey[ed] information" as the Eighth Circuit did below. Rather, the Second Circuit in *Kregos* conducted a *Feist*-style analytic examination of all the creative choices made in the process in creating the work to see if there was

"some minimal level of creativity" by the author when constructing the work. *Kregos*, 937 F.2d at 703. Indeed, the Second Circuit crunched the numbers to show just how much creative choice is involved in choosing even nine categories. *Id.* at 704 n.3 ("If the universe of available data included even 20 items and a selector was limited to 9 items, there would be 167,960 combinations of items available.").

Below, by contrast, the Eighth Circuit didn't examine the creative choices involved in the creation of the Guest Sheet. Rather, it simply looked at the work and determined that it did "not convey information" A4.

The Eighth Circuit's "convey information" standard is in conflict with the Kregos approach that turned on creative choices. Thus, the Eighth Circuit's convey information standard only deepens an existing and acknowledged circuit split about what standard of copyrightability to blank forms applies. *Compare Kregos v. AP*, 937 F.2d at 708, *with Utopia*, 596 F.3d at 1320 (11th Cir. 2010).

* * * * *

The Eighth Circuit Opinion below cites *Utopia*, *Bibbero*, and *Kregos*. But *none* of those cases were setting forth a generally-applicable "convey information" standard of copyrightability, as the Eighth Circuit did below. Rather all of those cases asked a threshold question (is the work a blank form?) before then applying a *sui generis* standard to that particular category of works. Thus, there is a split between the Eighth Circuit's treatment of a "convey information" standard as a generally applicable standard of copyrightability applicable to all works and the Eleventh, Ninth, and Second circuits which apply such a standard only to blank forms. Beyond that, if the Eighth Circuit were *sub silentio* applying its "convey information" standard only to blank forms (without so indicating) then it would merely be entering an acknowledged Circuit split

II. THE EIGHTH CIRCUIT'S ABERRANT "CONVEY INFORMATION" STANDARD CONTRAVENES CENTURIES OF PRECEDENT, ENDANGERS ARTISTS, AND RISKS SIGNIFICANT OVERBREADTH.

A. Constitutional principle

The originality standard of copyrightability is long-standing. Indeed, copyright law's originality standard is rooted in the Constitution itself, tracing all the way back to this Nation's founding. *See Feist*, 499 U.S. at 346 ("Originality is a constitutional requirement."); 1 NIMMER ON COPYRIGHT § 1.06[A] (2024) (noting that, in copyright, "originality is a statutory, as well as a constitutional, requirement").

For centuries, originality has been the "touchstone of copyright protection[.]" *E.g.*, *Feist*, 499 U.S. at 347 (1991); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), *The Trade-Mark Cases*, 100 U.S. 82 (1879); *see* U.S. Cons. Art. I, §8, cl. 8 (1789). The originality standard traces back to the earliest statutes implementing copyright protection. *See Burrow-Giles*, 111 U.S. at 57-58 (1884) ("An author in that sense is 'he to whom anything owes its ***origin***; ***originator***; maker; one who completes a work of science or literature." (emphasis added)) (discussing the Copyright Acts of 1790 and 1802). This commitment to the originality standard has continued into the twentieth century. *Feist*, 499 U.S. at 355 ("'originality' was a 'basic requisite' of copyright under the 1909 Act").

Across centuries, this Court and the Congress have consistently reaffirmed that originality is the standard of copyrightability. *E.g.*, *Fest*, 499 U.S. at 347 ("The ***originality*** requirement articulated in *The Trade-Mark Cases* and *Burrow-Giles* remains the touchstone of copyright protection today."); *id.* at 359 (The "1976 revisions to the Copyright Act leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection[.]"); 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in ***original*** works of authorship").

Against the grain of this centuries-long, commitment to the originality standard of copyrightability, the Eighth Circuit fashioned an aberrant, new-fangled "convey information" standard of copyrightability. And, notably, the Eighth Circuit's opinion is glaringly devoid of *any* justification explaining this aberrant departure. Its Opinion gives no rationale as to ***why*** it chose information conveyance.

Somewhat famously, philosopher G.K. Chesterton cautioned that one should not clear a fence away unless one knows the purpose for which it was erected—what it kept out. G.K. Chesterton, *The Thing: Why I am Catholic* 27 (Dodd, Mead & Co., Inc. 1930) ("In the matter of reforming things, as distinct from deforming them, there is one plain and simple principle"). A useful corollary to Chesterton's principle is that if one takes down a fence, he should at least articulate why.

The Eighth Circuit's opinion gives no articulation or justification why its shifts from the long-standing originality standard of copyrightability that focuses on protects intellectual products that aren't copied and into a focus on information conveyance that may have nothing to do with human expression.

Whatever the possible rationale, the Opinion below marks a stark departure from settled, centuries-long bedrock principle that originality is the standard governing copyrightability—a standard embedded in the U.S. Constitution and Congress' statutes. And, the Eighth Circuit's aberrant "convey information" standard and its disruptive implications for copyright law has pragmatic bite, inviting a host of newfound problems.

B. National Uniformity

The Eighth Circuit's aberrant "convey information" standard threatens national uniformity in this nation's copyright law.

In copyright law, uniformity is of paramount importance. *See Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 162 (1989) ("fundamental purposes" underlying Constitution's Patent and Copyright Clauses to "promote national uniformity in the realm of intellectual property"). Indeed, courts have been mindful that "the creation of a circuit split would be particularly troublesome in the realm of copyright." *E.g., Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (en banc).

After all, Circuit splits in copyright have the undesirable effect of leaving "different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide." *Id.* That concern is particularly acute here, where the split involves the standard of copyrightability itself. The simple fact of the matter is that if different Circuits have different standards of copyrightability, then whether a person even has a property right in their copyright will vary from circuit to circuit. It's hard to imagine a greater invitation to forum shopping and vociferous venue disputes.

Indeed, here the Copyright Office issued Mr. Ragan a registration in his Guest Sheet. Yet, applying an aberrant standard of copyrightability, not found or applied in other circuits, Mr. Ragan was stripped of that property right. Such disharmony across the Circuits as to whether a work is even copyrightable or whether a property right even exists in a particular work would yield a highly unworkable system under which there are different property rights and "different levels of protection in different areas of the country" for the very same work. *See Silvers*, 402 F.3d 881 at 890 (9th Cir. 2005).

Moreover, the Eighth Circuit's creation of an aberrant "convey information" standard of copyrightability undermines Congress' central objectives and goals in enacting the 1976 Copyright Act itself.

In drafting the 1976 Copyright Act, Congress had a "paramount goal" of "enhancing predictability and certainty" of copyright protections. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (citing H.R. Rep. No. 94-1476). Critically, reaffirming originality as ***the*** standard of copyrightability in the face of some of the lowers courts' deviations from that standard was one of Congress' top goals in enacting the 1976 Copyright Act. *See Feist*, 499 U.S. at 355 ("The Register suggested making the originality requirement explicit. Congress took the Register's advice. In enacting the Copyright Act of 1976, Congress dropped the reference to 'all the writings of an author' and replaced it with the phrase '***original*** works of authorship.'" (emphasis added)).

Section 102(a) made originality express in the statute. And, originality simply doesn't require that a work convey information. Indeed, the Eighth Circuit provides absolutely no basis for deviating from *Feist* and the centuries-long originality standard of copyrightability, expressly codified by Congress in 17 U.S.C. § 102(a). Regardless, clarifying the proper standard of copyrightability is essential to ensuring the uniformity and predictability that are cornerstones of an effective national copyright system.

C. International Treaty Obligations

Moreover, the Eighth Circuit's "convey information" standard for copyrightability isn't just an aberration from domestic copyrightability standards but is also at odds with the originality standards animating international treaties that harmonize international copyright law—giving yet more reasons to course correct.

The "Berne Convention for the Protection of Literary and Artistic Works (Berne Convention, Convention, or Berne), which took effect in 1886, is the principal accord governing international copyright relations." *Golan v. Holder*, 565 U.S. 302, 306-307 (2012). The United States, along with 180 other nations, are signatories of Berne, which harmonizes copyright laws across the much of the globe. *See Impression Prods. v. Lexmark Int'l, Inc.*, 581 U.S. 360, 384 (2017) (Ginsburg, J., dissenting) ("More importantly, copyright protections, unlike patent protections, are harmonized across countries.") (providing general background on the Berne Convention).

Notably, the originality standard of copyrightability is centrally featured throughout such treaties and reflects an international consensus regarding the originality standard of copyrightability. *Compare* Berne Convention Art. 2.3 ("original works") *and* Art. 2.5 ("selection and arrangement") *with Feist*, 499 U.S. at 350 ("original selection or arrangement."); *cf.* EU Council Directive 93/98/EEC Article 6 ("original in the sense that they are the author's own intellectual creation shall be protected").

Indeed, leading treatise author Professor Paul Goldstein notes that the originality standard of copyrightability is the "normal standard for protection of literary and artistic works, applied across both common law and civil laws systems[.]" Paul Goldstein, INTERNATIONAL COPYRIGHT §6.1.1, at 177 (2019).

Professor Goldstein explains in his treatise that this "generalized standard of originality applies to all classes of literary and artistic works, from high art to lowly directories, catalogs, and instruction manuals." *Id.* at §6.1.1 at 178. As such, the Eighth Circuit's "convey information" standard doesn't just threaten national uniformity of copyright law but also deviates from an internationally recognized harmonization around the originality standard of copyright protections. And, the Eighth Circuit's stark departure from the long-standing *Feist* originality standard of copyright law doesn't just undermine national uniformity regarding the standard of copyrightability, but also fractures an international harmony surrounding the originality standard for copyrightability.

D. Effect on Visual Artists

The Eighth Circuit's "convey information" standard of copyrightability is also problematically both underinclusive and overinclusive as compared to the *Feist* originality standard.

Consider the difference between this Court's *Feist* originality standard and the Eighth Circuit's "convey information" standard when applied to famous instances of art. The originality standard "requires independent creation plus a modicum of creativity[.]" *Feist*, 499 U.S. at 346. The Eighth Circuit's "convey information" standard requires something else: it demands that the work "convey information" and will hold a work to be uncopyrightable where that work "fail[s] to convey information." A5. That standard would deprive copyright protection to artistic works that are readily protectible under the *Feist* originality standard. Consider, for example, famed American artist Mark Rothko's *Orange and Tan*[2] shown on the next page:

[2] Mark Rothko, "*Orange and Tan* (1954)," National Gallery of Art (last accessed July 1, 2024).

What information does that convey? *See* A5 ("uncopyrightable because [it] fail[s] to convey information.").

Or consider, Jackson Pollock's painting *Number 5*[3]:

[3] Jackson Pollack, "*Number 5* (1948)," Jackson-Pollock.org (last accessed July 1, 2024) (image rotated 90 degrees).

Judges and litigants would be hard pressed to explain what *information* Jackson Pollock's painting *conveys*. A5.

Perhaps one might be tempted to say that these paintings convey colors and shapes. Yet, if to "convey information" merely means to convey *sensory* information or impressions, then anything *visible* or *legible* would fit the bill—including Mr. Ragan's Gust Sheet—so that's plainly *not* what the Eighth Circuit meant. *See* A4. Indeed, under the Eighth Circuit's concocted "convey information" standard of copyrightability it's unclear how wide swaths of visual artists would every receive copyright protection. Applied to visual arts, the Eighth Circuit's "convey information" standard is standard is strikingly underinclusive.

Yet, the Eighth Circuit's standard is also problematically overinclusive as well. Consider the portions of the phonebooks at issue in *Feist* itself. In Feist, the list of "1,309 names, towns, and telephone numbers from Rural's white pages" certainly *conveyed* information. *Feist*, 499 U.S. at 361. Under Feist's originality standard, that conveyance of information did not constitute originality and did *not* qualify for copyright protection. Yet, under the Eighth Circuit's "convey information" standard, *Feist* would have come out differently. And, given that the originality standard is not merely statutory but also *Constitutional*, the Eighth Circuit's shift is standard is an extraordinary and dramatic shift in what Copyright

Under the Eighth Circuit's standard, copyright—the law intending to encourage artists and creators to create new works—would *not* protect great works of visual arts but *would* protect phonebooks turning on the conveyance of information.

Fortunately, that's not the standard of copyrightability. The standard, since the Founding and reiterated unanimously by this Court in *Feist*, is originality. *Feist*, 499 U.S. at 346 ("independent creation plus a modicum of creativity[.]").

* * * * *

Since the Founding, originality has been the standard of copyrightability. That standard is rooted in the Constitution. Congress enacted that as this originality standard is statute after statute– from the Copyright Act of 1790 up through the current 1976 Copyright Act. This Court has consistently reiterated that originality is the standard of copyrightability, repeating that point across over a century of jurisprudence. And, since then, originality has become the global standard of copyrightability.

Against the grain of this long-standing and time-honored standard, the Eighth Circuit fashioned a highly aberrant, a-textual "convey information" standard of copyrightability. This aberrant standard is contrary to fundamental law; would disrupt the global harmonization of copyright law; would drastically under-protect creators and artists and would provide protection to works that cannot, under the Constitution, be granted protection. Indeed, applying this idiosyncratic, a-textual standard, the Eighth Circuit eviscerated Mr. Ragan's property right in his copyrighted Guest Sheet, A4–a *federal* property right rooted in the Constitution's originality standard and conferred upon him by Congress' statute. §102(a).

III. THE EIGHTH CIRCUIT'S DECISION IS PLAINLY INCORRECT UNDER THIS COURT'S *FEIST* ORIGINALITY STANDARD BECAUSE PETITIONER WROTE THE WORK HIMSELF AND DIDN'T COPY WHEN DOING SO.

Under the correct standard of copyrightability—originality—Petitioner's Guest Sheet is plainly copyrightable.

That's indisputably so at this procedural posture. That's because Petitioner's Guest Sheet is a *registered* work. A2 ("certificate of registration"); A5 ("registered work"); A8 ("registered on June 3, 1999"). The U.S. Copyright Office's certification of registration means that Petitioner is afforded a statutory presumption in favor of copyrightability. 17 U.S.C. § 410(c). Because Petitioner has never published his work, *see* 17 U.S.C. § 101 (defining "Publication" as a term of art in copyright), he is entitled to the full statutory presumption, 17 U.S.C. § 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.").[4]

In turn, that means Respondent would have the burden to show on this record that either that the words comprising the Guest Sheet were <u>*not*</u> creative—in the sense that those words were not written by Petitioner—or that the words (and the selectin of questions included and those excluded) were copied from somewhere else.

[4] The Eighth Circuit plainly misread Section 410(c) when it concluded that the extent of the statutory presumption was discretionary, *i.e.*, "*in the discretion of the court*." A.5 (quoting §410(c)) (emphasis in Eighth Circuit's opinion). That's because Petitioner never published his work, so the presumption was not discretionary. 17 U.S.C. § 410(c) ("In any judicial proceedings 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. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court."). Notably, the Eighth Circuit confused that the evidentiary weight of the presumption is only discretionary if the work is published for five years prior to registration. *Id.*

Respondent cannot do that because Petitioner *did* in fact author and create this Guest Sheet. In an era when car sales almost universally used hardball tactics, Petitioner had creative ideas about what questions to ask, what order to ask them, and to train car dealership employees to treat potential customers on the lot as *Guests*. Regardless, the point is that the Section 410(c) statutory presumption obligates Respondent to come forward with *evidence* of prior art or copying if it thinks the work is not original.

In short, Petition should ultimately prevail on copyrightability, but, for present purposes, applying the correct standard would mean that an opposite result would have obtained on copyrightability below—at least on this posture.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant the petition and review the judgment of the U.S. Court of Appeals.

Respectfully submitted,

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