

2021-1542

**United States Court of Appeals
for the Federal Circuit**

SAS INSTITUTE INC.,

Plaintiff-Appellant,

– v. –

WORLD PROGRAMMING LIMITED,

Defendant-Appellee.

*On Appeal from the United States District Court
for the Eastern District of Texas
Case No. 2:18-cv-00295-JRG, Hon. J. Rodney Gilstrap, Chief Judge*

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INTRODUCTION

It is notable that WPL explicitly wants this copyright appeal to be “less about copyright.” WR 27.¹ Its efforts to avoid copyright principles to focus instead on over-the-top, blame-the-victim rhetoric reveal the weakness of its position. WPL does not dispute that it breached its contract with SAS, committed fraud, and unfairly competed so that it could create a “clone” to replace the SAS System in the marketplace. SB 1. It likewise (a) admits SAS’s timely registration of the SAS System led to a “presumption of validity”; (b) accepts the SAS Material reflects SAS’s “creative judgment,” which the Supreme Court has held is the crux of copyright protection; (c) acknowledges it copied those choices; and (d) tacitly concedes it failed to show that all of the SAS Material it copied was unprotectable. Under those circumstances, the jury should have been permitted to compare the SAS Material to WPS to determine whether they are substantially similar.

Instead, the district court ignored black-letter copyright principles and the Federal Rules. WPL entreats this Court to do the same so that it can avoid culpability for its infringement. To do so, it repeatedly misdescribes its cited cases, using misleading quotations to suggest courts reached holdings they did not. Likewise, it twists the record below, misrepresenting the evidence and castigating

¹ Capitalized terms are defined in SAS’s opening brief (“SB”). “WR” is WPL’s response, and *amicus* briefs are “___ Br.,” according to lead *amicus*.

SAS for following legal rules that should have governed this case.

Despite WPL's smokescreen, the following legal principles apply:

- In the filtration analysis, WPL's burden was to show that all of the SAS Material it copied was unprotectable. Congress created a presumption of validity to shift this burden to the defendant, and numerous courts have followed that principle. This also is how copyright cases are litigated as it is more practical to have a defendant substantiate its argument and for the plaintiff to respond. WPL did not meet its burden simply by listing limiting doctrines it asserted *might* apply to the SAS System, whether or not they actually applied to the material copied. Thus, the jury should have been permitted to compare the copied SAS Material to WPS.
- The district court's approach to dismissing SAS's claim is divorced from civil procedure rules, which independently warrants reversal. It could not have granted summary judgment as it previously found genuine issues of material fact. Nor could it have made a decision under Rule 52 as it did not issue findings of fact or conclusions of law applying the limiting doctrines to the SAS Material.
- The SAS Material is protectable as a matter of law because it is creative, and SAS's decisions were unconstrained.

- Source code is not necessary to identify the nonliteral SAS Material WPL copied.

Under these legal principles, WPL failed to satisfy its burden to show the material it copied is unprotectable. The district court also erroneously excluded SAS’s witnesses’ testimony, largely based on its misconception of the parties’ burdens. To preserve the Constitutional incentives to create new programs, Copyright Alliance Br. 4-7, SAS respectfully requests that this Court hold the district court erred in its filtration analysis, find WPL copied protectable SAS System elements, vacate the judgment, reverse the exclusion of SAS’s witnesses’ testimony, and remand for trial.

ARGUMENT

I. THE DISTRICT COURT’S OPINION WAS CRITICALLY FLAWED

A. WPL’s Authorities *Confirm* the Burden-Shifting Framework Was Misapplied

In its opening brief, SAS provided three reasons that it was WPL’s burden to prove the SAS Material it copied was unprotectable. First, under 17 U.S.C. §410(c), a timely registration certificate is “*prima facie* evidence of the validity of the copyright,” shifting the burden to the defendant. SB 40-41. Second, cases across the circuits have held that “the *defendant* bears the burden of proving—as part of the filtration analysis—that the elements [it] copied from a copyrighted work are *unprotectable*.” SB 39; *Compulife Software Inc. v. Newman*, 959 F.3d

1288, 1305 (11th Cir. 2020) (emphasis in original). Third, shifting the burden makes practical sense as it is straightforward for the defendant to explain why what it copied is unprotectable, but can be impossible for a plaintiff to prove that none of the limiting doctrines apply. SB 41-43; *Compulife*, 959 F.3d at 1305-06. It also is how copyright cases are litigated. See *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 140 (5th Cir. 1992) (*defendant's* argument that map merged rejected).² The district court's approach is, thus, a departure from accepted practice, divorced from the law, and impractical.

WPL presents three reasons to upend copyright law, all of which fail. *First*, WPL concedes that SAS's registration certificates create a "presumption of validity," but argues that presumption applies to the validity of the work as a whole, not the SAS Material it copied. WR 37-38. Yet, WPL's argument is inconsistent with the cases SAS cited (which WPL ignores), holding that the presumption "shifts the burden to [the defendant] to rebut that the allegedly copied elements are not protectable expression." SB 40-41 (quoting *Brocade Commc'ns*

² *Boisson v. Banian, Ltd.*, 273 F.3d 262, 269 (2d Cir. 2001) (*defendant* failed to show copied layout was public domain); *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 68 (1st Cir. 2009) (*defendant* did not prove copied plush-toy elements were merged or *scènes à faire*); *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 99 (2d Cir. 2002) (*defendant's* merger evidence "unpersuasive"); *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 635-36 (8th Cir. 1989) (*defendant's* short phrases and mathematical formula arguments rejected).

Sys. Inc. v. A10 Networks Inc., No. 5:10-cv-03428, 2011 WL 7563043, at *2 (N.D. Cal. Aug. 16, 2011)); Oman Br. 12.

Moreover, the Copyright Act does not limit the presumption of “validity of the copyright” to exclude the work’s constituent elements. 17 U.S.C. § 410.

Likewise, in the House Report on which WPL itself relies, WR 38, Congress *explicitly* explained that the presumption “orders the burdens of proof” so that the plaintiff is *not*:

forced in the first instance to prove all of the multitude of facts that underline the validity of the copyright unless the defendant, by effectively challenging them, shifts the burden of doing so to the plaintiff.

H.R. Rep. No. 94-1476, at 157 (1976).³ Taken to its logical extension, WPL’s approach would remove the benefit of the presumption in all but the small fraction of cases involving complete reproduction.

Moreover, WPL’s cited cases do not support its argument that the presumption applies to only the “work *as a whole*.” WR 37. It misquotes *Nola Spice Designs, L.L.C. v. Haydel Enterprises, Inc.*, which says *nothing* about the

³ WPL tries to undermine Congress’ presumption because the Copyright Office may not review every part of the works it registers. WR 38. Yet the presumption is not just about deference to the Office’s examination, but is an independent “inducement to register works.” Scholars Br. 7. WPL’s cited case does not hold otherwise. *See Universal Furniture Int’l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 430 (4th Cir. 2010) (“evidence” required to rebut presumption).

presumption's application to the work's elements. 783 F.3d 527, 549 (5th Cir. 2015) (stating only *infringer* did not show “work as a whole is unprotectable”). And its other cases do not address the presumption either. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991); *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 533 (5th Cir. 1994).⁴

WPL's reliance on *Smith v. Jackson* is particularly remarkable as it too shows that all courts put the burden of proving unprotectability on the defendant, albeit for different reasons. In the Ninth Circuit, the burden is on the defendant because the limiting doctrines are “affirmative defenses,” *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1358 (Fed. Cir. 2014); see *Dixon v. United States*, 548 U.S. 1, 8 (2006); Copyright Alliance Br. 16. Thus, in *Smith*, the court did not apply the presumption of validity to the “copying” inquiry, 84 F.3d 1213, 1219 (9th Cir. 1996), but still required the defendants to submit evidence that all of the copied material was “*scènes à faire*,” which the plaintiff “rebutted.” *Id.* at 1220. In the Fifth Circuit—whose law WPL admits this Court must apply, WR 30, 33—the limiting doctrines are questions of “copyrightability,” *Mason*, 967 F.2d at 138

⁴ See also *Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1038 n.5 (9th Cir. 2015) (not deciding issue). *Bikram* is consistent with other courts' application of the idea/expression dichotomy. See *Cisco Sys. Inc v. Arista Networks, Inc.*, No. 14-cv-05344, 2016 WL 4440239, at *8 (N.D. Cal. Aug. 23, 2016).

n.5, to which WPL admits the presumption applies. WR 37. Thus, regardless of how circuits approach it, the limiting-doctrine burden is always on the defendant. *Infra* 7.

Second, WPL incorrectly claims that, although the rest of the country places the burden on the defendant to show unprotectability, the Fifth Circuit does not. Yet, all circuits apply the same approach: “**the defendant bears the burden of proving—as part of the filtration analysis—that the elements he copied from a copyrighted work are unprotectable.**” *Compulife*, 959 F.3d at 1305. This is the same process applied in the First and Second Circuit cases SAS cited (neither of which WPL meaningfully distinguishes), the Ninth Circuit (*supra* 6), and the *Nimmer* treatise (which WPL tellingly does not address). *Compare* SB 41, with WR 37 n.5 (admitting that defendant must produce “proof” of alleged unprotectability or its filtration arguments are “waived”).⁵ Yet, WPL has never

⁵ Even WPL’s Sixth Circuit cases place the burden on the defendant. *See R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 275 (6th Cir. 2010) (defendants explained “any alleged similarities arose from” both programs being designed to serve the same functions; plaintiff failed to respond); *Automated Sols. Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 520 (6th Cir. 2014) (defendant “identified eight reasons why [work] could not have been copied,” shifting burden to plaintiff). WPL’s cited treatises solely cite *Automated Solutions*, and neither addresses burden shifting, making their statements that a plaintiff has *some* burden irrelevant. *See Goldstein on Copyright* § 9.3.2; *Scott on Computer Info. Tech. L.* § 2.51.

explained why each piece of SAS Material it copied was unprotectable, likely because having set out to create a SAS System “clone,” Appx9, it cannot do so.⁶

Struggling to distinguish the general approach to copyright litigation, WPL misdescribes Fifth Circuit opinions to assert that courts require the “plaintiff” to filter unprotectable expression. WR 31-36. Yet, the cases it repeatedly cites *do not say that*. In *General Universal Systems, Inc. v. Lee*, the Fifth Circuit explicitly did not “consider” the “allocation of the burden of proof.” 379 F.3d 131, 143 n.26 (5th Cir. 2004). WPL misleadingly quotes the opinion, which actually stated that “*the court* filters out unprotectable expression.” *Id.* at 142-43 (emphasis added). *Nola Spice* similarly focuses on the *court’s* analysis, not the parties’ burdens. *Nola Spice*, 783 F.3d at 550 n.6 (“[W]e ... filter ...”).⁷

⁶ WPL’s remaining out-of-Circuit cases, WR 34, are inapposite. *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1201 (10th Cir. 2014) (special master’s report; does not address burden shifting); *Siegler v. Sorrento Therapeutics, Inc.*, No. 3:18-cv-01681, 2019 WL 3432294, at *10 (S.D. Cal. Aug. 2, 2019) (*pro se* plaintiff wanted to prevent reliance on her “theories, research ideas, and scientific discoveries,” not copying her descriptions of them); *Ford Motor Co. v. Versata Software, Inc.*, No. 15-cv-10628, 2019 WL 355638, at *4 (E.D. Mich. Jan. 29, 2019) (Ford showed software was unoriginal and unprotected).

⁷ So too in *Gates Rubber Co. v. Bando Chemical Industries, Ltd.* 9 F.3d 823, 834 (10th Cir. 1993). And in *Macro Niche Software, Inc. v. 4 Imaging Solutions, L.L.C.*, on which WPL relies (at 34), the plaintiff claimed all elements of its program were protectable, even ideas. No. 12-cv-2293, 2013 WL 12140417, at *5 (S.D. Tex. Dec. 18, 2013). SAS, by contrast, asserts that WPL copied the specific protectable elements of the Input Formats and Output Designs. SB 50-59. *General Electric Co. v. Wabash Appliance Corp.*, a patent case about the

Next, WPL argues that the Fifth Circuit would not follow *Compulife* because, in *General Universal*, it “approvingly” cited a supposedly contrary holding in the Eleventh Circuit’s *MiTek Holdings, Inc. v. Arce Engineering Co.* opinion. WR 36; 89 F.3d 1548 (11th Cir. 1996). WPL, however, misreads these cases. Consistent with *Compulife*’s burden-shifting analysis, the *MiTek* plaintiff identified the elements of its computer program that it alleged the defendant had copied. 89 F.3d at 1555. In *General Universal*, the plaintiff tried to shift that burden to the defendant. 379 F.3d at 143 n.26, 144-45. Although the Fifth Circuit did not decide the question, it suggested that *MiTek* disagreed with the plaintiff’s argument. *Id.* Thus, those cases dovetail with *Compulife*: first the plaintiff identifies the copied elements, and then the defendant identifies what is unprotectable and why. 959 F.3d at 1309 (quoting *MiTek*, 89 F.3d at 1560). The Fifth Circuit agreed that the plaintiff should identify the copied material, and is likely to follow *Compulife*’s burden-shifting framework when it comes to filtration.⁸ SB 39 n.3.

written-description requirement, 304 U.S. 364, 368-69 (1938), is inapposite as SAS satisfied the copyright application requirements.

⁸ *General Universal* is otherwise distinguishable as the plaintiff failed to show actual copying of its software’s nonliteral elements, 379 F.3d at 144, whereas here there was “repeated evidence.” Appx15; SB 24. WPL claims the Fifth Circuit “assumed” such copying, WR 36 n.4, but quotes the portion of the opinion concerning copying literal “code” elements, not the part about nonliteral elements. *Compare* 379 F.3d at 143 (affirming dismissal due to no

Third, WPL argues that flipping the burdens would not be impractical, relying on the same failed arguments discussed above. WR 39. Yet again, however, its cited cases support SAS. As described above, *MiTek* and *Compulife* provide that the plaintiff identifies what was copied, next the defendant shows why those elements are unprotectable, and then the plaintiff responds. *Supra* 9.⁹ Similarly, in *Ho v. Taflove*, after the plaintiff identified a copied atomic model, the defendants explained that the entirety of the model was “not protected” because it amounted to “an idea.” 648 F.3d 489, 497 (7th Cir. 2011). And in *N.Y. Mercantile Exchange, Inc. v. IntercontinentalExchange, Inc.*, after the plaintiff identified its copied settlement prices, the defendant argued they were all unprotectable under the merger doctrine. 497 F.3d 109, 117 (2d Cir. 2007). That those plaintiffs did not rebut the defendants’ evidence does not change the fact that the defendants *came forward* with evidence as to why the material they copied was unprotectable. Moreover, WPL’s cases only serve to show why it is more practical for the defendant to explain how the material that it copied was unprotectable, and for the plaintiff to respond, than for the plaintiff to boil the ocean. SB 41-43.

evidence “nonliteral elements” copied) *with id.* at 157 (copying “COBOL code” assumed and case decided based on substantial similarity).

⁹ WPL attempts to distinguish *Compulife* as about literal elements, WR 37, but *Compulife*’s discussion of the unfairness of requiring a plaintiff “to prove a negative,” 959 F.3d at 1305, applies to all works. Creators Rights Br. 12-21.

Here, despite WPL's assertions that SAS refused to conduct "an abstraction-filtration analysis," WR 40-41, and that SAS has not "listed everything" that WPL copied, WR 42-44, the district court found (and WPL does not challenge) that SAS satisfied its burden as to factual copying and abstraction.¹⁰ Appx9; Appx12. SAS also provided numerous lists and examples of WPL's copying. SB 24-28; *see* Appx741-747; Appx816-1137 (listing hundreds of side-by-side comparisons of copied Output Designs); Appx1373-1428 (listing hundreds of SAS Input Formats "supported" in WPS); Appx13883-13891 (excerpting list of thousands of Input Formats in WPS source code).

Given the district court's findings, SAS's extensive evidence, and WPL's deliberate creation of a SAS System "clone," Appx9, WPL cannot credibly argue that it does not understand what it copied. This is not a circumstance where a defendant is accused of copying vague "action sequences." WR 45. It is closer to a defendant trying to avoid liability for creating a top-to-bottom *Star Wars* rip off

¹⁰ Because these findings show SAS's claim were sufficiently specified, WPL cannot hide behind the court's discretion to "particularize claims." WR 45. Further, if WPL is arguing that the court could have required SAS to drop certain allegations of copying, that would be a due process violation. *Cf. Gentherm Can., Ltd v. IGB Auto., Ltd*, No. 13-cv-11536, 2016 WL 1170801, at *2 (E.D. Mich. Mar. 25, 2016) (objection to patent reduction "violates due process").

by saying starships are *scènes à faire*.¹¹ SB 42. In other words, that WPL’s copying was so extensive to be a “clone” supports a finding of infringement, not prohibits it as WPL argues. WR 43-44.

Thus, based on both parties’ cases, the burden shifted to WPL to explain why what it copied was unprotectable. *Supra* 7, 10. WPL argues that it satisfied its burden by merely “identify[ing] the ‘species of unprotectability’” without showing that each and every element it copied is unprotectable. WR 42. As SAS explained, and WPL ignores, that “is precisely the error that the Eleventh Circuit reversed.” SB 43; *Compulife*, 959 F.3d at 1306 (defendant must indicate where “that portion” of the copied work “can be found” in “the public domain”). Where WPL did identify specific elements that were allegedly unprotectable, WR 41, 43-44, SAS addressed them. SB 51-59; *infra* 15. Even WPL admits that SAS “rewrote the source code sufficiently to obtain a copyright.” WR 6. Nowhere does WPL argue that it explained why everything it copied was unprotectable, nor can it. That is why the district court’s misapplication of the burden-shifting framework alone requires reversal.

¹¹ WPL tries to avoid this analogy by arguing it copied only nonliteral elements, but “setting, characters, or plot” are nonliteral elements. *See Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 51 (D. Mass. 1990) (collecting cases), *cited by, Eng’g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1341 (5th Cir. 1994).

B. WPL Does Not Defend the District Court’s Misapplication of the Federal Rules

Tacitly conceding the district court did not follow the Federal Rules, WPL nowhere explains the procedural posture of the court’s novel order. WR 58-60.

As SAS explained, this is a critical issue:

- The district court could not have granted WPL summary judgment as it previously found that factual issues foreclosed doing so. SB 45 (quoting Appx1).¹²
- If it was operating under Rule 52, factual findings and an application of limiting doctrines to those facts was required. SB 45-46. Yet, the court did not do that, and tellingly WPL does not argue otherwise.¹³

The court’s dismissal of SAS’s case without application of the Federal Rules was

¹² WPL claims that the district court found “summary judgment was the wrong ‘framework,’” WR 59, but the court indicated it could not grant summary judgment given the “genuine issues of material fact” and did not want to deny it, allowing the jury to decide copyrightability. Appx1. WPL also claims SAS identified no factual disputes, but that is because the undisputed facts show the SAS Material is protectable. SB 47-59. As the movant, it was WPL’s burden to show otherwise. *Raytheon Co. v. Indigo Sys. Corp.*, 688 F.3d 1311, 1314-15 (Fed Cir. 2012). Nowhere did the court find that WPL had done so, Appx18, and WPL does not do so here. *Infra* 16. Regardless, WPL does not treat this as a summary-judgment appeal, failing to recite the *de novo* review standard. WR 30; SB 36.

¹³ Instead, WPL merely reiterates its incorrect burden-shifting argument. WR 59; *supra* 4.

clear error. What the court should have done is identify any unprotectable elements in the SAS Material, and treat the remainder as protectable in comparing the works. SB 46-47 (quoting *Compulife*, 959 F.3d at 1306); Oman Br. 15. It did the opposite.

Instead of defending the district court's order, WPL obfuscates. It claims that the court "must decide which elements should be filtered out before trial," WR 58, but fails to identify an appropriate procedural vehicle for that determination. In so doing, WPL ignores SAS's cited authority, holding that filtration normally occurs "at trial or summary judgment." SB 43, 47; Copyright Alliance Br. 18-19. If the district court found disputed factual issues, it should have instructed the jury on the legal categories of unprotectability and allowed the jury to decide. *See, e.g.*, Final Jury Instructions (Dkt. 737), at 23, *Cisco*, No. 5:14-cv-5344-BLF (N.D. Cal Dec. 12, 2016); Final Jury Instructions (Dkt. 1017), at 8-11, *Oracle Am., Inc. v. Google Inc.*, No. 3:10-cv-03561-WHA (N.D. Cal. Apr. 30, 2012).¹⁴ Accordingly, reversal is appropriate.

¹⁴ WPL's cited cases, WR 58-59, do not say otherwise. *See Eng'g Dynamics*, 26 F.3d at 1340 (filtration procedure not mentioned); *see also CompuLife*, 959 F.3d at 1300, 1309 n.12 (filtration decided by court before factfinder decides substantial similarity; no mention of *how*); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 34 n.5 (1st Cir. 2001) (same); *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996) (filtration not mentioned).

C. The SAS Material Is Protectable As a Matter of Law

In addition to its burden-shifting and procedural errors, the district court erred in not finding that the SAS Material that WPL copied was protectable. As SAS explained, and WPL does not deny, whether elements of a program are protected is a “mixed issue of fact and law” subject to “*de novo* review.” SB 35-36 (quoting *Gates Rubber*, 9 F.3d at 832, and *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000)).

Here, there are three reasons that SAS’s Input Formats and Output Designs are protectable. First, there is no dispute, whether below or on appeal, that they are creative, which is the essence of protectability. SB 48-49 (citing *Feist*, 499 U.S. at 345). Second, SAS’s selection and arrangement is protectable, and WPL did not produce any evidence that it would be filtered by a limiting doctrine. SB 50. Third, the copied SAS Material survives filtration under the limiting doctrines discussed by the district court. SB 50-59. As WPL had its opportunity to show otherwise, this Court should hold that the material is protectable and remand for a trial for a jury to assess whether WPS is substantially similar to the SAS Material.

WPL’s arguments to the contrary are unavailing. **First**, with regard to creativity, it cannot be overemphasized that WPL admits that SAS “exercised ... ‘creative’ judgment.” WR 46; Computer Scientists Br. 14-27. As the numerous cases SAS cited make clear, creative choices are the core showing for

protectability. SB 48. WPL does not even address these cases. Instead, it argues that “creativity establishes only the threshold requirement that a copyrighted *work* is ‘original,’” WR 46 (discussing copyright claim’s first element), but the Supreme Court made clear that copyright protection extends “to those *components* of a work that are original to the author.” *Feist*, 499 U.S. at 345, 348 (emphasis added) (considering second element); *see Stewart v. Abend*, 495 U.S. 207, 234 (1990) (author’s “original additions” protectable). Thus, as WPL concedes that the SAS Material is original, that material is protectable.

Second, with regard to SAS’s selection and arrangement, WPL argues that “actionable copying of compilations cannot be established without evidence of what the ‘entire’ compilation contains.” WR 46. Again, WPL does not address SAS’s cited cases. SB 49-50. If it had, WPL would have realized that a selection and arrangement copyright is not restricted to compilations. *See Softel, Inc. v. Dragon Med. & Sci. Commc’ns*, 118 F.3d 955, 964 (2d Cir. 1997) (selection-and-arrangement protection for software commands). In fact, in *Mason*, the Fifth Circuit explicitly held that selection-and-arrangement protection is available in categories of works beyond compilations. 967 F.2d at 142.¹⁵

¹⁵ *Experian Information Solutions, Inc. v. Nationwide Marketing Services, Inc.*, cited by WPL (at 46), acknowledged that the “manner of selecting and displaying ... information” can be protectable if original. 893 F.3d 1176, 1184 (9th Cir. 2018). WPL admits the SAS Material is. *Infra* 17.

WPL also argues that compilations require filtration, WR 47, but WPL's own cited case holds that WPL would need to show SAS's selection and arrangement was unprotectable. *See BellSouth Advert. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 999 F.2d 1436, 1442 (11th Cir. 1993). WPL did not do so. Instead, it repeated its same (and incorrect) unprotectability arguments concerning stray elements of SAS Material. *Compare*, WR 47 *with* SB 50-59; *infra* 18. Nowhere does WPL show that SAS's selection and arrangement that WPL copied is unprotectable. SB 50; Scholars Br. 13-15.

Moreover, given that the district court never reached the comparison step of the AFC analysis, WPL's focus on comparing the works, WR 31, or the degree of similarity required, WR 46-47, is irrelevant. WPL also is wrong. The Fifth Circuit does not require "verbatim" copying of an entire work or permit copying of "more than a trivial degree," as WPL claims. *Compare* WR 47, *with* *S. Credentialing Support Servs., L.L.C. v. Hammond Surgical Hosp., L.L.C.*, 946 F.3d 780, 784 (5th Cir. 2020). In any case, WPS "emulates" the SAS System's Input Formats and displays "equivalent" Output Designs with "similar graphical output." SB 25 (quoting Appx10); *supra* 11.¹⁶ In other words, WPL copied SAS's selection and

¹⁶ Unlike WPL's slavish copying, the defendant in *Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Group*, on which WPL relies (at 47 n.6), exercised its own professional judgment. 463 F.3d 478, 483 (6th Cir. 2006).

arrangement of these elements.

Third, WPL raises one limiting doctrine as to each type of SAS Material, waiving its other unprotectability arguments.

As to **Input Formats**, WPL argues that they are unprotectable as a “language,” WR 48-52, but it cites no case holding that “language” cannot be protected as part of a work’s copyright, and ignores SAS’s cases holding that input formats and even languages are protectable. SB 52-53. Although WPL quotes from *Engineering Dynamics*, even then it ignores *why* the Fifth Circuit found those input formats protectable: they told users “which data to collect as well as the order of collection.” 26 F.3d at 1346. SAS’s Input Formats are similarly expressive, SB 12-16, and could have been written in numerous other ways, SB 21-24. WPL does not argue otherwise, and its cited cases, WR 50, confirm that SAS’s particular expression of the Input Formats is protectable. *See Baker v. Selden*, 101 U.S. 99, 104 (1879) (system’s expression copyrightable); *Design Basics, LLC v. Signature Construction, Inc.*, 994 F.3d 879, 889 (7th Cir. 2021) (copyright protects elements with more than “limited ways” to express idea or achieve functionality).¹⁷

¹⁷ WPL’s reliance (at 50) on *Lotus Development Corp. v. Borland International, Inc.* is misplaced. First, the First Circuit rejected the AFC test that the Fifth Circuit applies. 49 F.3d 807, 815 (1st Cir. 1995); *see Oracle*, 750 F.3d at 1366. Second, the Fifth Circuit agreed with the reversed district court’s analysis. *Eng’g Dynamics*, 26 F.3d at 1343. Third, unlike *Lotus*, it is undisputed that the SAS Material is creative, *supra* 17, and WPL can write PROCs without copying them, *infra* 21. Likewise, the U.K. court’s copyright decision, on which WPL

WPL also takes quotations out of context to argue that users supposedly are able to write in the “SAS language” without a license. WR 49-50. But as SAS explained, that testimony was about the ability of SAS customers to physically use the Input Formats, not that no legal permission is needed for a competitor to copy them. SB 53 n.4. Moreover, WPL identifies no *legal* consequence such statements would have that denies protection to the Input Formats. To the contrary, the one case WPL discusses similarly involved software elements that “software developers use[d] ... to write applications,” and held they were nevertheless protectable. *Oracle*, 750 F.3d at 1347-48. WPL tries to distinguish *Oracle* on the basis that the defendant could have written equally functional code in other ways, WR 51, but WPL admits it too was able to write its own PROCs without copying the Input Formats. WR 9-10, 47 n.6. It just chose not to.

WPL also claims that the PROCs are merely “‘commands’ to SASII’s or WPL’s software,” WR 51, but commands are protectable. *Softel*, 118 F.3d at 966-67 (commands protectable); *Pyrotechnics Mgmt., Inc. v. XFX Pyrotechnics LLC*, No. 2:19-cv-00893, 2021 WL 925812, at *8 (W.D. Pa. Mar. 11, 2021); *Cisco*, 2016 WL 4440239, at *8; *Consul Tec, Inc. v. Interface Sys., Inc.*, No. 90-cv-70757,

relies (at 51), is inconsistent with U.S. protection. SB 30. And WPL’s argument that it achieved SAS’s functionality “a different way,” WR 50, is irrelevant as the district court never reached the comparison step, and incorrect as WPL copied the way SAS wrote the Input Formats. SB 25; *supra* 12.

1991 WL 427891, at *3 (E.D. Mich. Oct. 31, 1991).¹⁸ Thus, SAS’s claim is not akin to seeking protection of the idea of individual words or grammar, but rather SAS’s particular expression. That is protectable. *See Softel*, 118 F.3d at 964.

As to **Output Designs**, WPL claims it is an “open question whether copyright in a computer program reaches outputs.” WR 52. As SAS explained, and WPL ignored, that is wrong. It is black-letter law that screen display outputs, like those at issue here, are part of a program’s copyright. SB 55 n.5.

Further, WPL argues that the SAS System does not perform the “lion’s share of the work” in producing the Output Designs and, thus, SAS’s copyrights do not extend to them. WR 52-53. The district court, however, did not address that issue, tacitly rejecting it. SB 55 n.5. WPL also is wrong. In *Engineering Dynamics*, just as WPL asserts here, WR 53, users provided information to the plaintiff’s system. 26 F.3d at 1338. Nevertheless, the protectability of the system’s outputs was “proved by the existence by other, dissimilar structural engineering programs available in the market.” *Id.* at 1346. That also is true here. SB 22-24. Likewise, despite the fact that users control the outcome of video games and other programs,

¹⁸ Compare *Computer Scientists Br.* 14-15 (PROCs are “methods” and “subroutines”), *with Oracle*, 750 F.3d at 1349, 1359 (methods protectable); *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 705 (2d Cir. 1992) (subroutines protectable computer programs); *Whelan Assocs., Inc. v. Jaslow Dental Lab’y, Inc.*, 797 F.2d 1222, 1245-46 (3d Cir. 1986) (same).

courts repeatedly have held their visual displays to be protectable. *See Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982) (“player’s participation does not withdraw” copyrightability); *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 404 (D.N.J. 2012) (collecting cases; audiovisual display protectable and infringed by clone without source-code copying).¹⁹ That the Output Designs are particularly robust, WR 54, combining numerous distinct elements, WR 55, makes them more protectable, not less. *Supra* 11. As WPL’s clone extensively copied SAS’s creative choices, this Court should hold that the Output Designs are protectable.

Given its failure to satisfy its burden, WPL asks for a “remand for further proceedings.” WR 60. Given the record, however, this Court should find that WPL copied protectable elements of the SAS System and remand for trial.²⁰

¹⁹ *Design Data Corp. v. Unigate Enterprise, Inc.*, on which WPL relies (at 52), concerned output files, 847 F.3d 1169, 1171 (9th Cir. 2017), which are not at issue here.

²⁰ *Marshall v. Kimberly-Clark Corp.*, on which WPL relies (at 60), had “considerable evidence in support of each party’s contention.” 625 F.2d 1300, 1302-03 (5th Cir. 1980). Here, the undisputed facts show WPL copied protectable material, SB 50-59, which WPL’s own reference indicates is grounds for deciding the appeal “without further elaboration by the trial judge.” Wright & Miller, 9C *Fed. Prac. & Proc. Civ.* § 2577 (3d ed.) (permissible where “facts are undisputed”).

II. WPL'S BACKUP ARGUMENT MISAPPREHENDS SOFTWARE COPYRIGHTS

Evidently recognizing the weakness of its filtration position, WPL makes a last-ditch argument that SAS did not establish that the SAS Material is part of the SAS System's source code. WR 56. WPL, however, does not dispute that a program's copyright is not limited to its code, but extends to its nonliteral elements, including "input formats" and "output reports." SB 38 (quoting *Eng'g Dynamics*, 26 F.3d at 1346); WR 3, 58; Oman Br. 4-10. SAS provided extensive evidence that the SAS System includes the copied Input Formats and the Output Designs. SB 9-19; WR 7 (SAS's "software displays" outputs). It simply is unnecessary to look at the source code to identify those elements.

Manufacturers Technologies, Inc. v. Cams, Inc. is directly on point. There, the defendant (as WPL did here) copied screen displays of a program and then argued that the plaintiff must show the literal code was substantially similar. 706 F. Supp. 984, 993 (D. Conn. 1989). The court rejected that approach, reasoning that proving infringement of nonliteral elements using code would be "difficult, if not insurmountable." *Id.* This makes sense given that "analyzing whether source code was misappropriated would likely entail a different inquiry—or different

abstraction—than analyzing whether the graphical interface or display of a program was copied.” *Tetris*, 863 F. Supp. 2d at 402.²¹

WPL also objects to SAS’s use of manuals, the SAS System itself, and other documentation as evidence of the nonliteral elements, WR 57, but such materials are routinely used “as evidence of how the products themselves function[.]”

Finjan, Inc. v. Symantec Corp., No. 10-cv-593, 2013 WL 5302560, at *8 (D. Del. Sept. 19, 2013) (relying on “executable software and user manuals”), *aff’d*, 577 F. App’x 999 (Fed. Cir. 2014); *see Proveris Sci. Corp. v. Innovasys, Inc.*, 739 F.3d 1367, 1371 (Fed. Cir. 2014) (comparing “User Manuals” to demonstrate products’ similarities). Indeed, contrary to WPL’s criticism that Dr. Storer “looked at screenshots produced by user programs,” WR 57, its own cited case acknowledges that “evidence other than the original may be sufficient to establish the content of a

²¹ WPL’s source-code-copying citations, WR 56, are thus inapposite. *See Antonick v. Elec. Arts, Inc.*, 841 F.3d 1062, 1066 (9th Cir. 2016) (source-code-based claims but “none ... in evidence”); *Airframe Sys., Inc. v. L-3 Commc’ns Corp.*, 658 F.3d 100, 106 (1st Cir. 2011) (must show “code” because plaintiff “contends was infringed”); *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 576 (5th Cir. 2003) (same); *Nimmer on Copyright* § 13.03[F][1][b] n.282 (proving “source code [are] alike”).

copyrighted work.” *Airframe*, 658 F.3d at 107 n.9 (photographs evidence displays).²²

Finally, WPL asserts that SAS “lumped together” different works. WR 58. Multiple versions of the SAS System, however, were registered with the Copyright Office. Appx345-371. In such circumstances, courts treat different versions collectively, rather than parsing them out. *See Castle Rock Ent. v. Carol Publ’g Grp. Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) (*Seinfeld* “a single work”); *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1372-73, 1381 (2d Cir. 1993) (*Twin Peaks*); *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) (research-report abstracts); *Tetris*, 863 F. Supp. 2d at 396 (*Tetris*); *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 535 (S.D.N.Y. 2008) (*Harry Potter*). Likewise, using different manuals to show the functioning of the programs is appropriate. *Supra* 23. Accordingly, WPL’s argument should be rejected.

²² Thus, these materials are sufficient to make the “side-by-side comparison.” WR 3, 27, 31; *supra* 12. Regardless, the district court never reached comparing the works. *Supra* 19.

III. THE DISTRICT COURT’S WITNESS EXCLUSIONS WERE REVERSIBLE ERROR

A. SAS’s Expert Was Excluded Improperly

Because the district court erroneously held that the burden was on SAS to identify the unprotectable elements of the copied material, it excluded SAS’s expert, Dr. Storer, for not performing the filtration analysis that it wanted.

Appx18; WR 63-64 (admitting same). But that was not SAS’s burden.²³ As SAS explained, this was reversible error. SB 62; WR 66 (admitting exclusion substantially prejudiced SAS’s case).

Seeking to distance the exclusion from the court’s unsupportable copyrightability analysis, WPL asserts a series of arguments that make no sense. WR 60. WPL falsely claims that the order “adopted” the many arguments it submitted before the hearing, WR 61, Appx13623 (WPL admitting it filed “more [motions] than this busy Court desires to review or resolve”), but those issues were not part of the court’s reasoning. Appx18. The court’s order never objected to Storer’s inferences or other methodology, and cannot be read otherwise. Thus, although WPL asserts SAS “waive[d]” a response to its other arguments, WR 61, in fact they simply are not on appeal. *See* SB 62-64; *Certain Underwriters at*

²³ The court gave no notice that it expected him to perform such an analysis. Appx2. Nor did it permit Storer to rebut WPL’s expert with information outside the filtration subsection of Storer’s report. SB 62.

Lloyd's, London v. Axon Pressure Prods. Inc., 951 F.3d 248, 269 (5th Cir. 2020) (without reasons for expert exclusion “reviewing court has no way of knowing whether that gatekeeping responsibility has been adequately performed”).

WPL’s arguments also are incorrect. **First**, WPL claims that Storer was excluded because he did not provide an analysis of “the literal source code,” a “complete listing” of the asserted elements, or a “side-by-side comparison” of the works, WR 64, but Storer did those things. *Supra* 11 (comparisons); Appx737-739 (identifying Input Formats (citing Appx1373-1428)); Appx742-747 (identifying Output Designs (citing Appx866-1137)); Appx740 (analyzing source code (citing Appx13883-13891)). In any case, they are not requirements of SAS’s claim, *supra* 11, 23, and not necessary to admit expert testimony. *See Primrose Operating Co. v. Nat’l Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004) (methodological disputes go to weight, not admissibility).²⁴

Second, WPL relies on Storer’s supposed “discovery violations.” WR 61; Appx12918. Again, these Rule 26 and 37 arguments were not part of the *Daubert* order. Appx18 (considering WPL’s *Daubert* motion); Appx13896-13898

²⁴ WPL does not meaningfully address this, responding only that filtration is “dispositive,” WR 63-64, but cites only cases without filtration. *Supra* 7-8. Nor was Storer speculating, unlike the *Power Integrations, Inc. v. Fairchild Semiconductor International, Inc.* expert. 711 F.3d 1348, 1374 (Fed. Cir. 2013).

(renewing Storer *Daubert* motion). Those claimed violations, however, merely rehash WPL's incorrect merits theories or distort the record:

- WPL asserts that Rule 26 required Storer to analyze literal source code, identify elements, and compare the works, WR 62, but he did that, and doing so was not required for him to testify.²⁵
- WPL accuses Storer of not authoring his report because he enlisted assistance and one exhibit incorporated data from a separate expert, WR 61, but he directed the substance of the report, and the law permits such assistance. Appx13483:21-22 (“I edit it, looked at it, every word, reviewed it and it’s my report.”); *see Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321 (Fed. Cir. 2014) (permissible to rely on “results prepared by others”); *Zoch v. Daimler, A.G.*, No. 4:17-cv-578, 2018 WL 4610569, at *8-9 (E.D. Tex. Sept. 25, 2018) (report admissible if “substance” is expert’s).²⁶

²⁵ Because Storer detailed the bases for his conclusions, WPL's cases (at 62-63) are distinguishable. *See Rembrandt Vision Techs. L.P. v. Johnson & Johnson Vision Care, Inc.*, 725 F.3d 1377, 1381-82 (Fed. Cir. 2013) (expert failed to disclose methodology); *Olmstead*, 606 F.3d at 267 (two-page report failed to explain similarities); *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 638, 642-43 (7th Cir. 2008) (eight-statement report).

²⁶ *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, cited by WPL (at 64-65), affirmed the *Daubert* exclusion of an unqualified expert. 285 F.3d 609, 615-16 (7th Cir. 2002). Here, there is no such finding.

- WPL accuses Storer of evading “foundational” questions, WR 65, but those questions were either outside his report, Appx3435 (copyright registrations), or answered directly, Appx3443:9-12 (SAS versions reviewed), Appx3482:25-Appx3483:1-18 (code analysis).

Even on their own terms, these asserted issues do not justify “total exclusion.” *See E.E.O.C. v. Gen. Dynamics Corp.*, 999 F.2d 113, 117 (5th Cir. 1993).²⁷

Regardless, the exclusion order’s stated reasoning was based on filtration alone, and should be reversed.

B. SAS’s Fact Witness Was Entitled To Explain How the SAS System Operated

SAS’s fact witness, Keith Collins, was identified to testify about the “[h]istory and operations of SAS, including ... SAS System input formats and output designs.” Appx13893. It was therefore error to bar him from explaining the operation of the SAS System, a program he helped design. SB 66. Whenever Collins attempted to explain how individual elements operated, the court sustained WPL’s objections, inexplicably reasoning that Collins could explain “what is in the system,” but not “how it works.” Appx3360:8-15, 17-21. This was an irrational distinction. It would be like permitting a mechanic to identify individual pistons,

²⁷ WPL fails to address the factors for excluding experts and the district court’s failure to apply them. WR 66; SB 64; Appx18.

but not how they enable an engine to run. Nor does WPL acknowledge that courts routinely permit fact witnesses to explain the operation of systems they helped design. SB 66-67.

Ultimately, WPL's position is that Collins could not discuss Input Formats and Output Designs because they are not components of the SAS System, but rather legal fictions. WR 67. Yet courts apply such layers of abstraction *because* they are how programs actually operate.²⁸ *See Altai*, 982 F.2d at 706-07; *Eng'g Dynamics*, 26 F.3d at 1342-43. Collins was therefore entitled to explain the operation of the SAS System Input Formats and Output Designs, whether or not SAS used those terms in its product manuals. Without that testimony, SAS was forced to "truncate" the examination. Appx3380:4-5. This error (which SAS preserved at the hearing, Appx3376:10-14) had the "cumulative effect" of obstructing SAS's evidence of copyrightability and should be reversed. *See Meyer Intell. Props., Ltd. v. Bodum, Inc.*, 690 F.3d 1354, 1377 (Fed. Cir. 2012).

CONCLUSION

Accordingly, the district court impermissibly erred.

²⁸ They are thus unlike the "legal test" in the case WPL cites (at 67). *United States v. El-Mezain*, 664 F.3d 467, 512 (5th Cir. 2011).

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief has been prepared using a 14-pound, proportionally-spaced typeface and includes 6,996 words, based on the “Word Count” feature of Microsoft Word 2016, including footnotes and endnotes. This word count does not include the words contained in the items identified as excluded by Federal Rule of Appellate Procedure 32(f) or Federal Circuit Rule 32(b)(2).

Date: October 26, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court using the appellate CM/ECF system on October 26, 2021, which automatically will send email notification of such filing to counsel of record. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: October 26, 2021

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