

No. 24-_____

SUPREME COURT OF THE UNITED STATES

King For Congress and Steven King,

Petitioners,

vs.

Laney Griner and Sam Griner,

Respondents.

On Petition for a 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

1. Does Fed.R.Civ.P. 68 allow a non-prevailing judgment-defendant to recover attorneys' fees under this Court's *Marek* decision pursuant to Copyright Law, which simultaneously defines attorneys' fees as costs and awards costs to the prevailing party?

2. Does an implied license test that requires an arms-length agreement between the copyright owner and the potential licensee conflict with the implied license test fashioned by this Court in *De Forest*?

CORPORATE DISCLOSURE STATEMENT

Petitioner King for Congress is a Federal Election Commission registered sole proprietorship of, and wholly owned by, Congressman Steven King.

LIST OF PROCEEDINGS

This matter originated in the U.S. District court for the Northern District of Iowa (21-CV-4024 CJW-MAR, Laney Marie Griner and Sam Griner, *Plaintiffs* v. Steven Arnold King and King For Congress, *Defendants*). This district court reached a verdict on November 18, 2022. The District Court's final order, January 18, 2023, and order on bill of costs, February 22, 2023, were appealed to the U.S. Court of Appeals for the Eighth Circuit in the matter Nos. 22-3623 (Laney Marie Griner *Plaintiff-Appellee* Sam Griner *Plaintiff* v. Steven Arnold King *Defendant* King for Congress *Defendant-Appellant*) and 23-2117 (Laney Marie Griner; Sam Griner *Plaintiffs-Appellees* v. Steven Arnold King; King for Congress *Defendants-Appellants*). Appellate judgment was entered on June 7, 2024.

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OPINIONS BELOW

The decision of the U.S. District Court for the Northern District of Iowa in *Griner v. King* is reported at 2023 WL 2163994 (N.D. Iowa February 22, 2023). The decision of the Eighth Circuit on appeal is reported at 104 F.4th 1 (8th Cir. 2024).

JURISDICTION

The decision of the Eighth Circuit was entered on June 7, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND JUDICIAL RULES INVOLVED

This petition involves Federal Rules of Civil Procedure 54(d) and 68, App.113a-114a. 17 U.S.C. §§ 501(a) and 505. App.114a-115a. The relevant provisions of the Federal Rules of Civil Procedure and the Copyright Act of 1976 are reproduced in the appendix to this petition.

STATEMENT OF THE CASE

A. Factual Background

Petitioner-Defendant Steven King was a Congressman from Iowa. He operated political campaigns through the entity King for Congress. King for Congress had a social media account that posted a popular meme, the “Success Kid” meme. App.156a-157a.

Hours into King for Congress’ use of the Success Kid meme, the copyright owner of “Success Kid,” Laney Griner, sent King for Congress a take-down

notice. King for Congress complied immediately and apologized. App.157a.

The Success Kid meme is one of the world's most popular and reproduced images. Many meme websites exist to provide copies of popular memes, with functions that allow a user to supply his/her own caption upon the photograph, including the Success Kid image. App.164a-165a. Some websites claim to have provided millions of copies of the Success Kid meme, including the website that Griner used to create and circulate versions of the Success Kid meme. Griner publicly boasted about the mass use of Success Kid. App.136a, 164a, pars. 52-54.

Through social media, Griner for a period of ten or so years transmitted messages to the Internet population at large to create and copy versions of the Success Kid meme. App.136a, 164a-166a. She scoured the Internet and publicly posted on her social media Success Kid meme versions created by others and commented upon them. App.160a-166a. On her Success Kid fan page, Griner provided links to meme websites where fans could construct Success Kid meme versions. App.165a, pars. 59-64. When Griner transmitted her Success Kid meme versions, she included a link to the meme website where she made it that allowed viewers to create their own version. Griner displayed and rated Success Kid memes that others had created. App.160a-162a, 164a-165a. When Internet users informed her of third party uses, she would tell them 'to chill' and that Success Kid was a phenomenon for all. App.160a, par. 40; 164a-165a, pars. 52-58. Griner posted and commented favorably on Success Kid memes used by corporations. App.160a-162a, par. 42. She begged producers to consider using Success Kid in

new media. App.164a, pars. 52-54. Such uses were lengthy and continuous, and Petitioner-Defendants showed the uses to the District Court.

Griner sued King and King for Congress for approximately two years in response to King for Congress's hours of use.

B. Procedural Background

This case involves Griner's use of lawfare, which is the use of the legal system for the ulterior purpose of draining the energy, time, and resources of a defendant, particularly when the return on investment of the legal action is disproportionate to the action's costs and fees. When Griner occupied two years of the judiciary's time to sue King for Congress for its hour-long use of her copyrighted image, which is one of the world's most popular and circulated images, resulting in the *very* rare finding of "innocent infringement" and the minimum statutory award allowable, King for Congress sought post-trial remedies. App.17a-50a; 51a-66a.

King for Congress, in a bill of costs, sought attorneys' fees from the Rule 68 offer of judgment date. App.17a. The District Court denied attorneys' fees as Rule 68 costs, while recognizing that copyright law (unlike patent and trademark law) explicitly defines attorneys' fees as "costs." App.22a-24a. The District Court echoed the opinion held by some courts that attorneys' fees can only be awarded to a prevailing party when copyright and civil rights substantive statutes use the "prevailing party" language, notwithstanding Rule 68. App.24a. There is a circuit split on the issue of the availability of recovery of attorneys' fees pursuant to 17 U.S.C. § 505 to a non-prevailing

party who has made an offer under Rule 68. The District Court adopted the holding of the Ninth, Seventh, and First Circuits, whereas Petitioner-Defendants urged adoption of the holdings of the Eleventh and Second Circuits.

The District Court invoked an implied license test bearing an element that has never been recognized by this Court, “delivery from the copyright holder to the alleged infringer.” App.133a-134a. This element is the product of decades of Circuit Court interpretations of this Court’s implied license law for software licenses. In the Internet Age, where Internet users willingly post images for circulation to hordes of unseen, unidentified users, the requirement of requests and delivery to a known party cannot stand.

REASONS FOR GRANTING THE PETITION

A. A Split Among the Circuit Courts Has Developed on the Issue of Whether a Non-Prevailing Party Who Has Made an Offer Under Rule 68 Is Entitled to Attorneys’ Fees as Costs Pursuant to 17 U.S.C. § 505.

Prior to trial, Petitioner-Defendants made Respondent-Plaintiff a \$15,000.00 Rule 68 offer, which Respondent-Plaintiff spurned. App.20a, 38a. Petitioner-Defendant King for Congress was found to be an innocent infringer for damages totaling \$750.00. App.54a. Copyright law has a peculiarity in that it defines “costs” to include attorneys’ fees. Petitioner-Defendants submitted their attorneys’ fees to the District Court, and was denied them on the basis that copyright law only affords attorneys’ fees to a

“prevailing party.” This logic is unsatisfactory as “costs” as a matter of course are also only awarded to a prevailing party. Rule 68 alters the award equation. App.113a-114a.

1. The Public Policy of Rule 68 and the Circuit Split

The Federal Rules of Civil Procedure generally award “costs” to the prevailing party. Fed. R. Civ. P. 54(d). App.113a-114a. Rule 68 provides “costs” from the date of the offer to the non-prevailing party. Fed.R.Civ.P. 68. App.114a. Copyright Law provides costs to the prevailing party, which in exceptional circumstances may include attorneys’ fees. 17 U.S.C. § 505. App.115a. When the District Court held that attorney’s fees as a matter of law could not be awarded to a non-prevailing party, even under the auspices of Rule 68, it disregarded the intent and purpose of Rule 68, which is to give the non-prevailing party benefits normally reserved for the prevailing party.

Rule 68 springs from the common law concept of right of tender.

The purpose of the common law right of tender was not to encourage settlement. The right applied to a very limited class of cases [wherein] the plaintiff insisted on litigating despite the defendant’s genuine efforts to pay the amount in full. Under these circumstances, the plaintiff had no legitimate basis for suing the defendant.

Robert G. Bone, *To Encourage Settlement: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, NORTHWESTERN UNIVERSITY

LAW REVIEW, at 28-29, Vol. 102, 2008. Once tender occurred, any suit going forward was “obviously frivolous.” *Id.* Contemporaneous to the drafting of Rule 68, litigation was a weapon of choice for the robber baron to harass smaller competitors. Among the explanations and models for Rule 68, the “unreasonable plaintiff” model most aptly fits. *Id.* at 37-39. The drafting and early history of Rule 68 strongly indicates that it was not drafted to promote settlement, but rather to halt pointless litigation. *Id.* at 36-39 citing 1 Claudius L. Monell, *A Treatise on the Practice of the Supreme Court of the State of New York*, 508-509 (1854).

The offer of judgment statute was written with a paradigmatic situation in mind[: i]t contemplated an offer that the plaintiff could not reasonable reject [... in that ...] it offer[ed] everything that a plaintiff was entitled to receive from trial. It was unreasonable or a plaintiff to push forward in the face of such an offer. In effect, potential liability for costs gave the plaintiff “a reason to be reasonable.”

Id. at 39 citing George Donworth et al., *Changes Suggested in Washington Practice and Procedure*, 14 WASH. L. REV. & STATE BAR J. 154, 175 (1939). In short, Rule 68 was not drafted to settle cases, but rather to combat unreasonable litigation behavior. *Id.* at 40 citing *Bathgate v. Haskins*, 63 N.Y. 261, 264 (1875).

Lawfare is manifestly unreasonable because the case’s merits are incidental to the nuisance value. Griner complained of unwanted exposure claiming that in the minds of the public King for Congress linked Success Kid with King, yet immediately reached

out to the world's largest newspapers and magazines to inform them of the association. App.167a-168a, par. 68. Griner complained of the hours of King for Congress's use of the image, but spent almost two years litigating the issue. King for Congress accrued approximately \$30.00 in total contributions on the social media vehicle that posted the image; Griner demanded \$50,000.00 to cease the litigation. She complained of negative aftereffects from King's publication while posting images of her infant son with marijuana and masturbation themes. Griner complained of the David-and-Goliath aspects of litigating against a congressman, and then showed up to trial with a team of lawyers from New York and Los Angeles.

For its hours of unnoticed trespass and \$30.00 in ill-gotten gains, King for Congress offered judgment in the amount of \$15,000.00 to end the litigation, which Griner spurned. Griner never had a case for damages in excess of \$5,000.00 based on past licensing histories. Griner sought more from Petitioner than from Coca-Cola Corporation for its Super Bowl advertisement featuring Success Kid. Griner banked solely on the nuisance value of a suit against a favorite target of the media. Griner incorrectly gambled that this veteran of media attacks tired of them and sought serenity; it was to her great surprise that decades of media pressure had not worn away King's spirit, but rather hardened and honed it.

Copyright law includes an unusual remedy relative to its sister intellectual property rights. Patent and trademark laws offer attorneys' fees *in addition* to costs; Copyright Law offers costs, that include attorneys' fees. 17 U.S.C. § 505. Therefore Rule 68 cannot be invoked to claim attorneys' fees for infringe-

ments of patent and trademark, but because the copyright statutes define attorneys' fees as costs, Rule 68 can be so invoked. In other contexts, *e.g.*, civil rights litigation wherein attorneys' fees are defined as costs, Rule 68 provides attorneys' fees as costs to the non-prevailing parties. The Eleventh and Second Circuits adopted this view. Seemingly, copyrights should not be an unexplained exception, but the Ninth, Seventh, and First Circuits have so held – and now by implication, the Eighth Circuit has joined them. This Court should resolve this split among the circuit courts

2. The Law of Rule 68 and *Marek Redux*: This Court and the Circuit Paradigms

Rule 68 states:

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.

Fed.R.Civ.P. 68(a). App.114a. If unaccepted, there can be dire consequences to the plaintiff.

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(b). App.114a.

Costs which may be awarded under Rule 68 include all costs properly awardable under the relevant substantive statute. *Marek v. Chesny*, 473 U.S. 1, 15 (1985).

Marek instructs the federal courts that if costs are “available” to a plaintiff, then it is available to a Rule 68 judgment-defendant. Copyright law (along with Civil Rights law) contains one of the few statutes that defines attorneys’ fees as costs. The Eleventh and Second Circuits allow a Rule 68 judgment defendant to recoup attorneys’ fees under Copyright and Civil Rights laws. The Ninth, Seventh, and First Circuits do not, stating that the additional statutory language in copyright law (and Civil Rights law) requiring attorneys’ fees only to be awarded to a “prevailing party” makes them unavailable to a Rule 68 judgment-defendant because Rule 68 only applies to non-prevailing parties. *Id.*, at 9.

Under Rule 68 a prevailing plaintiff is required to pay litigation costs for spurned offers of judgment when the offer is more favorable than the ultimate judgment. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 348-49 (1981). The language of Rule 68 is mandatory; where the rule operates, it leaves no room for district court discretion. *Id.* at 354. The purpose of Rule 68 is to encourage cessation of pointless litigation. *Id.* at 352. *See also Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 869 (5th Cir. 1986) (“When it is likely that the plaintiff will obtain a judgment but the amount of such judgment is uncertain, the rule provides the plaintiff an additional incentive to settle the case by creating the possibility that the plaintiff will lose some of the benefits of victory if his recovery is less than the offer.”) (*quoting Delta*, 450 U.S. at 351).

The underlying statutes for both patent and trademark infringement suits do not include attorneys' fees as "costs." Instead, attorneys' fees are recoverable as a separate non-cost category under 35 U.S.C. § 285 and 15 U.S.C. § 1117(a), respectively, only by the prevailing party in "exceptional cases." Because of these definitions of "costs," a party cannot recover attorney's fees by making a Rule 68 offer in patent or trademark cases. Copyright law, however, categorizes "costs" as including attorneys' fees. 17 U.S.C. § 505. Subsection 505 provides:

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*.

Id. (emphasis added). Attorneys' fees are properly awardable to the Rule 68 offeror when the underlying action awards them as costs. *Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997); *See Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d 351, 361 (S.D.N.Y. 2006), *aff'd*, 249 F. App'x 845 (2d Cir. 2007).

There is, however, a circuit split. In contrast to the Eleventh Circuit and Second Circuit¹ (analogously in

¹ Although the Second Circuit has not expressly held that under copyright law attorneys' fees are properly shiftable under Rule 68, it has expressly held that attorneys' fees are awardable under Rule 68 in the context of a statute that defines attorneys' fees as costs and are properly awardable to a "prevailing party." *Wilson v. Nomura Sec. Int'l, Inc.*, 361 F.3d 86, 89 (2d Cir. 2004). "Where the underlying statute defines 'costs' to include attorney's fees, therefore, such fees are 'costs' for purposes of Rule 68. In construing

the circuit court, and explicitly in its district courts²) the Seventh, Ninth, and First Circuits hold that a non-prevailing defendant in this situation may recover its post-offer costs, but may not recover post-offer attorneys' fees, as it is not the "prevailing party" under the Copyright Act and similar statutes. *MG Recordings, Inc. v. Shelter Capital Partners LLC*, 716 F. 3d 1006, 1034 (9th Cir. 2013) (Copyrights); *Crossman v. Marcoccio*, 806 F.2d 329, 334 (1st Cir. 1986) (Civil Rights); *Payne v. Milwaukee County*, 288 F.3d 1021, 1023 (7th Cir. 2002) (Civil Rights).

The Ninth, Seventh, and First Circuits' logic is contrary to the purpose and nature of Rule 68 and the reasoning of *Marek*. *Marek* discusses the comparable treatment of attorneys' fees as costs in the civil rights litigation context:

Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976 . . . 42 U.S.C. § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." Since Congress expressly included attorney's fees as "costs" available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting

42 U.S.C. § 2000 e-5(k) (2001), the Second Circuit awarded attorneys' fees to a Rule 68 offeror based on the following statutory text: "The court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." *Id.*

² *Rice v. Musee Lingerie, LLC*, 2019 U.S. Dist. LEXIS 111487, *6, 2019 WL 2865210; *Leibowitz v. Galore Media, Inc.*, No. 18-CV-2626 (RA) (HBP), 2018 U.S. Dist. LEXIS 161110, 2018 WL 4519208, at *4 (S.D.N.Y. Sept. 20, 2018); *Wallert v. Atlan*, No. 14-CV-4099 (PAE), 2015 U.S. Dist. LEXIS 13958, 2015 WL 518563, at *1 (S.D.N.Y. Feb. 5, 2015).

provision of Rule 68. This “plain meaning” interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.

Marek, U.S. 473 at 9. *Marek* states that if the remedy is “available” to a plaintiff, then it is available to the judgment-defendant. Attorneys’ fees are available to the copyright plaintiff, therefore they are available to the judgment-defendant.

The contrarian circuits say that copyright law mandates that fee awards are reserved only to a “prevailing party,” yet this is exactly what the Federal Rules of Civil Procedure generally says about “costs.” Fed.R.Civ.P. 54(d) (“[C]osts shall be allowed as of course to the prevailing party unless the court otherwise directs.”). Fed.R.Civ.P. 54(d) and 17 U.S.C. § 505 allow “costs” and “attorneys’ fees” to prevailing parties, respectively. The contrarian circuits read Rule 68 to stand in the shoes of the prevailing party for purposes of Rule 54(d) but not for statutes similar to 17 U.S.C. § 505. This is logically flawed.

This Court should hold that Rule 68 means what it says and ratify *Marek*: a non-prevailing party can be awarded costs, and if those costs include attorneys’ fees, then attorneys’ fees can be part of the Rule 68 award. For Plaintiff-Respondent’s case that dizzyingly cycled between publicity-stunt and political attack, attorneys’ fees should be available.

B. A Split Exists Among the Circuit Courts Regarding the Test for the Formation of an Implied License and the Test As Applied Conflicts with This Court’s *De Forest* Decision.

The technology industries call it “scope creep.” Scope creep happens when an initial directive is interpreted multiple times, each time based on the last interpretation. When the result does not resemble the initial directive, a company is the victim of scope creep.

Implied licenses began legal life as broad directive: actions have consequences. Implied copyright licenses evolved into more narrow affairs laden with factors. These factors may be occasionally helpful; here there is little relationship between these factors and social media reality. Some circuits have prioritized the broad directive over specificities, others not. The District Court found the factors more persuasive than the general directive to hold that the Petitioner-Defendants lacked an implied license. The District Court should have prioritized the general directive in the social media context.

Since the dismissal stage of this matter’s litigation Petitioner-Defendants pressed the District Court to adopt this Court’s view concerning copyright implied license scope. The District Court applied the Fourth Circuit’s *Nelson-Salabes* standard in early rulings, which requires ‘delivery from the copyright holder to the potential licensee.’ On August 9, 2022 the District Court in its Summary Judgment ruling officially adopted the *Nelson-Salabes* factors over Petitioner-Defendants’ protests. App.77a, 133a-134a. Once more in requested jury instructions, Petitioner-Defendants pressed for an implied license standard that did not

require an arms-length ‘delivery.’ App.116a. This was denied; *Nelson-Salabes* would be the rule at trial.

Griner begged the world to copy the Success Kid meme. She showed them how to copy the Success Kid meme, and where copies could be found. There was approximately an entire trial day’s worth of such ‘intent’ testimony, but when the District Court rigidly interpreted implied license law to require ‘delivery’ from Griner to King for Congress, it diminished to a nullity the significance of Griner’s intent. As there was no delivery, the intent evidence was obviated. App.160a-166a.

1. Laney Griner Granted a Direct Implied License to Social Media Users 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)(J. Kozinski). 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). The court asks 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 most common test to determine implied license existence requires an arm’s-length transaction and then proceeds to analyze 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. See e.g., *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 514 (4th Cir. 2002). However, creating material at another's request is not the essence of a license; an owner's conduct 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.

The *Nelson-Salabes* arm's length transaction or meeting-of-the-minds test genre may have a utility for occasions such as software licenses, but for social media transactions numbering in the billions, a more general, flexible test ought be considered. *Korman v. HBC Florida, Inc.*, 182 F.3d 1291, 1293 (11th Cir. 1999) ("A nonexclusive license can be granted orally or can be implied from the conduct of the parties."). *Thompson v. Looney's Tavern Productions, Inc.*, 204 Fed. Appx. 844, 850-851 (11th Cir. 2006) (statements by both plaintiff's counsel and co-owner of copyright, after reviewing script, that it was noninfringing were sufficient to create license to perform play based on scripts and "nearly identical" scripts).

The district court rigidly adhered to the *Nelson-Salabes* factors to hold that an implied license could not exist because there was no arms-length relationship between the parties. At trial the District Court granted the Plaintiff-Respondent's motion to direct a verdict ruling that Petitioner-Defendants' implied license defense failed. The jury instructions expressly incorporated the *Nelson-Salabes* factors adopted at the Summary Judgment. Griner's myriad and lengthy actions concerning her encouragement and propagation

of the meme should have been weighed under the general directive, rather than *Nelson-Salabes*. When Griner asks the social media universe to create the Meme, and it does, her capacity to single out individual copyists ought to be severely curtailed.

When the King for Congress utilized the meme the same ways as billions of others, she must have blessed her lucky stars; but she didn't know King very well. Trolls may have an innate sense to detect vulnerability, but not so with character. King would pay no ransom.

The Appeals Court held that the implied license issue had been 'waived.' App.7a. It had not, the District Court *ruled* in Griner's favor, and the Appeals Court omitted key portions of Petitioner-Defendants' statements that agreed with Respondent-Plaintiff that they "could not meet the burden" of an arms-length delivery test. App.111a-112a.

2. Recent Evolution of Implied License Law

Copyright law historically infrequently dealt with mass transactions. Certainly, copyright is no stranger to mass-viewing; but the transactions that allowed them were select. 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 are following suit.

See e.g., *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006).

Petitioners recommend the reasoning in the *Field* opinion to this Court. This Court's website allows GOOGLE to use those website data to display results in its search engine. This Court and GOOGLE do not have an arm's length relationship. GOOGLE feels justified in scouring this Court's website data because this Court's Internet-Technology provider *has not*³ specifically instructed GOOGLE otherwise. HTML, which provides standards for website creation, adopts the use of a Robots.txt file; and in this file, a website in its HTML code can instruct search engines that the website does not wish to be "spidered" (*i.e.*, rendered search-engine-indexable). Many websites don't wish to appear in search results. GOOGLE, though large and oppressive, performs a significant service to humanity; and in *Field*, a malcontent tried to use the rigid interpretation of implied license to trap GOOGLE, but that district court applied this Court's broad directive instead.

Pre-*Field* was probably the extent of the pendulum concerning specific factors. When in doubt obey first principles. This Court merely needs to identify the self-evident principle that one cannot beg for, cheer on, instruct, cajole, and fawn over very public uses of copyrighted content in mass social media, only to demur when someone that she finds "abhorrent" takes her at her word.

³ This is important, and the district court in its analysis got this wrong; you don't ask a search engine to be spidered, you have to instruct it to leave you alone.

If *Nelson-Salabes* prevails for image posts and transmissions, this Court would be mass-producing infringement on an inconceivable scale: a world of infringers merely waiting to be sued.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari.

Respectfully submitted,

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