UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC.,

Defendant.

No. C 22-07611 WHA

MEMORANDUM OPINION ON FAIR USE

INTRODUCTION

This memorandum opinion explains the judge's instruction and ruling on "fair use" under Section 107 of the Copyright Act, namely:

> I instruct you that Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of reverse engineering the uncopyrighted S2S protocol was fair use. I further instruct you that Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of testing and troubleshooting Cribl software for interoperating with Splunk Enterprise was fair use.

(Dkt. No. 317 at 1).

STATEMENT

By way of background, the copyrighted work in this action was Splunk Enterprise, plaintiff Splunk Inc.'s flagship software product. Splunk Enterprise enables Splunk customers to collect data from different sources and put it into a dashboard so those customers can search the data and make wide-ranging decisions about what to do with it.

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Defendant Cribl, Inc. developed its own flagship software product, Cribl Stream, that sits between data sources and destinations, allowing Cribl customers to flexibly route data between them. Cribl Stream is a complementary product to Splunk Enterprise in that it can sit between data sources and Splunk Enterprise. It thereby enables Splunk customers to route data from data sources to destinations other than Splunk Enterprise, reducing the licensing fees paid to Splunk (by reducing the amount of junk data received in Splunk Enterprise) and/or increasing the licensing fees paid to Splunk (by increasing the amount of useful data received in Splunk Enterprise).

To get data into Splunk Enterprise, Splunk customers can use software called a "forwarder" to collect and forward data along to a Splunk "indexer," the Splunk Enterprise software component that receives the data on a server on premises ("on prem") or in the cloud. Although Cribl and other companies offer forwarders that can collect and forward data along to Splunk indexers, many Splunk customers have installed Splunk forwarders to do so. And, although forwarders can send data to Splunk indexers using a variety of protocols, Splunk forwarders send data to Splunk indexers using the S2S ("Splunk-to-Splunk") protocol. A protocol is not itself code but rather a set of rules for formatting and processing data that can be embodied in code. At trial, Splunk emphasized that the S2S protocol was developed by Splunk and "proprietary," but all agreed that the S2S protocol was not itself protected by copyright or, for that matter, copyrightable.

It bears emphasis that Splunk did not allege or in any way suggest that Cribl Stream code contained Splunk Enterprise code. There was no claim that Cribl or its customers infringed Splunk's copyright by copying and using Cribl Stream. According to Splunk, however, Cribl infringed Splunk's copyright by copying and using the Splunk Enterprise copyrighted software to reverse engineer the S2S protocol and to test, troubleshoot, and market Cribl Stream. Cribl's downloads and runs of Splunk Enterprise for these purposes were challenged herein, which put in issue the extent to which they were protected under the fair use doctrine.

In the first phase of argument and deliberations, to resolve underlying factual disputes relevant to fair use, the jury considered and rendered a verdict on a series of questions based on

those suggested by the parties. The jury's answers were then considered by the judge in making a ruling on the ultimate question of law as to whether the facts at hand showed fair use, a procedure called for by the Supreme Court's decision in *Google LLC v. Oracle America, Inc.*, 593 U.S. 1, 23–25 (2021). This series of questions, along with the jury's unanimous answers, are reproduced below:

> (1) Could Cribl viably interoperate with Splunk forwarders and indexers without reverse engineering the S2S protocol?
>
> *Answer: No.*
>
> (2) Was reverse engineering the only means for Cribl to determine the S2S protocol?
>
> *Answer: Yes.*
>
> (3) Was Cribl receiving data from a Splunk forwarder with "raw" or "syslog" a viable alternative to Cribl using the S2S protocol?
>
> *Answer: No.*
>
> (4) Was Cribl using the HEC protocol, with or without a third-party forwarder, a viable alternative to Cribl using the S2S protocol?
>
> *Answer: No.*
>
> (5) Would Splunk have earned more money had Cribl not copied and used Splunk Enterprise?
>
> *Answer: Unknown.*
>
> (6) Did the public benefit from Cribl's copying and use of Splunk Enterprise?
>
> *Answer: Yes.*
>
> (7) Was Cribl's S2S capability in its software a transformative use resulting from its copying and use of Splunk Enterprise?
>
> *Answer: Yes.*

(Dkt. No. 321 at 1–2).

As stated, the judge considered these answers in ruling on fair use as a matter of law and instructed the jury on fair use as per the paragraph quoted on the first page of this

memorandum opinion. In the second phase of argument and deliberations, counsel and the jury had the benefit of the judge's ruling on fair use. Now, to explain the fair use instruction and ruling, this memorandum opinion takes up the statutory factors.

ANALYSIS

Section 107 of the Copyright Act provides, in pertinent part:

> [T]he fair use of a copyrighted work, including . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

The first statutory factor "considers the reasons for, and nature of, the copier's use of an original work." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 509 (2023). As the Supreme Court recently observed, this factor asks the central question of "whether the use 'merely supersedes the objects of the original creation . . . (supplanting the original), or instead adds something new, with a further purpose or different character.'" *Ibid.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). The commercial nature of a use is not dispositive, but it is relevant. *Id*. at 510. Specifically, "[i]t is to be weighed against the degree to which the use has a further purpose or different character," recognizing this "furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create." *Id.* at 510–11.

What this means is that "the presumption of unfairness that arises in such cases can be rebutted by the characteristics of a particular commercial use." *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992) (citation omitted). So too here. Our analysis of the first statutory factor closely tracks our court of appeals' analysis of the first statutory factor in *Sega*, where the use of copyrighted software was "an intermediate one only and thus any commercial 'exploitation' was indirect or derivative." *Ibid.*

Recall, there were no allegations that Cribl Stream code contained Splunk Enterprise code, or that downloading and running Cribl Stream itself infringed Splunk's copyright. Cribl wrote its own code and created its own software that had its own distinct purpose. Its copies and uses of Splunk Enterprise were not made to duplicate and supplant the copyrighted software. For the most part, they were made to reverse engineer the S2S protocol used by the copyrighted software — which was itself unprotected and uncopyrightable — and to interoperate with the copyrighted software. This was not a commercial case where one party sold counterfeit copies of the other party's copyrighted work. Nor was this a commercial case where one party made copies "to be used for purposes that [were] substantially the same as those of the originals." *Warhol*, 598 U.S. at 512. Rather, this was a commercial case where one party used the other party's copyrighted work to build out its own interoperable, compatible software that could make the copyrighted work even more attractive to the other party's own customers, extending the copyrighted work's benefit, capability, and value.

In *Sega*, our court of appeals determined that the first statutory factor weighed in favor of an alleged infringer when the alleged infringer copied and used copyrighted software to gain access to the functional elements of that software and to discover the functional requirements for compatibility. 977 F.2d at 1522–23. Here too, Cribl copied and used copyrighted software to gain access to the functional elements of that software and to discover the functional requirements for compatibility. More precisely, Cribl copied and used the Splunk Enterprise copyrighted software to reverse engineer the S2S protocol and viably interoperate Cribl Stream with the Splunk Enterprise copyrighted software. As the jury recognized in its answer to Question 7, Cribl Stream's S2S capability reflected a "transformative use" of Splunk

Enterprise resulting from Cribl's copying and uses of Splunk Enterprise. Cribl's copying and uses of Splunk Enterprise to reverse engineer the S2S protocol and viably interoperate Cribl Stream with Splunk Enterprise were "reasonably necessary to achieve [its] new purpose." *Warhol*, 598 U.S. at 511.

During trial, Splunk repeatedly suggested that Cribl could have used other means to viably interoperate Cribl Stream with Splunk Enterprise without reverse engineering and using the S2S protocol, *i.e.*, receiving data from a Splunk forwarder using "raw" or "syslog," and sending data to a Splunk indexer with or without a forwarder using the HEC protocol. Therefore, Splunk argued, there was no need to copy and use the Splunk Enterprise copyrighted software for this purpose, so these downloads and runs of the Splunk Enterprise copyrighted software could not have been fair use. The jury rejected this argument in its answers to Questions 1, 3, and 4. It found that, even if the use of other means was available to serve a substantial customer base, Cribl needed to reverse engineer and use the S2S protocol to viably interoperate Cribl Stream with Splunk Enterprise.

Meanwhile, in evaluating the first statutory factor, "we are free to consider the public benefit resulting from a particular use notwithstanding the fact that the alleged infringer may gain commercially." *Sega*, 977 F.2d at 1523. In its answer to Question 6, the jury found that the public benefitted from Cribl's copying and uses of Splunk Enterprise. The evidence showed interoperability between Cribl Stream and Splunk Enterprise has facilitated synergy between the two products that has encouraged innovation and creativity — exactly what the Copyright Act was intended to encourage. Moreover, the Supreme Court has cautioned that the "primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. Const., art. I, § 8, cl. 8). In sum, the first statutory factor favors Cribl.

With respect to the second statutory factor, the nature of the copyrighted work, the Supreme Court has recognized that "where copyrightable material is bound up with uncopyrightable material, copyright protection is 'thin.'" *Google*, 593 U.S. at 21 (quoting

Feist, 499 U.S. at 349). Such is the case with respect to one's copyright interest in software. Computer programs are functional in nature, and functional aspects are not copyrightable. While software can certainly be creative, it is different from *Moby Dick* (and works of nonfiction). Often humans cannot gain access to the unprotected aspects of a program without obtaining a copy of that program. *See Sega*, 977 F.2d at 1525. "[B]ecause [the Splunk Enterprise copyrighted software] contain[s] unprotected aspects that cannot be examined without copying, we afford [it] a lower degree of protection than more traditional literary works" and ultimately "conclude that the second statutory factor also weighs in favor of [Cribl]." *Id.* at 1526.

Keep in mind that copying in this context is different from copying in commercial cases involving literature where it refers to reprinting exact passages, usually for direct profit. The analog would be copying part or all of Splunk's source code into an accused software product. But the copying at issue was simply Cribl copying Splunk's object code into memory and running the Splunk Enterprise copyrighted software, which allowed it to reverse engineer the uncopyrighted S2S protocol used by that software through "packet sniffing" (analyzing data packets flowing across a network when transferring data between Splunk forwarders and Splunk indexers) and decompiling JAR files. Across the full spectrum of copying, this falls on the least suspect side.

With respect to the third statutory factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the entire Splunk Enterprise software program was by necessity downloaded and run for reverse engineering the uncopyrighted S2S protocol and viably interoperating Cribl Stream with Splunk Enterprise. And, the simple fact is that one had to reverse engineer the uncopyrighted S2S protocol in order to support the S2S protocol, as the jury recognized in its answer to Question 2. Again, there were no allegations that Cribl Stream code contained Splunk Enterprise code, or that downloading and running Cribl Stream itself infringed Splunk's copyright. The use of Splunk Enterprise was an intermediate one. Although the third statutory factor weighs against Cribl, "where the ultimate

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(as opposed to direct) use is as limited as it was here, the factor is of very little weight." *Id.* at 1526–27.

With respect to the fourth statutory factor, the effect on the potential market for the copyrighted work, the jury was unanimous that it was "unknown" whether Splunk would have earned more money had Cribl not copied and used Splunk Enterprise in its answer to Question 5. True, Cribl marketed Cribl Stream on the premise that it would weed out junk data from Splunk Enterprise and reduce Splunk customers' licensing fees paid to Splunk. Yet there was ample evidence in the trial record that Splunk customers responded to this savings by routing more (useful) data into Splunk Enterprise, which could increase their licensing fees paid to Splunk. The fourth statutory factor thus does not tip in favor of either party. All told, however, the four statutory factors clearly favor Cribl.

In *Sega*, our court of appeals evaluated the four statutory factors and concluded that "where disassembly is the only way to gain access to unprotected elements embedded in a program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law." *Id.* at 1527–28. In doing so, it recognized that intermediate copying can be protected as fair use if it is necessary to gain access to functional elements of copyrighted software. This "preserves public access to the ideas and functional elements embedded in copyrighted computer software programs . . . consistent with the 'ultimate aim [of the Copyright Act], to stimulate artistic creativity for the general public good.'" *Sony Comput. Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 603 (9th Cir. 2000) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984)). This also allows fair use to "carry out its basic purpose of providing a context-based check that can help to keep a copyright monopoly within its lawful bounds." *Google*, 593 U.S. at 22 (citing, *inter alia*, *Sony Comput.*, 203 F.3d at 603–08, *and Sega*, 977 F.2d at 1521–27).

Sega looms large here, where reverse engineering was the only way for Cribl to gain access to the unprotected S2S protocol embedded in the Splunk Enterprise copyrighted software and viably interoperate with Splunk Enterprise, and where Cribl sought to build out its own interoperable, compatible software. Accordingly, Cribl's copying and uses of the

Splunk Enterprise copyrighted software for the purpose of reverse engineering the uncopyrighted S2S protocol was fair use. So was Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of testing and troubleshooting Cribl Stream for interoperating with Splunk Enterprise.

To the contrary, however, Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of marketing Cribl Stream was not fair use. In brief, downloading and running Splunk Enterprise to market Cribl Stream was not necessary for Cribl to access Splunk Enterprise's functional elements and to develop its own interoperable, compatible software with its own distinct purpose. So, by way of example, fair use did not allow Cribl to run Splunk Enterprise in its "sandbox" to show a potential customer how Cribl Stream worked with Splunk Enterprise.

CONCLUSION

For the foregoing reasons, Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of reverse engineering the uncopyrighted S2S protocol was fair use. In addition, Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purposes of testing and troubleshooting Cribl software for interoperating with Splunk Enterprise was fair use. Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of marketing Cribl software, however, was not.

IT IS SO ORDERED.

Dated: May 24, 2024.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC.,

Defendant.

No. C 22-07611 WHA

ORDER RE REMAINING CLAIMS AND DEFENSES, AND INJUNCTIVE RELIEF

This order addresses the claims and affirmative defenses preserved by the parties and tried to the bench, as well as plaintiff Splunk Inc.'s motion for a permanent injunction (Dkt. Nos. 346–48).

1. AFFIRMATIVE DEFENSES.

Starting with the affirmative defenses, defendant Cribl, Inc. seeks judgment in its favor on account of equitable estoppel, unclean hands, and copyright misuse.

First, the elements of equitable estoppel are (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the conduct is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely on the conduct to its injury. *Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011) (citation omitted). At a minimum, Cribl has not met its burden of proving, by clear and

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convincing evidence, that it was ignorant of the true facts. For example, Cribl has not met its burden of proving, by clear and convincing evidence, that it believed Splunk approved of uses of Splunk Enterprise that were permitted under the TAP contract but not under the SGT contract, which governed once the TAP contract was terminated for cause in November 2021. Cribl made no meaningful attempt to justify the argument it understood Splunk's position to be that Cribl would retain all rights it merely licensed under the TAP contract once the TAP contract was terminated. If that had been the case, why would Splunk have terminated the TAP contract to begin with? Meanwhile, Cribl has not met its burden of proving, by clear and convincing evidence, that it ever believed Splunk approved of its reverse engineering. Indeed, there is ample evidence in the trial record to support the proposition that Cribl understood Splunk did not (or would not) approve, so Cribl did not seek to "rock the boat."

Second, unclean hands "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 876–77 (9th Cir. 2000). "Bad intent is the essence of the defense of unclean hands." *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir. 1989). Cribl's argument that it was terminated from the TAP program in bad faith was submitted to and rejected by the jury. Although the judge found Cribl's argument that the TAP contract was improperly terminated because Cribl did not "become" a competitor colorable, the jury did not agree based on its response to Special Interrogatory A (Dkt. No. 327 at 3). In light of that, this order cannot reasonably find that Cribl has proven, by clear and convincing evidence, that it was terminated from the TAP program in bad faith. Nor can this order reasonably find that Cribl has proven, by clear and convincing evidence, that Splunk induced infringement and breach on account of improper termination, as Cribl now argues, seeing that the jury rejected Cribl's argument that the termination was improper to begin with.

Third, as for copyright misuse, our court of appeals has recognized that it "forbids a copyright holder from 'secur[ing] an exclusive right or limited monopoly not granted by the Copyright Office.'" *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001)

(quoting *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977–79 (4th Cir. 1990)). It thereby "prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly." *Ibid.* True, our court of appeals has held that copyright misuse is a "defense to copyright infringement" and "not a defense to [] state law claims." *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1090 (9th Cir. 2005). But Splunk is incorrect when it suggests this means copyright misuse cannot be used to bar enforcement of language in a licensing agreement that facilitates the misuse at issue. Indeed, "most of the cases that recognize the affirmative defense of copyright misuse involve unduly restrictive licensing schemes." *A & M Records*, 239 F.3d at 1027 n.8. Incorporating unduly restrictive language into a licensing agreement is how copyright holders generally secure an exclusive right or limited monopoly not granted by the Copyright Office. *Altera* stands for the straightforward proposition that "it makes little sense to allow [a party] to proceed on an independent claim for copyright misuse when there has been no allegation of copyright infringement." 424 F.3d at 1090.

Cribl appears to invite this district court to broadly enter judgment in its favor under the doctrine of copyright misuse. That cannot be right. Note the verdict is ambiguous concerning the extent to which the jury found Cribl liable for breaching the SGT contract. On the one hand, it might have found that several uses of the Splunk Enterprise copyrighted software by Cribl violated the "internal business purposes" use restriction in Section 9(c) and monitoring for competitive purposes use restriction in Section 9(e). On the other hand, it might have found that only the marketing uses did so. In any event, it cannot be said that Cribl has established that it should get off scot-free because some (but not all) of its uses of Splunk Enterprise were fair uses, notwithstanding all language in the SGT contract.

A narrower case could have been made that copyright misuse bars enforcement of language in that licensing agreement to the extent it would prohibit fair use. No court of appeals has yet to extend copyright misuse to language that prohibits fair use specifically, though some have come close. *See, e.g.*, *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 646 (7th Cir. 2003) (Judge Richard Allan Posner) (observing that restricting

access to one's uncopyrighted data within a copyrighted computer program by contract might constitute copyright misuse). Recognizing that Cribl did not advance the argument, however, and that any appeal will be to the Federal Circuit tasked with applying Ninth Circuit law on the issue, this would be an inappropriate vehicle to seek the Ninth Circuit's opinion on it. What's more, seeing that the injunction granted herein, as tailored, will afford Cribl the relief it could have attained by way of copyright misuse, it is also immaterial.

2. SECTION 17200 CLAIM AND COUNTERCLAIM.

Next, we turn to Splunk's claim and Cribl's counterclaim under Section 17200 of the California Business and Professions Code.

Starting with Splunk's Section 17200 claim, at this late stage in the litigation, Splunk sought to premise a violation only on Cribl's breach of the SGT contract. Specifically, Splunk argued that Cribl violated the unlawful and unfair prongs of Section 17200. With respect to the unlawful prong, our court of appeals has held that breaches of contract alone are insufficient to state a claim for unlawful violation of Section 17200. *See, e.g.*, *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1043–44 (9th Cir. 2010). Splunk averred that systematic breaches of contract are sufficient, but the decisions it cited are distinguishable. As a concession to the shortness of life, this order directs the reader to the reasons provided in Cribl's brief (Cribl Section 17200 Opp. 2–7).

Turning to the unfair prong, as Cribl recognizes, Splunk's motion is replete with decisions applying the traditional balancing test for claims brought by consumers. But "[t]he California Supreme Court has rejected the traditional balancing test for [Section 17200] claims between business competitors and instead requires that claims under the unfair prong be 'tethered to some legislatively declared policy.'" *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1104 (N.D. Cal. 2017) (Judge Lucy H. Koh) (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999)). "In competitor cases, a business practice is 'unfair' only if it 'threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" *Drum v. San Fernando*

Valley Bar Assn., 182 Cal. App. 4th 247, 254 (Cal. Ct. App. 2010) (quoting *Cel-Tech*, 973 P.2d at 544). Here, however, Splunk has not sufficiently pleaded any incipient violation of antitrust law, or violation of the policy or spirit of antitrust law, let alone any threat or harm to competition, beyond mere generalizations. *See Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1136–37 (9th Cir. 2014). Rather, it has focused on harm to itself, a competitor (and an incumbent). This is inadequate to state a claim for unfair violation of Section 17200.

As for Cribl's Section 17200 counterclaim, Cribl seeks to premise an unfair violation on copyright misuse. This order finds a Section 17200 claim can be premised on copyright misuse where that copyright misuse violates the policy or spirit of antitrust law. *See Apple Inc. v. Psystar Corp.*, No. C 08-03251 WHA, 2009 WL 303046, at *5 (N.D. Cal. Feb. 6, 2009). In light of the issues raised above, however, and seeing that the tailored injunction granted herein has the effect of affording Cribl the relief that Cribl could have attained under the counterclaim, this order does not address it further.

Before turning to injunctive relief, this order observes that Cribl has recently sought to broadly recast its affirmative defenses and counterclaim based on the judge's recent decision in another matter in which a party asserted a copyright preemption defense (*see, e.g.*, Cribl Supp. Br. 1 (quoting *X Corp. v. Bright Data Ltd.*, No. C 23-03698 WHA, 2024 WL 2113859, at *13 (N.D. Cal. May 9, 2024)). This is too little too late. "Cribl, mindful of the Court's request that [it] be selective in choosing which of its equitable defenses and counterclaims to pursue with the Court, [] narrowed its requests for determination" (Cribl Br. 1). In doing so, it deliberately "preserve[d] and assert[ed] its copyright preemption defense . . . to the extent it applie[d] to Splunk's pending claim of violation of California's [Section 17200]" (Cribl Br. 21). This order declines to allow Cribl to strategically pivot and try again after the fact. That said, it observes that Cribl's general concerns will be addressed in the injunctive relief analysis below.

3. INJUNCTIVE RELIEF.

Finally, this order takes up Splunk's motion for a permanent injunction, premised on the jury's findings of copyright infringement and breach of the SGT contract (not Splunk's failed

Section 17200 claim). The question that remains to be decided is whether injunctive relief is appropriate and, if so, the scope of that injunctive relief.

As for the standard,

> Under the Copyright Act . . . a court is authorized to grant a permanent injunction "on such terms as it may deem reasonable to prevent or restrain" further infringement of a copyright . . . . Such relief, however, does not automatically issue upon a finding of liability. Rather, a plaintiff must show entitlement to a permanent injunction by demonstrating: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Apple Inc. v. Psystar Corp., 673 F. Supp. 2d 943, 948 (N.D. Cal. 2009), *aff'd*, 658 F.3d 1150 (9th Cir. 2011) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Under California law, the same four-factor analysis has been used to enjoin breaches of contract where remedies at law were inadequate. *See, e.g.*, *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 533 F. Supp. 3d 802, 811 (N.D. Cal. 2021) (Judge William H. Orrick), *aff'd*, No. 21-15953, 2022 WL 3572943 (9th Cir. Aug. 19, 2022). This order evaluates injunctive relief for both copyright infringement and breach of the SGT contract using the *eBay* factors.

At the outset, it bears emphasis that Section 9(a) of the SGT contract prohibited "reverse engineering (except to the extent specifically permitted by statutory law)," as explained in the final charge for the second phase of argument and deliberations (Dkt. No. 317 at 6–7). And, as explained in the companion memorandum opinion on fair use, Section 107 of the Copyright Act allowed copying and uses of the Splunk Enterprise copyrighted software for the purpose of reverse engineering the S2S protocol. It also allowed copying and uses of the Splunk Enterprise copyrighted software for the purposes of testing and troubleshooting Cribl Stream for interoperating with the Splunk Enterprise copyrighted software.

One question teed up by the briefing of the motion for a permanent injunction is whether the SGT contract's use restrictions governing "internal business purposes" (in Section 9(c)) and monitoring for competitive purposes (in Section 9(e)) could override and disallow those statutory fair uses, as Splunk argued in its motion and at the hearing. As a matter of contract

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interpretation, this order finds they cannot. Why go through the trouble of spelling out how the SGT contract preserved the extent to which statutory law protects reverse engineering if such restrictions could override and disallow this anyways? Meanwhile, copying and using Splunk Enterprise to reverse engineer the S2S protocol, as required to viably interoperate Cribl Stream with Splunk Enterprise, accomplishes nothing if Cribl cannot copy and use Splunk Enterprise to test and troubleshoot Cribl Stream for maintaining the interoperability. Such ambiguity in the SGT contract will be resolved against the drafter, Splunk, so as to ultimately allow all statutory fair uses of Splunk Enterprise. Keep in mind, however, that copying and using Splunk Enterprise to market Cribl Stream was not and is not a statutory fair use.

The verdict is ambiguous concerning the extent to which the jury found Cribl liable for infringing Splunk's copyright. And, as already mentioned, it is all the more ambiguous concerning the extent to which the jury found Cribl liable for breaching the SGT contract. On the one hand, it might have found that several uses of Splunk Enterprise by Cribl violated the "internal business purposes" and monitoring for competitive purposes use restrictions. On the other hand, it might have found that only the marketing uses did so. Assuming, *arguendo*, the broadest possible finding of liability (contrary to the interpretation above), this order holds that an injunction is warranted but the balance of the hardships as well as the public interest militate against the broadest possible injunction.

With respect to irreparable injury, this order credits Splunk's observation that "[p]ermitting Cribl to continue operating as if it possessed a TAP license, and to indefinitely flout the scope of the SGT and Sections 9(c) and 9(e) in particular, would render both Splunk's TAP program and the SGT pointless" (Splunk Injunction Br. 13–14). Just because certain uses of the Splunk Enterprise copyrighted software are fair uses under the Copyright Act does not mean that Splunk must relinquish all control of its copyrighted software, as Cribl appears to suggest. Likewise, with respect to inadequate remedies at law, this order credits Splunk's observation that no monetary remedy can restore Splunk's ability to administer its own licensing program, which is basically essential to being a contemporary software company

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(Splunk Injunction Br. 16). As such, the first two *eBay* factors strongly favor an injunction. But the remaining two *eBay* factors strongly favor a narrower one.

With respect to the balance of the hardships, a consideration that weighs heavily against Splunk is the whole history of its TAP "partnership" program and how that program led Cribl, as a "partner," to invest many millions in developing its product that extended the features and functionality of Splunk Enterprise only for Splunk to then pull the rug out from under it. After all, the jury found that Splunk terminated Cribl's TAP membership not on account of breaches of confidentiality obligations and misappropriation, as Splunk had argued, but rather on account of competition, according to Special Interrogatories A and B (Dkt. No. 327 at 3). Originally, Splunk welcomed Cribl as a TAP partner specifically to develop a complementary product like Cribl Stream, and the TAP contract expressly acknowledged that the parties could cooperate to develop complementary products that were "competitive," *i.e.*, to engage in "coopetition." So, Cribl built its product and operated as a TAP partner from October 2018 to November 2021.

During the last fifteen months of that partnership period, however, Splunk's internal documents showed that Splunk was planning to terminate Cribl as a partner as soon as Splunk could improve its own inferior product (DSP) that it was developing to compete with Cribl Stream, which it finally did (after releasing Ingest Actions) in November 2021. Throughout that time, Cribl continued to invest in Cribl Stream, unaware of Splunk's termination plan. In other words, this was not a case of a copyright pirate selling knockoffs. This was a case of a "partner" being invited in by a copyright owner to use the copyrighted work, and to invest millions in designing and developing a complementary product, only to be terminated after all that effort was made. There is a large equity point on the scale favoring the terminated partner, Cribl. The sweeping injunction sought by Splunk could easily put Cribl out of business.

With respect to the public interest, Cribl Stream has been favorably received by customers. Dr. Chris Mattman, a witness who worked at the NASA Jet Propulsion Laboratory, which is a customer of both Splunk and Cribl, praised its performance on the stand. The trial record demonstrated that Cribl Stream could save Splunk customers money by redirecting junk

data to make room in Splunk Enterprise for useful data, a win for customers (and often Splunk too). In addition, the jury found Cribl Stream's S2S capability reflected a "transformative use" of Splunk Enterprise that benefited the public. A sweeping injunction would disserve the public by preventing Cribl from continuing to viably interoperate with Splunk Enterprise moving forward. Customers will need updates to account for changes made to Splunk Enterprise and the S2S protocol. This, too, weighs against a sweeping injunction.

In evaluation of the *eBay* factors and, in particular, the balance of the hardships and the public interest — all arising out of the course of dealing and history of Splunk and Cribl, the "partnership" program, and this court case — this order finds that the appropriate course is to allow Cribl to continue using the Splunk Enterprise copyrighted software for all fair uses under the Copyright Act but to enjoin Cribl from other uses, including uses for marketing purposes. The parties shall meet and confer to provide terms outlining a mechanism for enforcement of this injunction, which may include depositions and site visits, by **JUNE 4, 2024, AT NOON**. The parties shall also jointly file a proposed judgment that covers all issues addressed in this action at that time.

IT IS SO ORDERED.

Dated: May 24, 2024.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC.,

Defendant.

No. C 22-07611 WHA

FINAL CHARGE TO THE JURY FOR SECOND PHASE

1.

We now turn to the second and final phase. In this phase of your deliberations, you again must decide whether certain facts have been proven by a *preponderance of the evidence*. I remind you that a preponderance of the evidence means that the fact that is to be proven is more likely true than not.

2.

Now that you have made your factual findings, I have determined the legal issue of fair use under Section 107 of the Copyright Act. I instruct you that Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of reverse engineering the uncopyrighted S2S protocol was fair use. I further instruct you that Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of testing and troubleshooting Cribl software for interoperating with Splunk Enterprise was fair use.

In order to prove a claim for copyright infringement, Splunk must prove, by a preponderance of the evidence, that Cribl copied Splunk Enterprise copyrighted software for something other than fair use.

3.

With respect to Sunny Choi, it remains for you to decide whether she acted on behalf of Cribl when she copied Splunk Enterprise source code onto a hard drive. In other words, it remains for you to decide whether Cribl copied Splunk Enterprise copyrighted software when Ms. Choi copied Splunk Enterprise source code onto a hard drive.

4.

It also remains for you to decide whether copyright infringement (if any) was willful. Cribl's infringement would be considered willful if Splunk proves, by a preponderance of the evidence, both of the following elements:

(1) Cribl engaged in acts that infringed the copyright; and

(2) Cribl knew that those acts infringed the copyright, or Cribl acted with reckless disregard for, or willful blindness to, Splunk's rights.

So, that's the Copyright Act claim.

5.

I will now turn to Splunk's breach-of-contract claims. In order to prove a claim for breach of contract, Splunk must prove, by a preponderance of the evidence, each of the following elements:

(1) Splunk and Cribl entered into a contract,

(2) Splunk performed under the contract, doing substantially all of the things the contract required Splunk to do, or Splunk was excused for non-performance;

(3) Cribl breached the contract, doing something that the contract prohibited Cribl from doing; and

(4) resulting damages to Splunk.

6.

There are two contracts at issue: (1) the Technology Alliance Partner ("TAP") Program Agreement, which we will refer to as the TAP contract, and (2) the Splunk General Terms ("SGT"), which we will refer to as the SGT contract. Splunk alleges that Cribl's uses of Splunk Enterprise breached both contracts. Cribl denies it.

In evaluating Splunk's claims for breach of contract, all of the words and phrases in these contracts should be understood by you to have their plain and ordinary meaning except as I now will instruct you as to certain words and phrases.

7.

Let's start with the TAP contract. The parties stipulated that Splunk accepted Cribl into the TAP program on August 6, 2018, as set out in the TAP contract. Although Splunk terminated Cribl as a TAP program partner "for convenience" effective June 29, 2020, having provided notice thirty days prior, Cribl was readmitted into the TAP program in July 2020. But, near the end of the following year, Splunk terminated Cribl as a TAP program partner effective November 2, 2021. Splunk contends the termination was "for cause." Cribl disputes this. I instruct you that the TAP contract between Splunk and Cribl was effective between August 6, 2018, and November 2, 2021. (For the purposes of answering the questions at hand, you may ignore the handful of days in 2020 between when Cribl was terminated and readmitted.)

8.

All agree that, pursuant to the TAP contract, Cribl was granted a right to use Splunk Enterprise to test, troubleshoot, and market its own software. However, Splunk contends that Section 4 of the TAP contract prohibited Cribl from using Splunk Enterprise for reverse engineering and that this breached the TAP contract. Cribl denies that it has breached the TAP contract. That will be for you to decide.

9.

Section 1 of the TAP contract provided that "Extension means any separately downloadable suite, configuration, file, add-on, technical add-on, example module, command, function or application that extends the features or functionality of the Splunk Software."

Section 3 of the TAP contract provided that "TAP Extensions" are "Extensions for use with the Splunk Software." Section 1 provided that "Splunk Software means any software that Splunk makes available to TAP under this Agreement as a participant in the Technology Alliance Partner Program."

Section 3.3 of the TAP contract provided that Splunk granted a license to Cribl "to use the Splunk Software solely to: (i) test the Splunk Software for purposes of developing TAP Extensions and to test TAP Extensions use with Splunk Software in a lab environment and to undertake other lab uses of the Splunk Software relating to the development and testing of TAP Extensions;" and "(ii) demonstrate the use of TAP Extensions with the Splunk Software to actual, potential or prospective Users . . . . "

Section 4 of the TAP contract provided that, "Unless otherwise expressly permitted by Splunk," a TAP program partner "will not . . . (d) decompile, disassemble or reverse-engineer the Splunk Software, or determine or attempt to determine any source code, algorithms, methods or techniques embodied in the Splunk Software, except to the extent expressly permitted by applicable law notwithstanding a contractual prohibition to the contrary . . . . "

The phrase in Section 4 that stated "Unless otherwise expressly permitted by Splunk" included the express permission by Splunk in Section 3.3 to "test the Splunk Software for purposes of developing TAP Extensions" and "to undertake other lab uses of the Splunk Software relating to the development and testing of TAP Extensions" that, as expressly defined, "extend[] the features or functionality of the Splunk Software." So, the prohibition that a TAP program partner "will not . . . (d) decompile, disassemble, or reverse engineer" did not prohibit such actions to test Splunk Software and to undertake other lab uses of Splunk Software relating to the development and testing of TAP Extensions that extend the features or functionality of the Splunk Software.

The phrase "except to the extent expressly permitted by applicable law" would have, standing alone, included the privilege of fair use under the Copyright Act. However, the phrase was further modified by the phrase "notwithstanding a contractual prohibition to the contrary." This phrase meant that the "except to the extent expressly permitted by applicable law" language

was inapplicable because, by contract, parties may generally relinquish rights they otherwise would enjoy. That, however, did not change the effects of the lead-in clause "Unless otherwise expressly permitted by Splunk," which, as already stated, provided for Cribl's right to test Splunk Software and undertake other lab uses of Splunk Software relating to the development and testing of TAP Extensions that extend the features or functionality of the Splunk Software.

10.

Section 6.2 of the TAP contract governed "Termination for Convenience" and provided that "[e]ither party may terminate the Agreement or any license granted hereunder with or without cause upon thirty (30) days' prior written notice to the party . . . . "

Section 6.3 of the TAP contract governed "Termination for Cause" and provided that "[e]ither party may terminate the Agreement and all licenses contained in these Terms and Conditions upon written notice to the other party if: . . . (c) the party breaches its confidentiality obligations under the Agreement or infringes or misappropriates the terminating party's intellectual property rights . . . . "

Another question for you to decide is whether Splunk has proven, by a preponderance of the evidence, that it terminated the TAP contract "for cause" on November 2, 2021. Splunk contends that it properly terminated Cribl "for cause." Cribl contends that the alleged misappropriation was merely a pretext. That will be for you to determine.

11.

Recall, the parties have also entered into a different contract, the SGT contract. According to Splunk, Cribl entered into the SGT contract whenever it downloaded Splunk Enterprise from the Splunk website or ran Splunk Enterprise via Docker. I instruct you that Cribl was bound by the SGT contract at all relevant times, no matter how it acquired Splunk Enterprise. Again, its terms have their plain and ordinary meaning except as I now instruct you.

12.

According to Splunk, Cribl's uses of Splunk Enterprise to reverse engineer, test, troubleshoot, and market its own software were not permitted under the SGT contract because that contract prohibited "use . . . for any purpose other than your own Internal Business

Purposes." In other words, Splunk contends that Cribl's uses of Splunk Enterprise to reverse engineer, test, troubleshoot, and market Cribl software were not for Cribl's Internal Business Purposes. Splunk further contends that, like the TAP contract, the SGT contract did not permit Cribl's use of Splunk Enterprise for reverse engineering. In addition, Splunk further contends that the SGT contract did not permit Cribl's use of Splunk Enterprise in order to monitor Splunk Enterprise's availability, performance, or functionality for competitive purposes. Splunk asserts that all of these activities breached the SGT contract. Cribl denies that it has breached the SGT contract. Again, that will be for you to decide.

13.

Section 9 of the SGT contract governed "Use Restrictions" and provided that Cribl "agree[d] not to . . . (c) use an Offering for service bureau purposes, or for any purpose other than your own Internal Business Purposes . . . . "

Keep in mind "Internal Business Purpose" is a defined term in the SGT contract that means "your use of an Offering for your internal business operations, based on the analysis, monitoring or processing of your data from your systems, networks, and devices. Such use does not include use on a service bureau basis or otherwise to provide services to, or process data for, any third party, or otherwise use to monitor or service the systems, networks, and devices of third parties." It will be for you to determine whether Cribl used Splunk Enterprise for something other than its Internal Business Purposes.

14.

Section 9 of the SGT contract also provided: "Except as expressly permitted in an Order, these General Terms, or our documentation, you agree not to . . . (a) reverse engineer (except to the extent specifically permitted by statutory law), decompile, disassemble or otherwise attempt to discover source code or underlying structures, ideas or algorithms of any Offering."

The phrase "reverse engineer (except to the extent specifically permitted by statutory law)" refers to all conventional ways to reverse engineer, and the parenthetical phrase "(except to the extent specifically permitted by statutory law)" would include the fair use exception of the Copyright Act. I have already told you the extent of fair use in this case, which I will now

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repeat: Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of reverse engineering the uncopyrighted S2S protocol was fair use. Cribl's copying and uses of the Splunk Enterprise copyrighted software for the purpose of testing and troubleshooting Cribl software for interoperating with Splunk Enterprise was fair use.

Note, in the SGT contract, there was no qualifying further phrase like there was in the TAP contract to the effect of "notwithstanding a contractual prohibition to the contrary," so the privilege of fair use was incorporated without restriction into the SGT contract as to the phrase "reverse engineering."

According to Section 1 of the TAP contract, "'Splunk Software' shall be licensed to TAP under the terms of the Splunk Software License Agreement(s) applicable to the Splunk Software . . . ." Because the Splunk Software includes Splunk Enterprise, and Splunk Enterprise is licensed under the SGT contract, the TAP contract incorporates the SGT contract. In other words, at all relevant times the TAP contract was in effect, the SGT contract was also in effect. The SGT contract was more generous to Cribl with respect to reverse engineering because the SGT preserved the full extent to which the statutory privilege of fair use protected reverse engineering (whereas the TAP contract did not).

If you find that some or all of Cribl's reverse engineering was allowed by the SGT contract but not allowed by the TAP contract, the ambiguity must be resolved in Cribl's favor (so as to allow such reverse engineering) because the ambiguity should be resolved against the drafter of the document, who was in the better position to avoid the ambiguity in the first place — in this case, against Splunk.

That concludes my instructions on the meanings of the contracts. It is for you to decide whether they were breached.

15.

You have heard reference to the phrase "proprietary." This is a term used in industry to mean technology developed by or for the owner, but it does not necessarily mean that the technology is copyrighted, patented, or otherwise protected by law.

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You have heard evidence of Cribl hiring former Splunk employees. There is, however, no claim in this case for you to decide for poaching employees, nor could there have been on the evidence presented at trial. Nor is there any claim for you to decide for the billboard. It was lawful to put up the billboard.

You have heard evidence of certain Splunk employees downloading Splunk documents near the time of their departure from Splunk. There is, however, no claim in the case for you to decide for purloined documents. With respect to Sunny Choi, the relevant claim is for copyright infringement.

16.

I will now instruct you on damages. By instructing you on damages, I am not suggesting which party should win on any issue.

If Splunk prevails on any of its claims for copyright infringement or breach of contract, you must determine how much money will reasonably and fairly compensate Splunk for any injury caused by Cribl. This compensation is called "damages." Splunk has the burden of proving damages by a preponderance of the evidence. It is for you to determine what damages, if any, have been proven. You must not speculate or guess in awarding damages.

17.

For its copyright infringement and breach of contract claims, Splunk seeks actual damages in the form of "lost profits." To recover damages for lost profits, Splunk must prove, by a preponderance of the evidence, that it would have earned additional profits but for Cribl's infringement and/or breach.

To determine the amount of damages for lost profits, you must determine the gross, or total additional, amount Splunk would have received but for Cribl's infringement and/or breach, and then subtract from that amount the additional expenses Splunk would have had if Cribl's infringement and/or breach had not occurred. The amount of lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss. The amount also must be tailored to the specific time periods at issue and tailored to the specific way in which you found, if at all, that the infringement and/or breach occurred.

After careful attempt, if you find that the trial record does not allow you to determine a proper amount of damages, then you may not award any damages other than "nominal" damages in the amount of one dollar.

Due to the statute of limitations, no damages can be awarded for copyright infringement more than three years before this suit was filed on December 1, 2022. And, no damages can be awarded for a breach of contract more than four years before this suit was filed on December 1, 2022.

18.

You may now return to the assigned jury room to complete the verdict form for the second and final phase, under the same procedures as before.

Dated: April 17, 2024.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC.,

Defendant.

No. C 22-07611 WHA

FINAL CHARGE TO THE JURY FOR FIRST PHASE

1.

Members of the jury, it is now my duty to instruct you on the law that applies to this case. Each of you will receive a copy of these instructions to consult during your deliberations.

2.

It is your duty to find the facts from all the evidence. To those facts you must apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathies. This means that you must decide the case solely on the evidence before you. Perform these duties fairly.

In following my instructions, you must follow all of them and not single out some and ignore others. You must not read into these instructions, or into anything the judge may have said or done, as suggesting what verdict you should return. That is a matter entirely up to you.

3.

I will now instruct you about what is evidence in this case. The evidence from which you are to decide what the facts are consists of:

(1) the exhibits that have been received into evidence;

(2) the sworn testimony of witnesses who appeared in court, on both direct and cross-examination, regardless of who called the witnesses;

(3) the sworn testimony of witnesses in depositions, read into evidence or shown by video;

(4) answers to interrogatories read to you during trial; and

(5) any facts to which all lawyers have stipulated, meaning agreed upon, before you in court.

4.

Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by trial counsel are not evidence. Trial counsel are not witnesses. What they say in opening statements, closing arguments, and elsewhere is not evidence. Your interpretation of the evidence controls.

(2) A suggestion in a question to a witness by trial counsel or the judge is not evidence unless it was adopted by the answer of the witness.

(3) An objection to a question to a witness by trial counsel or argument in support of an objection is not evidence. If an objection to a question was sustained, meaning not overruled, you must disregard the question and any answer.

(4) A document that a witness or trial counsel mentioned but was not admitted into evidence is not evidence.

(5) Anything you may have seen or heard when court was not in session is not evidence. Again, you are to decide the case solely on the evidence

received at trial.

5.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw, heard, or did. Circumstantial evidence is proof of one or more facts from which you could find another fact.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may explain the presence of water on the sidewalk. Therefore, before you decide that a fact has been proven by circumstantial evidence, you must consider all the evidence in light of reason, experience, and common sense. In determining what inferences to draw from evidence, you may consider, among other things, a party's failure to explain or deny that evidence.

6.

The law permits you to give equal weight to direct and circumstantial evidence, but it is for you to decide how much weight to give to any evidence.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. Nor does it depend on which side called the witnesses or produced the evidence. The testimony of one witness worthy of belief is sufficient to prove any fact.

7.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, part of it, or none of it. In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see, hear, or know things testified to;

(2) the memory of the witness;

(3) the manner of the witness while testifying;

(4) the interest of the witness in the outcome of the case, and any bias or prejudice;

(5) whether other evidence contradicted the testimony of the witness;

(6) the reasonableness of the testimony of the witness in light of all evidence; and

(7) any other factors that bear on believability.

8.

You have heard testimony from witnesses who testified about their opinions and the reasons for those opinions. Such opinion testimony should be judged like any other testimony. You may accept or reject opinion evidence and give it as much weight as you think it deserves, considering the witnesses' specialized knowledge, skill, experience, training, or education; the reasons provided for the opinion; and other evidence in the case.

Note that these witnesses' opinions are necessarily based on assumed sets of circumstances. In evaluating these opinions, you should take into account the extent to which you agree or do not agree with the circumstances assumed by these witnesses.

9.

Any witness may be impeached and thus discredited by contradictory evidence or by evidence that, at some other time, the witness has said or done something (or has failed to say or do something) that is inconsistent with the present testimony. If you believe that any witness has been impeached and thus discredited, you may give the testimony of that witness the credibility, if any, you think it deserves.

Discrepancies in a witness's testimony, or between a witness's testimony and that of other witnesses, do not necessarily mean that such a witness should be discredited. Inability to recall and innocent misrecollection are common. You should consider whether a discrepancy pertains to an important matter or only to something trivial.

A witness willfully false in one part of that witness's testimony, however, is to be distrusted in other parts. You may reject the entire testimony of a witness who has willfully testified falsely on a material point, unless, from all the evidence, you believe that the probability of truth favors that witness's testimony in other particulars.

10.

In these instructions, I will refer to a party's "burden of proof." Let me explain. When a party has the burden of proof on any issue, it means you must be persuaded by the evidence of the truth of that party's allegation with respect to that issue. But how persuaded must you be for that party to meet its burden?

In the first phase of your deliberations, you must decide whether certain facts have been proven by a *preponderance of the evidence*. A preponderance of the evidence means that the fact that is to be proven is more likely true than not. To put it differently, if you were to put the evidence favoring one party and the evidence favoring another party on opposite sides of a scale, the party with the burden of proof on the issue would have to make the scale tip toward its side, even if just slightly. If that party fails to meet this burden, then that party loses on the issue. This standard is different from what you may have heard about in criminal proceedings where a fact must be proven *beyond a reasonable doubt*.

11.

I will now instruct you on the law in this case. Your deliberations will be divided into two phases. In the first phase, I will give you some questions and, based upon your answers, I will instruct you on the extent to which any of Cribl's copying and uses of Splunk's copyrighted software fell within the statutory privilege of fair use permissible under the Copyright Act. In the second (and last) phase, I will instruct you on the law that applies to the remaining claims and damages, and I will give you some more questions. We will have closing arguments by trial counsel before each phase.

12.

The first phase concerns copyright. A copyright is an intellectual property right granted by our federal government. It descends from the Constitution, which gives Congress the power to "promote the progress of . . . useful art" by providing authors exclusive rights in their "writings" for a limited time. The "writings" protected by copyright can cover books, of course, but also any original work of authorship fixed in a tangible medium of expression, including computer software.

In order to be original, a work must have a minimum degree of creativity. Not all elements within that work are protected, however. Copyright protects the specific expressive elements, but the ideas, facts, procedures, processes, systems, and methods are not copyrightable and remain in the public domain for others to freely build on.

When you create and fix an original work — for example, taking a creative photograph, recording a creative song, or writing creative software — you immediately become an owner of a copyright. In turn, when you copy and use another's creative photograph, creative song, or creative software, you copy and use works covered by another's copyright, which may or may not be unlawful.

13.

In this trial, it has been established that Cribl has copied and used Splunk Enterprise software Version 9.0.0. It has also been established that Version 9.0.0 of Splunk Enterprise is copyrighted software, that Splunk owns the copyright in this software, and that Splunk's copyright protection has been ongoing at all relevant times.

I instruct you that Cribl's copying and uses of Splunk Enterprise would have violated the Copyright Act, "infringing" Splunk's copyright, unless (1) Cribl's copying and uses of Splunk Enterprise fell within the statutory privilege of fair use, making them permissible uses under the Copyright Act, or (2) Cribl's copying and uses of Splunk Enterprise were licensed, making them permissible under a contract or contracts binding on both parties. Splunk also claims that Cribl has separately violated, or "breached," contracts. We start here with the relevant law concerning fair use and the Copyright Act. I instruct you not to consider contracts, and how provisions of contracts may or may not have a relationship to fair use and the Copyright Act, in making your factual findings in this first phase. Contracts will be taken up in the second phase.

14.

Under the Copyright Act, a copyright owner has the exclusive rights to use or authorize the use of its copyrighted work with a statutory exception that anyone may make "fair use" of its copyrighted work and may do so without payment of money to anyone. No permission is required to exercise the statutory privilege to make fair use. Take an everyday example: a

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book reviewer may use the statutory privilege of fair use to quote from a book without asking a copyright owner for permission.

15.

Specifically, Section 107 of the Copyright Act states, and I will quote it exactly:

> The fair use of a copyrighted work, including for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

I have quoted for you the privilege of fair use as enacted by Congress. As you just heard, the Act includes several examples of some types of uses that may be found to be fair uses, but that list is not exhaustive or exclusive.

16.

With respect to the factor of "purpose and character of the use," we may consider the extent to which the copier adds something new with a further purpose or different character, thereby altering the copyrighted work with new expression, meaning, or message. In answering this question, we consider the word "transformative" to describe a copying or use that adds something new and important.

17.

Turning to the case at hand, Splunk has a copyright in the Splunk Enterprise software, the original work it fixed in a tangible medium of expression. But the rest of the world, as far as the Copyright Act is concerned, has a privilege to copy and use Splunk Enterprise for the purpose of fair use.

Here, Cribl copied and used Splunk Enterprise to reverse engineer the S2S protocol implemented by that software and to test, troubleshoot, and market its own software that implemented the S2S protocol. Although the Splunk Enterprise software was copyrighted, no one contends that the S2S protocol was itself copyrighted, and I instruct you that the S2S protocol was not itself copyrightable. However, Splunk asserts infringement of its copyright on Splunk Enterprise, which includes its implementation of the S2S protocol.

The question for us is whether Cribl's copying and use of the Splunk Enterprise copyrighted software for the purpose of reverse engineering the S2S protocol to achieve interoperability with the Splunk Enterprise copyrighted software, and/or for the purpose of testing, troubleshooting, and marketing its own software, infringed the copyright in the Splunk Enterprise copyrighted software. If the copying and use of the Splunk Enterprise copyrighted software for these purposes qualifies as fair use, the copying and use of Splunk Enterprise for these purposes would not violate the Copyright Act. Because Splunk has proven Cribl copied Splunk Enterprise, Cribl bears the burden of proving fair use. Specifically, Cribl must prove, by a preponderance of the evidence, that the statutory privilege of fair use applies.

18.

Using copyrighted software to reverse engineer may be a fair use. With respect to reverse engineering, based on the policies underlying the Copyright Act, disassembly of copyrighted object code is fair use of the copyrighted work if such disassembly provides the only means of access to those elements of the code that are not protected by copyright and the copier has a legitimate reason for seeking such access.

19.

The Supreme Court has instructed us that fair use is a legal determination for me to decide, taking into account your factual determinations. Accordingly, I have included on the first verdict form some factual questions to assist me in making this determination. Once I have reviewed your answers to these questions, I will make a legal determination on fair use. I will then instruct you on the remaining claims, at which point you will return to the jury room to answer all remaining factual questions.

20.

I remind you that Splunk Enterprise software was at all times protected by copyright but that the S2S protocol used by that software was *not* protected by copyright. The questions for you to answer are as follows:

(1) Could Cribl viably interoperate with Splunk forwarders and indexers without reverse engineering the S2S protocol?

(2) Was reverse engineering the only means for Cribl to determine the S2S protocol?

(3) Was Cribl receiving data from a Splunk forwarder with "raw" or "syslog" a viable alternative to Cribl using the S2S protocol?

(4) Was Cribl using the HEC protocol, with or without a third-party forwarder, a viable alternative to Cribl using the S2S protocol?

(5) Would Splunk have earned more money had Cribl not copied and used Splunk Enterprise?

(6) Did the public benefit from Cribl's copying and use of Splunk Enterprise?

(7) Was Cribl's S2S capability in its software a transformative use resulting from its copying and use of Splunk Enterprise?

21.

I will now turn to the final part of these instructions. When you begin your deliberations, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict as to each question must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

22.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right. It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict. I will give you a verdict form to guide your deliberations.

23.

When you retire to your assigned jury room to deliberate, you will have with you the following things:

(1) a work copy of these jury instructions for each of you;

(2) a work copy of the verdict form for each of you;

(3) the official verdict form; and

(4) all of the exhibits received into evidence.

24.

You have all taken notes during the trial. Even so, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by notes. When you go into the assigned jury room, the courtroom deputy clerk will bring to you the exhibits received into evidence to be available for your deliberations.

25.

At no time may you conduct your own research about: the definition of the claims alleged, the meaning of any term, the law governing the claims alleged, the process of jury deliberations, or any other topic. You may not consult any law books, internet sources, non-jurors, or any other resources for information on how to reach a verdict or understand the law. If you have a question, you must direct it, in writing, to me.

26.

The courtroom deputy clerk will be outside the assigned jury room door during your deliberations. If it becomes necessary during your deliberations to communicate with me, you may send a note through the courtroom deputy clerk, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing via the courtroom deputy clerk, and I will respond to the jury concerning the case only in writing or here in open court.

If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone — including me — how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to me.

27.

If you do not reach a verdict by the end of the day, please place your work materials in the brown envelope provided and cover up any easels with your work notes so that if my staff needs to go into the room, they will not even inadvertently see any of your work in progress.

You have been required to be here each day when trial was in session from 7:45 A.M. to 1:00 P.M. Now that you are going to begin your deliberations, however, you are free to modify this schedule within reason. For example, if you wish to continue deliberating in the afternoons after a reasonable lunch break, that is fine. If you do not reach a verdict by the end of today, then you will resume your deliberations the following day. I do recommend that you continue to start your deliberations by 7:45 A.M.

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It is very important that you let us know via the courtroom deputy clerk in advance what hours you will be deliberating so that the lawyers and parties may be present in the courthouse at any time you are deliberating.

28.

You may only deliberate when all of you are together. This means, for instance, that in the mornings before everyone has arrived or when someone steps out of the room to go to the restroom, you may not discuss the case. The admonition that you are not to speak to anyone outside the room about this case still applies during your deliberations.

29.

After all of you have reached a unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form and advise me through the courtroom deputy clerk that you have reached a verdict. The foreperson should hold onto the filled-in verdict form and bring it into the courtroom when the jury returns the verdict.

Thank you for your careful attention. You may now go to the assigned jury room and begin your deliberations.

Dated: April 16, 2024.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC.,

Defendant.

No. C 22-07611 WHA

SPECIAL VERDICT FORM FOR FIRST PHASE

When answering the following questions and filling out this Verdict Form, please follow the directions provided throughout the form and all of my instructions to you. Your answer to each question must be unanimous.

We, the jury, unanimously agree to the answers to the following questions and return them under the instructions of law as our verdict in this case.

(1) Could Cribl viably interoperate with Splunk forwarders and indexers without reverse engineering the S2S protocol?

Yes _____ No ✓

(2) Was reverse engineering the only means for Cribl to determine the S2S protocol?

Yes ✓ No _____

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(3) Was Cribl receiving data from a Splunk forwarder with "raw" or "syslog" a viable alternative to Cribl using the S2S protocol?

Yes _____ No ✓

(4) Was Cribl using the HEC protocol, with or without a third-party forwarder, a viable alternative to Cribl using the S2S protocol?

Yes _____ No ✓

(5) Would Splunk have earned more money had Cribl not copied and used Splunk Enterprise?

unknown ✓

Yes _____ No _____

(6) Did the public benefit from Cribl's copying and use of Splunk Enterprise?

Yes ✓ No _____

(7) Was Cribl's S2S capability in its software a transformative use resulting from its copying and use of Splunk Enterprise?

Yes ✓ No _____

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If you wish to provide explanation for any of your answers, you may do so below, but it is not required:

____

____

____

____

____

____

You have now reached the end of the Verdict Form and should review it to ensure it accurately reflects your unanimous determinations. The foreperson should then sign and date the Verdict Form in the spaces below, and notify the courtroom deputy clerk that you have reached a verdict. The foreperson should retain possession of the Verdict Form and bring it when the jury is brought back into the courtroom.

Dated: 4/17, 2024.

By: 8:55 am.
Foreperson

Vicki Dolland

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC.,

Defendant.

No. C 22-07611 WHA

SPECIAL VERDICT FORM FOR SECOND PHASE

When answering the following questions and filling out this Verdict Form, please follow the directions provided throughout the form and all of my instructions to you. Your answer to each question must be unanimous.

We, the jury, unanimously agree to the answers to the following questions and return them under the instructions of law as our verdict in this case.

(1A) Has Splunk proven, by a preponderance of the evidence, that Cribl, through Sunny Choi, infringed Splunk's copyright on Splunk Enterprise software?

Yes _____ No ✓

(1B) Has Splunk proven, by a preponderance of the evidence, that Cribl otherwise infringed Splunk's copyright on Splunk Enterprise software?

Yes ✓ No ____

If you have answered "Yes" to Question 1A or Question 1B, proceed to Question 2. If not, proceed to Question 3.

(2) Has Splunk proven, by a preponderance of the evidence, that any copyright infringement by Cribl was willful?

Yes ✓ No ____

(3) Has Splunk proven, by a preponderance of the evidence, that it performed under the TAP contract substantially all of the things that the TAP contract required of Splunk or that Splunk was excused from such performance?

Yes ✓ No ____

(4) Has Splunk proven, by a preponderance of the evidence, that Cribl breached the TAP contract?

Yes ____ No ✓

(5) Has Splunk proven, by a preponderance of the evidence, that Cribl breached the SGT contract?

Yes ✓ No ____

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Northern District of California

(6) If you have answered "Yes" to any of the above, what damages, if any, has Splunk proven by a preponderance of the evidence as a result of infringement and/or breach?

$ 1.00

SPECIAL INTERROGATORIES

To help the judge on other issues in the case:

(A) Prior to the termination of the TAP contract in November 2021, had Cribl "become a competitor of" Splunk so as to allow the termination of the TAP contract under Section 6.3(b)?

Yes ✓ No _____

(B) Prior to the termination of the TAP contract in November 2021, had Cribl breached its confidentiality obligations under the TAP contract or infringe or misappropriate Splunk's intellectual property rights so as to allow the termination of the TAP contract under Section 6.3(c)?

Yes _____ No ✓

(C) Prior to the termination of the TAP contract in November 2021, had Splunk honored Section 5.3 of the TAP contract regarding competitive application in terminating Cribl?

Yes ✓ No _____

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You have now reached the end of the Verdict Form and should review it to ensure it accurately reflects your unanimous determinations. The foreperson should then sign and date the Verdict Form in the spaces below, and notify the courtroom deputy clerk that you have reached a verdict. The foreperson should retain possession of the Verdict Form and bring it when the jury is brought back into the courtroom.

Dated: 4/22, 2024. By: Vicki Dillard.

Foreperson

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC.,

Defendant.

No. C 22-07611 WHA

PERMANENT INJUNCTION

United States District Court
Northern District of California

Injunctive relief is warranted to restrain Cribl, Inc. from breaching the Splunk General Terms (SGT) and infringing Splunk Inc.'s copyrights (Dkt. No. 373 at 5–9). On the other hand, such relief must not foreclose fair uses of Splunk Inc.'s copyrights under the Copyright Act, which rights are honored in the SGT (*see id.* at 3–4, 5–9; Dkt. No. 372). That being so, and with advice of parties (Dkt. No. 391), this order enjoins Cribl as follows, effective immediately:

1. Cribl, Inc. and its successors, assigns, officers, agents, servants, employees, attorneys, and persons in active concert or participation with them (including any affiliated entities) (hereinafter collectively referred to as "Cribl"), during the period this order is in effect, are hereby enjoined from making, and from directing others to make, any use of Splunk Enterprise that is not:

(a) permitted under the version of the SGT applicable to said instance of Splunk Enterprise; or

(b) a fair use under the Copyright Act. Fair uses include copying and uses of the Splunk Enterprise copyrighted software that are necessary to gain access to Splunk

Enterprise's functional elements and to build out Cribl's own interoperable, compatible software, such as by:

(i) reverse engineering the uncopyrighted S2S protocol;

(ii) testing Cribl software for interoperating with Splunk Enterprise; and/or

(iii) troubleshooting Cribl software for interoperating with Splunk Enterprise.

Otherwise, marketing uses of Splunk Enterprise are barred. For instance, using Splunk Enterprise merely to prove Cribl's value to prospective customers is barred, but using Splunk Enterprise where necessary to test or troubleshoot interoperability issues for existing Cribl customers is permitted.

2. Cribl must comply, during the period this order is in effect, with the following provisions related to its use of Splunk Enterprise:

(a) Cribl shall log, for each download of Splunk Enterprise (whether from splunk.com, Docker, or a different source):

(i) each instance it downloads and/or executes a given downloaded copy of Splunk Enterprise, including the version of Splunk Enterprise executed;

(ii) any employee(s) and/or contractor(s) involved in each such download and/or execution;

(iii) the date of each such download and/or execution; and

(iv) the purpose of each such download and/or execution.

(b) Cribl shall retain, in a manner that permits them to be associated with the downloads and/or executions of Splunk Enterprise logged under Paragraph 2(a), the following materials:

(i) testing or troubleshooting scripts and related tickets (e.g., Jira or Confluence tickets); and

(ii) any other materials necessary to support any purpose of a download and/or execution not already reflected in scripts or tickets in (i).

(c) On a calendar quarterly basis, within sixty (60) days of each quarter's close, Cribl shall produce to outside counsel for Splunk and Cisco Systems, Inc. the logs specified in Paragraph 2(a) and the materials specified in Paragraph 2(b), all on a Highly Confidential—Attorneys' Eyes Only basis pursuant to the Protective Order issued in this litigation (Dkt. No. 69). For avoidance of doubt, in-house

counsel at Splunk and Cisco Systems shall have no access to any logs or materials produced.

(d) Each calendar year, at Splunk's option, Splunk may conduct up to two depositions not to exceed eight hours combined concerning Cribl's uses of Splunk Enterprise. Any such deposition shall be strictly limited in substantive scope to Cribl's compliance with this injunction, specifically to Cribl's uses of Splunk Enterprise that became due for reporting under Paragraph 2(c) in the time since the immediately prior deposition conducted under this section or, if none has been conducted, then since this order's entry. For avoidance of doubt, in-house counsel at Splunk and Cisco Systems shall not participate in or have access to depositions or deposition transcripts.

3. The district court retains jurisdiction to enforce and to modify the judgment and this permanent injunction.

IT IS SO ORDERED.

Dated: August 14, 2024.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC.,

Defendant.

No. C 22-07611 WHA

ORDER ON MOTIONS UNDER RULE 50 AND RULE 59

INTRODUCTION

After a civil jury verdict, it seems commonplace nowadays for one side or the other (or both) to contend that they are entitled to judgment, despite the verdict, as a matter of law and say so based on arguments not brought up at the time it mattered at trial — in other words, they want a redo with new arguments. This trend is in the wrong direction.

In this action involving software interoperability, the jury found that a new entrant had infringed an incumbent's copyrighted software and breached a general license (but not a partnership license, which was terminated), and awarded the incumbent one dollar in nominal damages. A judgment and permanent injunction were entered to cabin the entrant's use of the incumbent's software to licensed and fair uses under the copyright law, the latter being to reverse engineer, test, and troubleshoot to support interoperability. Both the incumbent (copyright owner) and the entrant (copyist) now move for more favorable judgments as a matter of law. The former also moves for a new trial and altered injunction.

STATEMENT

Incumbent copyright owner Splunk Inc. was founded in 2003 and runs Splunk Enterprise, a software service for businesses that stores and analyzes their data. To get their data into Splunk Enterprise, Splunk offers special software called a Splunk Forwarder that businesses can install at their data sources — in cloud servers, factory-floor machines, or otherwise — to send data to software called a Splunk Indexer for ingesting into Splunk Enterprise. Data is sent from forwarder to indexer using a special Splunk-to-Splunk (S2S) protocol. Data also can be sent to indexers using other means, in particular using the HEC protocol, or HTTP Event Collector, although our jury specifically found such other means were insufficient for operating commercial integrations with Splunk Enterprise. The fee for using Splunk Enterprise turns on the volume of data stored over time.

Entrant and copyist Cribl, Inc. was founded in 2017 by three former Splunk employees. It runs Cribl Stream, which also is a software service that started out complementing Splunk's set of software services but wound up competing with them. Cribl Stream performs various operations on data as it streams from various data origins to various data destinations. Relevant here, Cribl Stream can strip away low-value data as it streams from a Splunk Forwarder to a Splunk Indexer. This lets a business — which must be a customer of both Cribl Stream and Splunk Enterprise in this scenario — store only the data it wants at Splunk Enterprise and thereby either save money (store less data) or else get more value for its money (store more well-selected data) at Splunk Enterprise.

On August 6, 2018, Splunk granted Cribl a license to use Splunk Enterprise as a Technology Alliance Partner. Such TAP Licenses let a partner use Splunk Enterprise as it develops software services that integrate with and extend Splunk Enterprise's features. And, partners are allowed to use Splunk Enterprise to market these newly developed services and to market Splunk Enterprise. At all times (including during the partnership), Splunk also licensed Cribl to use Splunk Enterprise under its Splunk General Terms. This SGT License is the one available to the ordinary business user who downloads Splunk Enterprise and begins using it.

On November 2, 2021, however, Splunk terminated Cribl's TAP License. Splunk said Cribl had ceased being a complement and had become a competitor — and that it had violated its license and copyright law to do so. Splunk did not, however, revoke Cribl's SGT License also in effect at that date. So, after that date, Cribl had an SGT License but only an SGT License to use Splunk Enterprise. It kept developing and marketing interoperable software services, using Splunk Enterprise to do so.

On December 2, 2022, Splunk filed the instant suit. Its complaint asserted patent infringement (Counts I–V), copyright infringement of S2S (Count VI), copyright infringement of Splunk Enterprise and its source code (Counts VII–VIII), direct and indirect circumvention of copyright-protection measures (Counts IX–X), breach of the TAP License and of the SGT License (Counts XI–XII), and various state law claims (Counts XIII–XIV).

All patent claims were dismissed by motion (*see* Dkt. Nos. 55, 74, 103). The copyright claims respecting the S2S protocol and indirect circumvention were resolved by stipulation (Dkt. No. 115 ¶ 1). So too all claims stated against an individual defendant, the co-founder and chief executive officer of Cribl (*ibid.*). This left the copyright claims respecting Splunk Enterprise (and its source code), the contract claims respecting the TAP License and the SGT License, and the other state-law claims still in the case.

Importantly, the S2S protocol was merely a format for data and not software. The S2S protocol has never been copyrightable. But to learn how the S2S protocol was changed from iteration to iteration, Cribl had to run the Splunk Enterprise software to detect any changes. In this way, Cribl's product would be able to deliver its customers data in the exact S2S format expected by Splunk Enterprise.

We held a trial in two phases. In phase one, the jury decided underlying factual questions with relevance to all remaining issues. In phase two, the jury found some further facts in special interrogatories and applied the law instructed to all these underlying facts so as to enter findings on infringement and breach (*see, e.g.*, Dkt. No. 309 ("I Instruction") No. 11 (explaining)). In brief, the jury found copyright infringement and contract breach (not of the partnership license, but of the general license), and nominal damages. More specifically:

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As for the underlying facts, the jury found that to make Cribl Stream "viably" interoperate with Splunk Enterprise required using the S2S protocol — simply using alternatives like the HEC protocol was not viable (Dkt. No. 321 ("I Verdict") Nos. 1–4). And, using the S2S protocol required, the jury found, reverse-engineering the S2S protocol by using Splunk Enterprise (*id.* Nos. 1–2). (Relatedly, the jury found that Cribl had not misappropriated source code (Dkt. No. 327 ("II Verdict") Nos. (1A), (B)).) The public benefited, the jury found, from this copying and use of Splunk Enterprise, which was transformative and did not clearly increase or reduce revenues for Splunk (I Verdict Nos. 5–7).

As for the copyright claims, based on the phase one verdict, the district judge concluded that it was a fair use to copy Splunk Enterprise in order to reverse engineer the S2S protocol and a fair use to copy Splunk Enterprise in order to test and to troubleshoot for purposes of maintaining Cribl Stream's interoperability with Splunk Enterprise via the S2S protocol (Dkt. No. 317 ("II Instruction") No. 2; Dkt. No. 372 ("Fair Use Op.")). Then, in phase two, the jury found that Cribl had willfully infringed Splunk's copyright in Splunk Enterprise (II Verdict Nos. 1B, 2).

As for contract claims, the jury found that Cribl had not breached the TAP License. Nor had Splunk breached it when terminating Cribl as a rising competitor (*id.* Nos. 3–4, A, C (citing TAP § 6.3(b))). But Cribl had breached the SGT License (*id.* No. 5).

As for damages, the jury found that Splunk had not proven damages and awarded only nominal damages of one dollar (No. 6).

A permanent injunction and judgment were entered after an extensive effort to mediate post-trial differences. The injunction stopped Cribl from using Splunk Enterprise except for licensed and fair uses. It defined the latter as those uses necessary to reverse engineer the S2S protocol, to test Cribl software for interoperability with Splunk Enterprise, and to troubleshoot Cribl software for interoperability with Splunk Enterprise. *Notably, this meant the injunction banned Cribl from using Splunk Enterprise to market Cribl software*. And, it required a compliance program involving Cribl logging its copying of Splunk Enterprise and Splunk challenging these logs and the purported uses (or otherwise) (Dkt. No. 392).

Finally, both sides brought post-trial motions under Rule 50. *As for the copyright issues*, Splunk moved for judgment that Cribl's infringement of Splunk Enterprise was not a fair use. Meanwhile, Cribl cross-moved for judgment that it technically had not infringed Splunk Enterprise (it had not made fixed copies), or else that it had not done so willfully. *As for the contract issues*, Splunk moved for judgment that Cribl had breached the TAP License. And, it sought clarification and judgment as a matter of law that Cribl had breached the SGT License not only as to marketing uses but also as to reverse engineering, testing, and troubleshooting uses — either because the latter were not fair uses at all or because if fair uses the contract still proscribed copying for those uses. Meanwhile, Cribl moved for judgment that technically the restrictions of the SGT License were unenforceable as to instances of Splunk Enterprise downloaded from the Docker website (a platform where developers go to get and run applications). *Also*, Splunk moved under Rule 59 for a new trial as to contract breach of the TAP License, and as to damages. *Finally*, Splunk sought to amend the injunction.

This order follows full briefing and argument.

ANALYSIS

Jury instructions are regularly prepared by judges and given to counsel for critique and for objection to be heard at a charging conference. Once the final charge is given, those instructions of law become the law of the case and the losing side may only complain on some point of objection or critique that was preserved.

In our particular trial, the draft instructions for phase one had a preface that read:

> Please submit any and all objections in writing by TOMORROW, APRIL 16, AT 7:00 A.M. A charging conference will take place after the defense rests (and any rebuttal or surrebuttal). *All objections not made at the charging conference will be waived.*
>
> Your objections must be based on the law and why the instructions as they stand are not in accordance with it. Mere argument without more will not suffice.

(Dkt. No. 301 at 1 (emphasis added)). Written objections were received from Splunk (Dkt. No. 305), and oral objections were made at our charging conference (Tr. 1628–62). Likewise, the draft instructions for phase two had a preface that read:

> Please submit any and all objections in writing by TOMORROW, APRIL 17, AT 7:30 A.M. A charging conference will take place shortly thereafter. *All objections not made at the charging conference will be waived.*
>
> Your objections must be based on the law and why the instructions as they stand are not in accordance with it. Mere argument without more will not suffice.

(Dkt. No. 312 at 1 (emphasis added)) — that is, it had the same preface. Written objections were received from Cribl (Dkt. No. 313) and Splunk (Dkt. No. 315), but the Court reemphasized that because of late-filed errata objections needed to be made orally at our charging conference (Tr. 1740). We held that charging conference with limited interruption for other business (Tr. 1740–1764, 1769–84, 1788–99, 1809–18; *cf.* 1799–1809 (re fair use and instructions broadly)).

After an adverse verdict, counsel cannot make new objections or offer new theories of law that should have been raised at the charging conference. This is to give the trial judge a chance to consider a change. So, in this case, the law was settled in the jury instructions as given save and except for those critiques and objections expressly raised in a timely written response to the proposed instructions or else at the charging conference.

The motions now raised are full of points of law that were not raised in a timely written response to the proposed instructions or else at the charging conference. As to these, the law must be taken as given in the jury instruction. As to the points properly preserved, the district judge believes, as before, they are without merit.

1. THE RULE 50 MOTIONS.

A Rule 50 motion must be denied when, under the jury instructions as given, the trial evidence admits of a rational line of reasoning in favor of the verdict (even if it seems against the weight of the evidence). A Rule 50 motion is not an occasion to complain about legal error in the instructions, for any such error could only be grounds for a new trial, not for judgment notwithstanding the verdict (except in the rarest of circumstances). Nor is it an occasion to complain about evidentiary rulings or misconduct by counsel, which, at most, can only lead to a new trial, not a reversal of judgment. When the Rule 50 movant had the burden of proof on

the issue — such as on contract breach — the movant might have lost on the simple ground that it had not carried its burden of proof. So, the movant must show that the evidence compelled *only* one verdict, taking into account the burden of proof standard.

A. The Copyright Issues.

(i) Splunk's Motion Seeking a Ruling that There Was No Fair Use.

Splunk does not challenge the division of labor between the jury and the judge in deciding this mixed question of fact and law. *See Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 23–24 (2021). Nor does Splunk challenge the threshold question of the uses at issue in this intermediate copying case — reverse-engineering, testing, troubleshooting, and marketing uses. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 533, 541, 543 n.18, 546–48 (2023). Instead, Splunk asserts that as a matter of law the four statutory factors should have pointed against fair use at least for the testing and troubleshooting uses, if not also for the reverse-engineering use. Recall Splunk prevailed as to the marketing use, which was held not to be a fair use. This order takes these factors in turn, pointing out when the analysis applies to all three uses at issue in the motion and when it applies only to some. (It addresses the marketing use only occasionally to explain a difference from the other three uses.)

(a) The Purpose and Character of the Use.

The first factor is "the purpose and character of the use." 17 U.S.C. § 107(1). The district judge determined this factor favored Cribl for reverse engineering, testing, and troubleshooting (Fair Use Op. 4–6).

First, as to all uses, Splunk argues that the record contains evidence that Cribl obtained Splunk Enterprise through false pretenses and broken promises (Splunk Br. 15–16). But the Supreme Court has held squarely that the character of the use turns on the copyist's "objective . . . use," not "subjective intent." *Warhol*, 598 U.S. at 544–45. And, here, among other relevant facts, the jury found that Cribl's objective use of Splunk Enterprise benefited the public (I Verdict 6). That is a general finding Splunk does not challenge as to any use. The

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record supports the result reached, notwithstanding prior circuit law since overtaken by higher authority. *See also Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

Second, as to all uses, Splunk argues that the record is replete with evidence that all uses had a commercial character — namely that "Cribl's entire focus [was] for Cribl Stream to use the allegedly complementary aspects of [Cribl Stream] to ultimately replace Splunk [Enterprise]" (Splunk Br. 14–15). But this argument fails to focus on what exactly was commercialized in each instance: What "affects the weight [to] afford commercial nature as a factor" is "the degree to which the new user exploits the copyright for commercial gain — as opposed to incidental use as part of a commercial enterprise." *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003). Here, this distinction makes a difference: *As for the reverse-engineering, testing, and troubleshooting uses*, the Court found that Cribl *had incidentally used* the copyrighted work. Cribl had sought to reverse-engineer Splunk Enterprise's non-protectable, functional elements and then to test and troubleshoot its own software's interoperability with those elements. The copyright owner could not have rightly expected to control those functional elements, whether or not other later software developed to share those functional elements ultimately harmed the copyright owner. And, to the extent Cribl also copied the copyrightable, expressive elements of Splunk Enterprise to get at the non-copyrightable, functional ones, this was reasonably necessary or even unavoidable (Fair Use Op. 4–6). By contrast, *as for the marketing uses*, the Court found that Cribl *had exploited* the copyright for commercial use. Cribl had demonstrated Splunk Enterprise to generate sales of its complement Cribl Stream (in some instances generating sales of Splunk Enterprise, too). This use was enjoined (Fair Use Op. 9; Injunction ¶ 1). *See Warhol*, 598 U.S. at 538–40.

Third, Splunk contends that intermediate copying "to gain access to the functional elements of that software and to discover the functional requirements for compatibility" is fair use but only if the functional learnings are not later used for a competitive purpose (Splunk Br. 13 (quoting Fair Use Op. 5)). Again, not so. At bottom, this argument repeats ones rejected above. The Copyright Act protects original creative works, not competitors seeking to

exclude rivals from facts, figures, and functionality. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522–24 (9th Cir. 1992).

Related to this point, Splunk argues that even if copying Splunk Enterprise for "reverse engineering" was a fair use, copying it for "testing" and "troubleshooting" Cribl's *customers' problems* were not fair uses because these were not limited to discovering Splunk Enterprise's functional requirements *for interoperability* (Splunk Br. 14). Yes, these uses are distinguishable in some respects, but the evidence did not support that they were so distinguishable as to make a difference on this factor. *See Warhol*, 598 U.S. at 541, 543 n.18, 546–48. Splunk made herkie-jerky changes to Splunk Enterprise such that software developed to interoperate one day might not the next (*see* Cribl Opp. 13 n.11 (citing Dkt. No. 352-107 (TX-3616))). Testing and troubleshooting were reasonably necessary to identify when reverse-engineering had succeeded, and when more systematic efforts were needed again to achieve interoperability.

Even assuming some testing and troubleshooting was not directed to reverse-engineering as such, Splunk fails to explain how the evidence compels the conclusion that such testing and troubleshooting was directed to exploiting anything the copyright owner rightly could have expected to control: Operating Splunk Enterprise "simply" to replicate the environment within which Cribl's software operated (this being Splunk's characterization of the testing and troubleshooting evidence that most favors Splunk (Splunk Br. 13)) is replication directed towards using the functional elements of the one in conjunction with validating the functional elements of the other under conditions where the functional elements operate together— that is, to see how they interoperate functionally.

Finally, Splunk makes a litany of arguments that boil down to contending that the facts here seem unlike the facts in cases where a transformative use was found, concluding that a transformative use should not be found here (Splunk Br. 11–13). Relying on *Google v. Oracle* in particular, Splunk emphasizes that there code was copied to create code in a new environment (newly into phones), while here code was copied to create code in the same environment (sitting between Splunk forwarders and indexers).

But Splunk's synopsis overlooks a difference in *Google*: There, the copyist copied and kept intact some of the software's source code, so where and why that code reappeared somewhere else was especially critical to the overall transformative use assessment; here, by contrast, the copyist *never copied* source code nor kept it, so where the fresh code appeared was less critical. 593 U.S. at 31, 33, 40.

Moreover, not every transformative use will look like the transformative use in *Google*. Indeed, even if Cribl Stream had promised nothing more than to modify the data flowing between Splunk Forwarders and Splunk Indexers, its use of copies of Splunk Enterprise to enable such capabilities perhaps could be transformative. *Cf. Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992) (holding end customers' use of a Game Genie sitting between Nintendo game cartridges and Nintendo game consoles to modify Nintendo's copyrighted displays made fair use of those displays). On our record, however, Cribl Stream did more than that minimum: It had the capability to expand from acting merely as middleware between Splunk Forwarders and Splunk Indexers to acting as middleware between many systems to facilitate the flow of data into Splunk Enterprise or into rival services — tending to make the use even more beneficial to the public on dimensions even further afield from anything within the scope of what a copyright holder could rightly expect to control by copyright. *Cf. Sony Comput. Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 606–07 (9th Cir. 2000) (Connectix's middleware enabling console-based game cartridges to be played on desktop computers).

This factor was found to favor fair use — except as to marketing — and Splunk fails to show this was error.

(b) The Nature of the Copyrighted Work.

The second factor is "the nature of the copyrighted work." 17 U.S.C. § 107(2). This factor "recognizes that creative works are 'closer to the core of intended copyright protection' than informational and functional works, 'with the consequence that fair use is [less] difficult to establish when the [latter] works are copied.'" *Dr. Seuss Enters., L.P. v. Penguin Books*

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USA, Inc., 109 F.3d 1394, 1402 (9th Cir. 1997) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)). This case plainly involves work of the latter kind.

As to the reverse-engineering use, Splunk argues that its code was more creative than credited. But Splunk ignores two basic points. *First*, Splunk does not address the actual code copied — whereas the nature of the work turns on the actual code copied (Fair Use Op. 7). *Google*, 593 U.S. at 27–29. Splunk touts the creativity of its source code. But the evidence supported that it was the executable object code that was copied during reverse-engineering. Also, no evidence compelled the conclusion that creativity in the source code — such as well-chosen variable names or well-crafted explanatory comments — ever propagated into the object code that was copied during reverse-engineering (Cribl Opp. 18). *Second*, Splunk does not address the extent to which even the creative elements it touts (assuming they did carry into object code or were otherwise copied) were bound up with functional elements. "[W]here [the] copyrightable material is bound up with [the] uncopyrightable material, copyright protection is 'thin.'" *Google*, 593 U.S. at 21. As the fair use opinion stated, the copying here thus falls on the least suspect side (Fair Use Op. 7).

As to the testing and troubleshooting uses, Splunk argues that these uses involved copying other and additional code, which is partly true, and that this should make a difference in the nature of the work copied, which is not persuasive. No evidence compelled the conclusion that anything but executable object code was loaded to run Splunk Enterprise. No evidence compelled the conclusion that functional elements could have been copied separately from creative elements.

This factor was found to favor fair use for all uses — and Splunk fails to show error.

(c) The Amount and Substantiality of the Portion Used.

The third factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). The crux of this factor is whether the amount was "reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586. Thus, the amount of copying is considered first against the work itself, then more importantly

against the proposed use. *See Warhol*, 598 U.S. at 543 & n.18. Here, this factor weighed in favor of Splunk but was accorded little weight (Fair Use Op. 7–8). Splunk argues the Court should have afforded it more weight (Splunk Br. 18–20). Splunk again overlooks basic points.

First, Splunk overlooks that it is unremarkable that the entire executable code was copied, particularly in relation to the proposed uses of reverse-engineering, testing, and troubleshooting Cribl's own interoperable software. Ordinarily, copying the entirety counsels against a finding of fair use. *Sony*, 203 F.3d at 606. But it does not preclude such a finding where copying the entirety is reasonable in relation to the use. *Sega*, 977 F.2d at 1526–27. As set out above, the functional elements of Splunk Enterprise were bound up with the creative elements. Substantial evidence showed it was reasonably necessary for Cribl to use the entirety of the Splunk Enterprise executable object code for these uses (Cribl Opp. at 18–19 (citing record); *see also* Dkt. No. 372 at 7)). No evidence compelled the conclusion that Splunk Enterprise was copied avoidably or for a dual purpose. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 222 (2d Cir. 2015). However, the same cannot be said for the marketing use. Fittingly, that use was not found to be a fair use.

Second, Splunk overlooks that it is irrelevant that the ultimate result of this copying was to threaten the entire codebase of Splunk Enterprise with fresh competition. At issue in this factor is the amount copied, not the amount threatened. And, the amount threatened also may be beside the point, as addressed in the next factor.

There is no manifest error in the finding that this factor favored Splunk but was accorded little weight (Fair Use Op. 7–8). With respect to the marketing use, this factor did favor Splunk. With respect to the other uses, this factor was treated as favoring Splunk, too, though an argument could be made this factor should have been neutral. Splunk suffered no error.

(d) The Effect of the Use Upon the Market for the Copyrighted Work.

The fourth factor addresses the "effect" of the entrant's copying on the "market for or value of the copyrighted work." 17 U.S.C. § 107(4). While the purpose-and-character factor conceptually examines whether the copyist's work in theory could be a substitute for the

copied work, the markets-effect factor examines whether the copyist's work in practice will be one. *See Warhol*, 598 U.S. at 536 n.12; *Campbell*, 510 U.S. at 590.

Recall our jury found that whether Cribl Stream increased or decreased Splunk Enterprise's profits overall was not proven (I Verdict 5; II Verdict A). These findings reflected the evidence. *Possibly increasing Splunk's total customers*, Cribl marketed both Cribl Stream and Splunk Enterprise to businesses that might not have heard about Splunk Enterprise otherwise. *But possibly decreasing Splunk's per-customer data stored*, Cribl Stream culled data from what each Splunk customer might have stored in Splunk Enterprise otherwise. *And, possibly maintaining or increasing Splunk's per-customer data stored*, Cribl Stream let customers forward more data from more data sources than before, such that after culling some data the amount stored in Splunk Enterprise might be the same or greater. Moreover, no evidence showed that Cribl Stream was usurping from Splunk Enterprise a copyright entitlement reserved to the copyright owner. So, following the jury, the district judge found this factor a toss-up (Fair Use Op. 8).

In its post-trial arguments, Splunk misses the factual complexity and the dispositive legal question.

First, Splunk simplifies the factual complexity: It argues, in brief, that each dollar a customer spent on Cribl to cull data was a dollar the customer would not spend with Splunk to store data. But, as above, the actual record was not so clear. Indeed, Splunk itself chose to partner with Cribl Stream in a program designed to find customers to buy from Cribl Stream and Splunk Enterprise at once. And, Splunk itself introduced a Cribl Stream-like service, Splunk Data Stream Processor (Splunk DSP), to coexist with Splunk Enterprise (not to supplant Splunk Enterprise).

Second, seemingly acknowledging that complexity and now arguing in the alternative, Splunk argues that even if Cribl Stream increased demand for Splunk Enterprise, this shows only that Cribl Stream affected demand for Splunk Enterprise — which it says is the dispositive point for finding that the fourth factor favors the copyright owner. Yes, the Copyright Act protects even a copyright owner's choice *not* to exploit the copyright. So, for

example, if a copyist's movie version increases the value of the copyright owner's book version, even this increase in value supports the fourth fair use factor favoring the copyright owner. *Cf. Campbell*, 510 U.S. at 590 n.21. But Splunk's point raises another, which is devastating for Splunk. Not everything one competitor usurps from another is protected by copyright — and facts, figures, formats, and functionality are not protectable. The Copyright Act only protects a copyright owner against a usurpation of an entitlement that the Copyright Act protects. And here, if anything, the evidence better supports that Cribl Stream's competitive success as a "substitute" came from replicating functional elements that the Copyright Act does not cede to the copyright owner. *Cf. Google*, 593 U.S. at 34; *Campbell*, 510 U.S. at 592 ("[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.").

Note that the marketing use did exploit copyright-protectable elements. And, such use reasonably had some effect on the market for the copyrighted work. Significantly, however, the marketing use was not held to be a fair use.

* * *

Splunk is not entitled to judgment as a matter of law that Cribl's reverse-engineering, testing, and troubleshooting uses were not fair uses, so its motion in this regard (Splunk Br. 9–22) is **DENIED**.

(ii) Cribl's Motion Seeking a Ruling that There Was No Willful Infringement.

Cribl was found at trial to have infringed Splunk Enterprise, and willfully. In other words, although some of Cribl's copying was for fair uses (addressed above), and although some of Cribl's copying was for licensed uses (addressed below), the jury still found this left some of Cribl's copying as *neither* for fair uses *nor* for licensed ones. Cribl does not complain about the judge's instructions to the jury. Instead, Cribl complains about the evidence presented to the jury. It argues the evidence failed to show that Cribl made any copies that could form the basis for an infringement claim. And, it argues the evidence failed to show that it knew or deliberately disregarded that any copies could infringe. Neither point is persuasive.

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(a) No Unauthorized, Fixed Copy?

Cribl contends that no copy Cribl made of Splunk Enterprise could have formed the basis of an infringement claim. *As for initial copies in disk*, Cribl argues that its downloaded copies of Splunk Enterprise were fixed copies but were authorized ones, with this authorization not depending on any further uses to which these copies or others from them were put. *As for later copies in RAM*, Cribl argues that its copies loaded from disk into RAM were, if not authorized, too transitory to be "fixed" within the meaning of the Copyright Act. *See MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 518–19 (9th Cir. 1993) (citing 17 U.S.C. § 101). Because Cribl is plainly wrong about the RAM copies, there is no reason to reach anything about the disk copies.

There was direct evidence at trial that material portions of Splunk Enterprise's executable object code were loaded repeatedly into RAM. And, there was circumstantial evidence at trial that these copies endured in RAM long enough to be perceived, reproduced, or otherwise communicated. For example, an expert testified that copies in RAM endured until displaced by (some unspecified volume of) other processes, from which a jury could have inferred that at least on some occasions these copies endured long enough to be "fixed" copies. Also, there was evidence that screen displays of Splunk Enterprise persisted long enough to be perceived while copies of Splunk Enterprise were being used, from which a jury could have inferred that the underlying copies in RAM persisted for a similar duration, too. *Cf. Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 128 (2d Cir. 2008); *CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1276–77 (9th Cir. 2021) (on preliminary injunction). Yes, some kinds of copying might have involved more persistence than other kinds. And, the copying involving the most persistence might have been done most commonly for uses that were fair uses or licensed uses — such as for reverse-engineering. But the jury heard that copying associated with persistence "may" have been performed for uses that were not fair uses or licensed ones (Cribl Br. 6). And, given that possibility, a jury could have inferred such especially persistent copying "was" at least sometimes performed for infringing uses like marketing.

Thus, there is substantial evidence for the jury's implied finding that embodiments of more than transitory duration were made.

(b) No Willful Infringement?

Cribl next contends there was no evidence from which a jury could conclude Cribl knowingly or recklessly infringed the Splunk Enterprise copyright. It focuses most on there being no evidence that Cribl believed infringement was likely while taking deliberate steps to avoid learning more. *See Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1073 (9th Cir. 2013).

Reciting Cribl's arguments nearly rebuts them. Cribl acknowledges that a jury could conclude that Cribl's founders "contemplated whether there [wa]s a fair use right with respect to Cribl's creation and maintenance of its interoperable software product" (Cribl Br. 8). And, it acknowledges that a jury could conclude that there was an "absence of discussion" among the founders as to whether "using Splunk Enterprise in marketing-related activities (*e.g.*, by making it accessible in Cribl's customer sandboxes or demonstrating Cribl Stream in a manner that might interoperate with Enterprise) was a potential [infringement] issue" (*id.* at 11). Finally, Cribl argues that the reasonable jury *must* conclude from this comparison that the "absence of discussion *demonstrat*[*ed* that] the founders did *not* contemplate" whether marketing uses of its rival's software could be infringing (*ibid.*). However, a reasonable jury — ours being one of them — could have observed all the same evidence and made the opposite inference at the end: The founders were aware of copyright law, they were aware their innovative uses came close to the line (for reverse engineering), *and* they were even aware their less innovative uses all but certainly crossed the line (for marketing a rival offering), *which is why* they specifically avoided talking or learning more about exactly where that line was drawn before walking right over it.

* * *

Cribl is not entitled to judgment as a matter of law that Cribl's copying was not in some instances infringing — it never argues, for instance, that marketing uses were either fair uses or

licensed ones under the SGT License — so its motion in this regard (Cribl Br. 4–11) is **DENIED**.

B. THE CONTRACT ISSUES.

Recall that Cribl was subject to the TAP License from August 6, 2018 to November 2, 2021 — and subject to the SGT License at all times. Splunk contests how each contract as well as the interaction between the two should have been interpreted and applied to the facts.

(i) Splunk's Motion Seeking a Ruling that Cribl Breached the TAP License (Effective from 2018 to 2021).

The jury found the TAP License was not breached. Splunk contends, however, that as a matter of law the TAP License *did* bar reverse engineering; so, because the trial record conclusively established that Cribl used Splunk Enterprise for reverse-engineering, a properly instructed jury necessarily should have found that the TAP License *was* breached. Splunk seeks that judgment now as a matter of law.

(a) Restrictions of Section 4 Overtake Permissions of Sections 3.3?

Splunk first argues that Section 4 bars reverse engineering irrespective of Section 3.3. The Court instructed the jury that Section 3.3's permissions (including for uses related to developing, testing, and marketing applications that extended the features or functionality of Splunk software) overtook Section 4's restrictions (against reverse-engineering Splunk software) because the latter section started out by saying its restrictions applied "[u]nless otherwise expressly permitted by Splunk" (II Instruction No. 9). In its motion, Splunk asserts the opposite was true: Section 4's restrictions overtook Section 3.3's permissions because of a different prefatory phrase in Section 3 saying its permissions applied subject to compliance with the restrictions in Section 4 (Splunk Br. 4–5). This order sets out those contractual provisions, before turning back to the arguments about them.

Section 4's provision imposing restrictions — including its opening limitation that the jury instructions relied upon — is as follows:

> **4. License Restrictions and Obligations[:]** *Unless otherwise expressly permitted by Splunk*, TAP will not, and neither TAP nor any User shall have a right to: **(a)** copy any Splunk Software (except as required to run the Splunk Software and for reasonable backup purposes); **(b)** modify, adapt, or create derivative works of the Splunk Software; **(c)** rent, lease, loan, resell, transfer, sublicense, distribute, disclose or otherwise provide Splunk Software to any third party; **(d)** decompile, disassemble or *reverse-engineer the Splunk Software*, or determine or attempt to determine any source code, algorithms, methods or techniques embodied in the Splunk Software, except to the extent expressly permitted by applicable law notwithstanding a contractual prohibition to the contrary; **(e)** provide to any third party the results of any benchmark tests or other evaluation of the Splunk Software without Splunk's prior written consent; . . . .

(TAP § 4 (header's capitalization altered) (emphasis added)). Meanwhile, Section 3's provision granting permissions — including its opening limitation that Splunk seeks to rely on instead — is as follows:

> **3. License Grant and License Terms[:]** *Subject to TAP's compliance with the Agreement (including the restrictions set forth in Section 4* (License Restrictions and Obligations) of these Terms and Conditions), the Splunk Software License Agreement (with respect to the Splunk Software) and the Program Guide: . . .
>
> **3.3 <u>Splunk Software</u>[:]** Subject to Section 10.5 (Entire Agreement) part (iii), Splunk hereby grants TAP a non-exclusive, non-transferable, worldwide, non-sublicensable license during the Term to download (and make up to five (5) copies) and use the Splunk Software solely to:
>
> **(i)** test the Splunk Software *for purposes of developing TAP Extensions* and to test TAP Extensions use with Splunk Software in a lab environment and to undertake other lab uses of the Splunk Software relating to the development and testing of TAP Extensions[, that is, 'including to support interoperability between the Splunk Software and TAP's system,' per Section 3.1].

Splunk's simplest point is that any reading of the contract whereby "reverse engineering" was "expressly permitted by Splunk" in Section 3.3 to trigger the exception in Section 4 was wrong because "reverse engineering" was not expressly stated by Splunk in Section 3.3. (It was stated in the prohibitions of Section 4(d).) But to be expressly permitted and to be expressly stated are not the same thing. A contract that expressly states that "the worker can use any tool in the shed" expressly permits the worker to use the screwdriver in the shed. Splunk's rereading of "unless otherwise expressly permitted by Splunk" as meaning "unless

otherwise expressly [stated] by Splunk" imposes an unduly cramped view of the express permissions that Splunk's partners relied upon.

Splunk's other point is that reverse engineering is not expressly permitted, either, because there were other ways to satisfy the permission to use Splunk Enterprise to "test the Splunk Software for purposes of developing TAP Extensions" and to "support interoperability between the Splunk Software and [the TAP Partner]'s system." By analogy, in other words, there were other tools in the shed besides the screwdriver (and screw) that could be used for connecting two things, namely a hammer (and nail). That is because the HEC protocol was available to partners, in Splunk's view obviating any need to reverse-engineer the S2S protocol. Splunk points to record evidence that it supported its TAP partner's use of the HEC protocol and never supported its TAP partner's use of the S2S protocol (Splunk Br. 5–6). But this runs headlong into jury findings that Splunk does not contest. The jury found "Cribl [could not] viably interoperate with Splunk forwarders and indexers without reverse engineering the S2S protocol" (I Verdict No. 1). In other words, a nail was not good enough (HEC), a screw was needed (S2S), and a screwdriver was essential to that installation (reverse engineering of S2S). Splunk may wish to emphasize other record evidence about what other partners did. But the jury's findings in phase one (read out in the morning) informed the Court's final instructions about the contract's permissions as articulated in phase two (finally published in the afternoon). There was no basis to state as a matter of law that Section 4's restrictions on reverse engineering were impervious to Section 3.3's permissions.

This forecloses even the need to reach whether Section 3's header imposed compliance with the restrictions of Section 4 because Section 4 itself already excepted from its restrictions anything expressly permitted anywhere else. This reading is not a piecemeal reading that ignores the whole contract. Indeed, the same interplay between Section 3 and Section 4 can be observed as to other express permissions and restrictions. For instance, Section 3.3 permits downloading five copies of Splunk Enterprise for purposes like testing, whereas Section 4 prohibits downloading any copy not necessary for running Splunk Enterprise, which is not five copies (Cribl Opp. 2). These provisions can be read together as consistent because Section 4

includes the exception "unless otherwise expressly permitted." They cannot be read together if Section 4's most restrictive language is read to dominate Section 3's most permissive language notwithstanding Section 4's own exception.

Moreover, Splunk abandoned the contention raised here that the prefatory remark in Section 3 subjected even Section 3.3 to the limitations in Section 4(d) regardless of the prefatory remark in Section 4 (*see* Cribl Opp. 2–3). Yes, it is true that Splunk did move for judgment as a matter of law that the TAP Agreement barred reverse engineering (Dkt No. 304 at 11). But the most specific that motion got about language in the TAP License was to cite a footnote to Splunk's prior filing calling forth certain terms in the contract for the Court to interpret (*id.* at 11 n.2 (citing Dkt. No. 269)) — and those terms did not include the new one raised here. (Indeed, Splunk's position cited therein led with this: "[A]ll other terms in the SGT and TAP agreements, other than as expressly noted below, should be submitted to the jury" (Dkt. No. 269 at 1).) Similarly, it is true that Splunk did object to phase-two jury instructions involving the TAP License (Dkt. No. 315 at 2–5). But it never objected on the basis of the specific language cited here. To suppose that a sweeping objection — such as an objection to any interpretation that would permit reverse engineering — could suffice to preserve all subsidiary ones would lead to absurd results. If that were the rule, a party to a jury trial could state its preferred results, not contribute to the work of contract interpretation at trial (which involves mixed questions of fact and law), and then seek judgment as a matter of law (or a new trial) if the results did not match preferences. This is no efficient way to administer justice, and nothing contrary is required by any binding decision cited by the non-binding decisions cited by Splunk (Splunk Reply 3 n.1).

(b) TAP License Overtakes SGT License Under Section 10.5(iii)?

Splunk next argues that the TAP License bars reverse engineering irrespective of the SGT License. Important to note here is that the two contracts addressed rights afforded by statutory law differently. The Court instructed the jury that the TAP License included an extra clause recognizing that the contract could relinquish fair use rights otherwise available (*see*

TAP § 4(d)), whereas the SGT License preserved the full extent to which the statutory privilege of fair use protected reverse engineering (*see* SGT § 9(a)) (II Instruction Nos. 9,14). Moreover, the Court instructed the jury that both contracts applied at all times and "[i]f you find that some or all of Cribl's reverse engineering was allowed by the SGT contract but not allowed by the TAP contract, the ambiguity must be resolved in Cribl's favor (so as to allow such reverse engineering) because the ambiguity should be resolved against the drafter" (II Instruction No. 14; *see also* Tr. 1759–60). For the first time, Splunk argues that the TAP License overtook the SGT License. This is based on a reading of Section 10.5(iii) of the TAP License (Splunk Br. 6). That section reads as follows:

> **10. General.**
>
> . . .
>
> **10.5 Entire Agreement[:]** The ['Technology Alliance Partner Program Agreement'] consists of the Program Guide, these Terms and Conditions and any documents, exhibits, addenda or further terms and conditions referenced therein, and comprises the entire agreement between Splunk and [the 'Technology Alliance Partner'] and supersedes all prior or contemporaneous negotiations, discussions or agreements, whether written or oral, between Splunk and TAP regarding the licenses granted herein, provided that:
>
> . . .
>
> **(iii)** to the extent there is conflict between the ['Technology Alliance Partner Program Agreement'] and the applicable *Splunk End User Software Agreement*, the ['Technology Alliance Partner Program Agreement'] shall govern; and . . . .

Note that Section 1 of the TAP defined "'*Splunk Software License Agreement*' [as] the then-current form of standard end user license agreement that governs the use of Splunk Software that any party looking to access and use Splunk Software must accept as part of the downloading process" — that is, the Splunk General Terms License.

The answer here is succinct: Splunk failed to preserve this argument. It never argued even in sweeping terms that the TAP License overtook the SGT License in the case of conflict. It never cited to Section 10.5(iii). As counsel for Splunk conceded at our oral argument on this motion (at 6):

> **MR. CASEY JAMES McCRACKEN [of Gibson Dunn & Crutcher, LLP, appearing for Splunk]:** . . . And finally on that issue, the TAP Agreement actually says which agreement controls in the event of a conflict between --
>
> **THE COURT:** Was that provision ever pointed out to me?
>
> **MR. McCRACKEN:** It was --
>
> **THE COURT:** No. It was not.
>
> **MR. McCRACKEN:** It was not in the objections to the Jury Instructions.
>
> **THE COURT:** It was not.
>
> **MR. McCRACKEN:** I agree with that.

Indeed, it was the district court — not Splunk — that even raised the possibility that the SGT License might operate at the same time as the TAP License (Tr. 1758–59, 1762). The district court proposed that any conflict should be construed against the drafter (*ibid.*; *compare also* Dkt. No. 312 at No. 13, *with* II Instruction No. 14 (adding)). Splunk neither proposed that both contracts applied, nor that the TAP License dominated the two. Even more basic than Splunk having had the best opportunity to avoid ambiguity in what it had drafted, it had the best opportunity to know what it had drafted. Splunk fired its counsel and brought in a new firm but that is not an occasion for new rulings on never-made objections or redo of a jury trial in federal court. Even if the jury had been told the TAP License's provisions overtook the SGT License's provisions, the jury still could have concluded from our record that the TAP License permitted reverse engineering for the reasons addressed above.

* * *

Splunk is not entitled to judgment as a matter of law that the TAP License barred reverse engineering, nor that the TAP License's stingy approach to fair use stamped out the SGT License's more permissive approach to fair use, so its motion in this regard (Splunk Br. 3–6) is **DENIED**.

(ii) Splunk's Motion Seeking a Ruling that Cribl Breached the SGT License in Still More Ways.

Splunk argues that it is entitled to judgment as a matter of law that the SGT License was breached not only by Cribl's marketing uses of Splunk Enterprise but also by its reverse-engineering, testing, and troubleshooting uses. The jury found that the SGT License was breached (II Verdict No. 5). But, it did not specifically find what provisions of the SGT License were breached. *Nor did Splunk at the time ask that the verdict form be more specific to avoid this ambiguity.* Instead pointing out this ambiguity after post-trial briefing, the district court found that the evidence at trial and *the jury's other findings* were most consistent with the jury having found that marketing uses violated the SGT License and were not fair uses, but that troubleshooting, testing, and reverse-engineering were fair uses not violating the SGT License (Order re Remaining Claims 7). Its arguments focus on Section 9(a), Section 9(c), and Section 9(e). All together and in context, they read as follows:

> **9. Use Restrictions[:]** *Except as expressly permitted in an Order, these General Terms or our Documentation*, you agree not to (nor allow any user or Third Party Provider to): **(a)** reverse engineer (*except to the extent specifically permitted by statutory law*), decompile, disassemble or otherwise attempt to discover source code or underlying structures, ideas or algorithms of any Offering; **(b)** modify, translate or create derivative works based on the Offerings; **(c)** use an Offering for service bureau purposes, or for any purpose other than your own Internal Business Purposes; **(d)** resell, transfer or distribute any Offering; **(e)** access or use any Offering in order to monitor its availability, performance, or functionality for competitive purposes; **(f)** attempt to disable or circumvent any license key or other technological mechanisms or measures intended to prevent, limit or control use or copying of, or access to, Offerings; **(g)** separately use any of the applicable features and functionalities of the Offerings with external applications or code not furnished by Splunk or any data not processed by the Offering; **(h)** exceed the Capacity purchased or **(i)** use any Offering in violation of all applicable laws and regulations (including but not limited to any applicable privacy and intellectual property laws).

(SGT § 9 (all but first emphasis added)).

(a) Fair Use Not "Specifically Permitted by Statutory Law" Under Section 9(a)?

Splunk first argues that Section 9(a) did not contemplate any exception for fair uses, and that even if it had contemplated such exception it only would have applied to fair uses for reverse engineering (Splunk Br. 7–8). Under Section 9(a), the user agrees not to "**(a)** reverse engineer (*except to the extent specifically permitted by statutory law*), decompile, disassemble or otherwise attempt to discover source code or underlying structures, ideas or algorithms of any Offering" (SGT § 9(a)). The jury was instructed that "the parenthetical phrase '(except to the extent specifically permitted by statutory law)' would include the fair use exception of the Copyright Act" (II Instruction No. 14). The jury found there was a breach of the SGT contract (II Verdict No. 5).

First, Splunk argues that reverse engineering is not "specifically" set forth by statutory law on fair use because the statutory right of fair use is a flexible concept. What statutory law did the parties reasonably have in mind, if not the statutory right of fair use in the Copyright Act? Splunk alludes to some statute in Germany as what the parties had in mind, to the exclusion of our law. This is ridiculous. The contract was made in America and certainly the parties had reasonably in mind American "statutory law" including our Copyright Act. And, Section 107 specifically allows fair use of copyrighted material.

Second, Splunk argues that reverse engineering is not "permitted" by statute, or not "specifically permitted," because fair use protections can be contracted away by private ordering. It would be a strange contract indeed that contracted away a statutory protection by going out of its way to preserve it. Again, any ambiguity here must be construed against the drafter.

Third, Splunk argues that the exception for statutory permissions applied only to excuse reverse engineering, not to excuse "decompiling, disassembling, or 'otherwise attempt[ing] to discover'" the "underlying structures, ideas, or algorithms" of Splunk Enterprise (Splunk Br. 8). Splunk's argument is based on the so-called "last antecedent rule," that "qualifying words, phrases[,] and clauses are to be applied to the words or phrases immediately preceding

and are not to be construed as extending to or including others more remote." *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 147 Cal. App. 4th 137, 150 (2007) (cleaned up). This misses the forest for the trees. There is also a canon to construe a contract so that it effects its purpose. Because decompiling and disassembling are common methods of reverse engineering, as established in our trial record, it is difficult to see how a permission to reverse engineer would disallow decompiling or disassembling full stop.

(b) Reverse Engineering, Testing, and Troubleshooting Not "Internal Business Purpose[s]" Under Section 9(c), or Equal to "Monitor[ing]" Under Section 9(e)?

Splunk next argues Section 9(c) and/or Section 9(e) were necessarily violated by reverse-engineering (Splunk Br. 8–9). We have heard variants of these arguments before (*e.g.*, Dkt. No. 315 at 7–8), but most notably after the phase two verdict came back and Splunk moved for injunctive relief (*see* II Verdict No. 5; Dkt. No. 347). The answer there provided still suffices:

> Note the verdict is ambiguous concerning the extent to which the jury found Cribl liable for breaching the SGT contract. On the one hand, it might have found that several uses of the Splunk Enterprise copyrighted software by Cribl violated the "internal business purposes" use restriction in Section 9(c) and monitoring for competitive purposes use restriction in Section 9(e). On the other hand, it might have found that only the marketing uses did so. In any event, it cannot be said that Cribl has established that it should get off scot-free because some (but not all) of its uses of Splunk Enterprise were fair uses, notwithstanding all language in the SGT contract.
>
> . . .
>
> One question teed up by the briefing of the motion for a permanent injunction is whether the SGT contract's use restrictions governing "internal business purposes" (in Section 9(c)) and monitoring for competitive purposes (in Section 9(e)) could override and disallow those statutory fair uses, as Splunk argued in its motion and at the hearing. As a matter of contract interpretation, this order finds they cannot. Why go through the trouble of spelling out how the SGT contract preserved the extent to which statutory law protects reverse engineering if such restrictions could override and disallow this anyways? Meanwhile, copying and using Splunk Enterprise to reverse engineer the S2S protocol, as required to viably interoperate Cribl Stream with Splunk Enterprise, accomplishes nothing if Cribl cannot copy and use Splunk Enterprise to test and troubleshoot Cribl Stream for maintaining the interoperability. Such ambiguity in the SGT contract will be resolved against the

> drafter, Splunk, so as to ultimately allow all statutory fair uses of Splunk Enterprise. Keep in mind, however, that copying and using Splunk Enterprise to market Cribl Stream was not and is not a statutory fair use.
>
> The verdict is ambiguous concerning the extent to which the jury found Cribl liable for infringing Splunk's copyright. And, as already mentioned, it is all the more ambiguous concerning the extent to which the jury found Cribl liable for breaching the SGT contract. On the one hand, it might have found that several uses of Splunk Enterprise by Cribl violated the "internal business purposes" and monitoring for competitive purposes use restrictions. On the other hand, it might have found that only the marketing uses did so. Assuming, arguendo, the broadest possible finding of liability (contrary to the interpretation above), this order holds that an injunction is warranted but the balance of the hardships as well as the public interest militate against the broadest possible injunction.

(Order re Remaining Claims 3, 6–7).

* * *

Splunk is not entitled to judgment as a matter of law that the SGT License was breached in each of these additional ways so its motion in this respect (Splunk Br. 6–9) is **DENIED**.[*]

2. THE RULE 59 MOTION.

Splunk alternatively seeks a new trial on breach of the TAP License and on damages. Splunk's arguments for a new trial in each respect are premised wholly on the same arguments already rejected above. In particular, "[a]s Splunk explained above" but never at trial, to the extent its arguments turn on the provision of the TAP License suggesting that the TAP License overtakes the SGT License in case of conflict, these arguments may or may not be the basis for a claim by Splunk against its counselors — recall the jury found the SGT License breached but the TAP License not breached, the latter being the one Splunk now says should take priority — but these arguments are not the basis for a new trial. The juries of this district cannot be asked to suffer another trial every time Splunk fails to win and with a new flash of thinking wants another turn. Splunk's motion for a new trial is **DENIED**.

[*] For preservation purposes only, Cribl also renews an earlier Rule 50(a) motion (Cribl Br. 11). At trial, Cribl had moved for judgment that the SGT License was not enforceable for instances of Splunk Enterprise downloaded from the Docker website. Cribl still fails to convince on this point.

3. THE MOTION TO AMEND THE JUDGMENT AND THE INJUNCTION.

Splunk's motion to amend the judgment and injunction also rest on all the same points already rejected, except that one fresh point is provided. Splunk argues that the injunction should have specified that the judgment applies to "Cribl Stream" but not "Cribl software." Splunk's argument is that nothing in our trial involved Cribl software other than Cribl Stream. But Splunk made contrary points when requesting to remove Cribl "Stream" from the jury instructions in favor of Cribl software or still broader verbiage (*e.g.*, Tr. 1752–53 (requesting to remove "Stream" to emphasize "reverse engineering" as such); Dkt. No. 315 at 2, 6 (same, and no contest to "Cribl software")). That made sense then. The evidence, the contracts, and the statutory law decided by the jury and the district judge did not turn so narrowly on one version of Cribl's software so much as on Splunk's contracts and the factual requirements for achieving interoperability with Splunk's software (*e.g.*, II Instruction Nos. 8, 14 ("Cribl software")).

The practical import of this amendment is also unclear. To remain within the scope of the injunction as amended, would Cribl simply ensure that all its software was marketed under the mark Cribl Stream — prompting Splunk to complain next that "Cribl Stream's" scope although *not* expanding superficially *was* expanding substantively? In its instant motion, Splunk does not point to a substantive expansion, only to the possibility of a superficial one of some kind. This is not a sufficient basis for amending the injunction.

Splunk's motion to amend the injunction is **DENIED**.

CONCLUSION

All post-trial motions are **DENIED.**

IT IS SO ORDERED.

Dated: December 31, 2025.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC. and CLINT SHARP,

Defendants.

No. C 22-07611 WHA

ORDER RE MOTION TO DISMISS

INTRODUCTION

In this intellectual property dispute, alleged infringers move to dismiss patent and copyright claims. For the following reasons, the motion is **GRANTED IN PART** and **DENIED IN PART**.

STATEMENT

Patent and copyright owner Splunk Inc. was founded in 2003 and runs a platform for analyzing large volumes of data. Its flagship product, Splunk Enterprise, "ingests real-time flows of machine data from disparate sources across a distributed environment and indexes that data, regardless of its source or format." This allows customers to "interact with their data through an interface from which they can generate graphs, reports, alerts, dashboards, and visualizations," and "monitor and react to their data in real time" (Compl. ¶¶ 1, 17).

Splunk Enterprise is customizable. Recognizing that customers use different types of data in different ways, Splunk "supports and encourages third parties to develop on top of the Splunk platform," "extending the features and functionality." Through its Technology Alliance Partner ("TAP") program, Splunk grants partners a license to use its software development tools and a limited license to run Splunk Enterprise software for related development (Compl. ¶¶ 22, 24–25).

According to Splunk, some Splunk software is specifically provided for partners to use, such as the "HEC" protocol, which enables partners to send data to, or receive data from, a running copy or "instance" of Splunk Enterprise. Other Splunk software is apparently proprietary, such as the "S2S" or "Splunk-to-Splunk" protocol, which Splunk uses to send data to, or receive data from, Splunk Enterprise and other Splunk software. Splunk alleges that it "does not support use of S2S by third parties, does not publish S2S's source code, and does not document S2S in a manner that facilitates third-party use of this protocol" (Compl. ¶¶ 31–32).

Alleged infringer Cribl, Inc. was founded in 2017 by three former Splunk employees, including alleged infringer and Cribl CEO Clint Sharp. In 2018, Cribl launched its first product, now known as Stream, and joined the TAP program by entering into a TAP agreement with Splunk. Stream and other Cribl products interoperate with Splunk Enterprise. As explained by Splunk with respect to Stream, "Stream sits between a Splunk customer's sources of machine data and that customer's Splunk Enterprise instance. Instead of flowing directly from data sources into Splunk Enterprise, data flows into Stream. Stream can then filter this data before it is passed along to Splunk Enterprise, with a goal of reducing the total volume of data a customer adds to its Splunk Enterprise instance" (Compl. ¶¶ 2–3, 39, 46, 51).

In November 2021, Splunk terminated Cribl's membership in the TAP program, thereby terminating the TAP agreement. Roughly one year later, it filed an 85-page complaint against Cribl and CEO Sharp alleging patent infringement, copyright infringement, and other unfair business practices. According to Splunk, Cribl has infringed patents awarded to Splunk for its foundational innovations, developed and marketed its software by making unlicensed copies of Splunk's copyrighted software, and used misappropriated information to compete unfairly

against Splunk. Meanwhile, CEO Sharp "actively participated" in the misappropriation. Among other actions, he purportedly posted a derivative of Splunk's copyrighted source code — "go-S2S" — to his personal webpage on code hosting platform GitHub before leaving Splunk to found Cribl with this source code, replacing Splunk's copyright headers with a false open-source license to obscure unlawful copying before taking the code offline in December 2021 (Compl. ¶¶ 2, 4, 33–37, 42–44, 67; *see generally* Compl. ¶¶ 119–338).

Cribl and CEO Sharp (together, "alleged infringers") now move to dismiss patent and copyright claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Specifically, they move to dismiss: (1) all claims for willful and indirect patent infringement against Cribl; (2) all claims for patent infringement against Cribl based on ineligibility of all asserted patents; (3) all claims for indirect copyright infringement against Cribl and CEO Sharp; and (4) a claim for violation of the Digital Millennium Copyright Act Section 1202 against CEO Sharp. The claims will be taken up in turn. This order follows full briefing and oral argument.

ANALYSIS

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). At the pleading stage, a district court "accept[s] all factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). A "legal conclusion couched as a factual allegation," however, may be disregarded. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

1. WILLFUL AND INDIRECT PATENT INFRINGEMENT.

Splunk alleges that Cribl committed willful patent infringement and both forms of indirect patent infringement (induced and contributory infringement) of all five asserted patents: U.S. Patent Nos. 9,208,206; 9,762,443; 10,805,438; 10,255,312; and 9,838,467.

According to alleged infringers, Splunk's willful and indirect infringement claims against Cribl should be dismissed because Splunk has not pleaded that Cribl had pre-suit knowledge of the asserted patents, let alone pre-suit knowledge of their infringement. Alleged infringers emphasize that Splunk has failed to assert that it sent Cribl a notice letter, much less that anyone at Cribl was personally aware of the asserted patents. Instead, Splunk "merely implies" that Cribl gained knowledge of the asserted patents because its co-founders and some of its employees previously participated in Splunk's patent program (Br. 1). According to alleged infringers, this is insufficient when "general knowledge of a patentee's portfolio does not plausibly allege actual notice of a particular patent" (Br. 1–2). Splunk counters that it has alleged pre-suit knowledge not based on general knowledge of a patent portfolio but rather "extensive factual allegations," such as:

> (1) Cribl was founded by ex-Splunkers who managed Splunk software products that practice the patents Cribl infringes (*e.g.*, Compl. ¶¶ 89–93, 116–118); (2) this software is marked as practicing the asserted patents (*id.* ¶ 114); (3) Cribl has been a customer/user of the software since it was founded (*id.* ¶¶ 22–29; 69–78); (4) Cribl copied this software (*id.* ¶ 118); and (4) [*sic*] Cribl's founders and employees were aware of Splunk's patent-marking page when it copied and used this software (*id.* ¶¶ 116–118).

(Opp. 22–23). This order agrees with alleged infringers that such allegations are too attenuated to support a showing of pre-suit knowledge.

To establish willful infringement, a patent owner must prove knowledge of the asserted patents and knowledge of their infringement. Although the jury decides willfulness, willfulness only goes to the jury if it was properly framed by the pleadings. Seeing that no additional pleading requirements have been expounded since the legal standard for willful infringement was clarified in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 579 U.S. 93 (2016), knowledge of the asserted patents and knowledge of their infringement should be pleaded with plausibility. *Sonos, Inc. v. Google LLC*, 591 F. Supp. 3d 638, 643 (N.D. Cal. 2022), *leave to appeal denied*, 2022 WL 1486359 (Fed. Cir. May 11, 2022). Because both forms of indirect infringement also require such knowledge, the "foregoing ground rules concerning the adequate pleading of willful infringement . . . apply with parallel force to the

parallel issues for indirect infringement." *Id*. at 647. In other words, knowledge of the asserted patents and knowledge of their infringement should be pleaded with plausibility for indirect infringement claims as well.

Prior orders have explained the need for a notice letter in almost all circumstances. *See id*. at 643–44; *Sonos, Inc. v. Google LLC*, 2022 WL 2046828, at *3 (N.D. Cal. June 7, 2022); *MasterObjects v. Amazon.com, Inc.*, 2021 WL 4685306, at *7 (N.D. Cal. Oct. 7, 2021). The practice of establishing pre-suit knowledge through a cease-and-desist letter that calls out patent claims and how accused products infringe should be encouraged to give an alleged infringer a meaningful opportunity to cease infringement or get a license before a lawsuit commences. (That such a letter may provoke a declaratory relief suit in a district of that alleged infringer's choosing does *not* excuse the failure to send one.) Although there are circumstances in which pre-suit knowledge is properly alleged despite the absence of a notice letter, "the complaint will generally not be adequate to serve as notice for either willful or indirect infringement." *Sonos*, 591 F. Supp. 3d at 648.

Such is the case here. That Cribl was founded by ex-Splunkers who once managed products which practice patents Cribl allegedly infringes does not give rise to a plausible inference that Cribl's founders were aware of the five specific asserted patents and that they were infringing them. This knowledge would be above and beyond what could reasonably be expected of senior technical employees — at least when they were not named inventors of the asserted patents. Similarly, that Splunk software directed those who used it to a patent-marking webpage listing Splunk patents and corresponding Splunk products does not give rise to a plausible inference that Cribl's founders or employees were aware of the five specific asserted patents and that they were infringing them. The implication seems to be that these individuals would affirmatively investigate which of over 1,000 Splunk patents their Splunk software practiced *even though Cribl had received a license to use that Splunk software* pursuant to the TAP agreement. Again, this is untenable. It is especially untenable upon review of the patent-marking webpage, excerpts of which are provided below (Compl. Exh. P). Note two patents-in-suit are listed under "Splunk® Enterprise," two patents-in-suit are listed

under "Splunk® Apps," and one patent-in-suit is listed under "Splunk® Technology." They are highlighted for ease of reference.

Splunk® Enterprise

10,013,454, 10,019,226, 10,019,496, 10,037,331, 10,049,473, 10,055,886, 10,061,626, 10,061,807, 10,061,821, 10,061,824, 10,067,876, 10,067,944, 10,069,972, 10,083,190, 10,091,358, 10,095,397, 10,095,741, 10,108,403, 10,114,663, 10,127,258, 10,133,806, 10,139,997, 10,142,412, 10,152,773, 10,162,863, 10,164,994, 10,169,405, 10,169,434, 10,178,152, 10,185,708, 10,185,740, 10,193,916, 10,203,842, 10,204,093, 10,204,132, 10,216,779, 10,216,862, 10,223,423, 10,223,826, 10,225,136, 10,229,150, 10,235,221, 10,235,345, 10,235,409, 10,235,418, 10,235,431, 10,235,460, 10,235,803, 10,242,039, 10,242,086, 10,242,109, 10,243,818, 10,244,114, 10,255,310, 10,255,312, 10,255,322, 10,261,673, 10,268,652, 10,268,755, 10,282,455, 10,282,463, 10,296,616, 10,303,344, 10,310,708, 10,318,360, 10,318,535, 10,318,537, 10,318,541, 10,318,553, 10,318,555, 10,320,877, 10,324,957, 10,326,883, 10,331,720, 10,339,149, 10,339,162, 10,346,357, 10,353,957, 10,362,041, 10,372,722, 10,375,098, 10,379,895, 10,380,122, 10,387,396, 10,387,423, 10,387,448, 10,388,067, 10,394,802, 10,394,946, 10,402,384, 10,403,041, 10,409,794, 10,419,494, 10,423,595, 10,444,956, 10,459,938, 10,459,939, 10,460,255, 10,460,519, 10,467,263, 10,474,674, 10,474,682, 10,496,605, 10,496,731, 10,503,698, 10,506,084, 10,509,555, 10,509,784, 10,509,794, 10,515,469, 10,523,538, 10,528,607, 10,534,791, 10,536,356, 10,540,321, 10,545,798, 10,545,964, 10,552,728, 10,558,614, 10,558,651, 10,565,196, 10,565,220, 10,572,811, 10,579,607, 10,579,648, 10,585,851, 10,585,910, 10,585,919, 10,592,694, 10,594,576, 10,599,308, 10,606,810, 10,606,856, 10,606,857, 10,607,150, 10,614,132, 10,642,852, 10,650,069, 10,656,924, 10,657,146, 10,659,609, 10,678,696, 10,678,767, 10,678,803, 10,679,142, 10,685,001, 10,685,279, 10,688,394, 10,693,743, 10,698,777, 10,698,895, 10,698,897, 10,698,900, 10,705,695, 10,713,245, 10,713,269, 10,713,314, 10,719,493, 10,719,525, 10,725,616, 10,726,030, 10,726,037, 10,726,354, 10,728,389, 10,735,492, 10,740,313, 10,740,970, 10,747,742, 10,748,330, 10,761,687, 10,762,081, 10,762,097, 10,768,786, 10,768,798, 10,769,178, 10,776,194, 10,776,350, 10,778,710, 10,778,761, 10,783,318, 10,783,324, 10,795,555, 10,798,148, 10,802,797, 10,810,221, 10,810,771, 10,810,796, 10,812,514, 10,817,544, 10,817,757, 10,838,605, 10,846,316, 10,853,082, 10,853,380, 10,853,382, 10,853,383, 10,853,399, 10,855,712, 10,855,793, 10,860,537, 10,860,591, 10,860,592, 10,860,624, 10,861,202, 10,866,994, 10,877,963, 10,877,986, 10,877,987, 10,885,026, 10,885,125, 10,887,320, 10,891,281, 10,891,284, 10,896,175, 10,896,182, 10,901,811, 10,908,977, 10,909,140, 10,909,151, 10,915,583, 10,929,163, 10,929,560, 10,936,643, 10,942,774, 10,949,419, 10,956,278, 10,956,481, 10,956,834, 10,977,233, 10,977,286, 10,983,788, 10,984,013, 10,985,970, 10,997,138, 10,997,191, 11,003,337, 11,003,644, 11,003,675, 11,003,682, 11,003,687, 11,003,691, 11,010,214, 11,010,390, 11,010,412, 11,010,970, 11,016,821, 11,030,173, 11,030,192, 11,030,254, 11,036,566, 11,036,567, 11,037,342, 11,042,510, 11,042,515, 11,042,539, 11,042,545, 11,042,591, 11,042,697, 11,055,300, 11,061,918, 11,062,016, 11,068,323, 11,068,452, 11,074,216, 11,074,283, 11,075,825, 11,087,236, 11,093,476, 11,093,837, 11,095,690, 11,100,150, 11,106,691, 11,106,713, 11,113,342, 11,119,728, 11,119,833, 11,119,982, 11,120,344, 11,126,477, 11,138,191, 11,138,218, 11,144,521, 11,144,528, 11,144,608, 11,151,083, 11,151,137, 11,157,446, 11,159,397, 11,163,599, 11,163,738, 11,170,016, 11,170,129, 11,172,065, 11,176,146, 11,182,367, 11,184,467, 11,188,550, 11,189,083, 11,190,422, 11,194,794, 11,200,246, 11,204,817, 11,210,072, 11,210,325, 11,216,491, 11,222,014, 11,226,977, 11,227,208, 11,231,840, 11,232,124, 11,232,146, 11,238,033, 11,238,057, 11,244,247, 11,249,710, 11,249,971, 11,250,068, 11,252,224, 11,269,476, 11,269,808, 11,288,231, 11,288,283, 11,294,559, 11,308,061, 11,310,313, 11,314,733, 11,314,744, 11,314,758, 11,314,759, 11,314,761, 11,314,799, 11,316,882, 11,321,311, 11,341,129, 11,347,577, 11,347,695, 11,348,294, 11,349,947, 11,354,308, 11,354,365, 11,375,011, 11,379,479, 11,379,508, 11,379,530, 11,386,109, 11,386,133, 11,392,590, 11,392,604, 11,394,767, 11,403,333, 11,409,758, 11,411,804, 11,422,873, 11,423,216, 11,429,608, 7,937,344, 8,112,425, 8,412,696, 8,515,963, 8,516,008, 8,548,961, 8,566,336, 8,583,631, 8,589,304, 8,589,321, 8,589,375, 8,589,403, 8,589,432, 8,589,876, 8,682,886, 8,682,906, 8,682,925, 8,694,450, 8,745,109, 8,751,499, 8,751,529, 8,751,963, 8,756,262, 8,756,593, 8,756,614, 8,788,459, 8,788,525, 8,788,526, 8,825,664, 8,904,389, 8,909,642, 8,943,056, 8,972,992, 8,977,638, 8,983,994, 8,990,184, 8,990,245, 9,002,854, 9,015,716, 9,031,955, 9,047,246, 9,087,090, 9,124,612, 9,128,779, 9,128,916, 9,128,980, 9,128,985, 9,129,028, 9,129,041, 9,130,971, 9,142,049, 9,152,682, 9,152,929, 9,160,798, 9,177,002, 9,185,007, 9,208,206, 9,229,985, 9,245,039, 9,256,501, 9,280,594, 9,292,590, 9,298,805, 9,317,582, 9,361,357, 9,384,261, 9,417,774, 9,419,870, 9,426,045, 9,430,488, 9,430,574, 9,437,022, 9,442,981, 9,509,765, 9,514,175, 9,582,557, 9,582,585, 9,589,012, 9,594,545, 9,594,789, 9,594,814, 9,607,414, 9,645,975, 9,646,398, 9,667,640, 9,733,974, 9,740,755, 9,740,788, 9,747,316, 9,753,909, 9,753,974, 9,754,359, 9,754,395, 9,767,112, 9,767,122, 9,813,528, 9,817,854, 9,817,862, 9,836,336, 9,836,501, 9,836,623, 9,836,874, 9,842,160, 9,842,432, 9,843,598, 9,916,346, 9,921,730, 9,921,732, 9,922,037, 9,922,065, 9,922,066, 9,922,067, 9,922,082, 9,922,084, 9,922,097, 9,922,099, 9,922,102, 9,922,114, 9,928,262, 9,942,318, 9,977,803, 9,978,127, 9,983,912, 9,983,954, 9,984,128, 9,984,129, 9,990,386, 9,990,423, 9,990,769, 9,992,208, 9,996,571

Splunk® Apps

The following patents as well as other apply to one or more Splunk Apps:

10,007,710, 10,049,160, 10,114,663, 10,127,273, 10,152,480, 10,205,643, 10,243,818, 10,257,059, 10,264,106, 10,310,708, 10,334,085, 10,348,583, 10,353,965, 10,360,196, 10,366,101, 10,374,883, 10,379,895, 10,380,799, 10,382,599, 10,387,408, 10,439,922, 10,459,819, 10,460,255, 10,462,002, 10,462,004, 10,469,344, 10,474,723, 10,503,784, 10,515,469, 10,523,521, 10,523,538, 10,536,351, 10,536,356, 10,552,287, 10,564,622, 10,567,557, 10,585,851, 10,585,951, 10,592,522, 10,592,525, 10,592,561, 10,592,562, 10,592,563, 10,599,723, 10,599,724, 10,664,298, 10,671,262, 10,678,804, 10,684,934, 10,691,523, 10,693,742, 10,693,743, 10,700,950, 10,701,191, 10,719,332, 10,726,009, 10,726,080, 10,747,816, 10,754,638, 10,761,687, 10,761,813, 10,762,049, 10,769,163, 10,775,976, 10,776,140, 10,776,355, 10,776,377, 10,776,441, 10,795,884, 10,805,438, 10,860,596, 10,860,618, 10,860,665, 10,880,366, 10,885,049, 10,904,080, 10,909,128, 10,909,182, 10,916,063, 10,917,389, 10,922,341, 10,922,625, 10,929,163, 10,929,415, 10,936,585, 10,942,897, 10,951,474, 10,956,362, 10,956,415, 10,970,298, 10,977,260, 10,997,180, 10,997,192, 11,003,475, 11,003,714, 11,010,236, 11,010,435, 11,023,463, 11,023,504, 11,023,539, 11,036,456, 11,074,152, 11,075,825, 11,080,345, 11,086,289, 11,086,890, 11,086,897, 11,087,236, 11,093,518, 11,093,564, 11,100,150, 11,100,172, 11,106,442, 11,106,681, 11,106,734, 11,108,659, 11,113,301, 11,113,353, 11,115,505, 11,126,632, 11,127,223, 11,132,373, 11,144,185, 11,151,125, 11,157,498, 11,159,397, 11,163,599, 11,163,758, 11,169,900, 11,176,208, 11,194,552, 11,194,564, 11,210,278, 11,210,622, 11,216,453, 11,218,366, 11,222,066, 11,232,100, 11,232,125, 11,238,012, 11,238,048, 11,238,112, 11,243,963, 11,245,581, 11,250,056, 11,250,371, 11,252,056, 11,256,497, 11,263,229, 11,269,876, 11,269,908, 11,269,939, 11,281,643, 11,281,706, 11,288,231, 11,294,941, 11,296,951, 11,308,163, 11,314,613, 11,314,737, 11,314,753, 11,321,321, 11,341,131, 11,386,127, 11,392,654, 11,392,655, 11,403,350, 11,405,301, 11,409,756, 11,416,278, 11,416,528, 11,422,686, 11,429,627, 11416505, 8,683,467, 8,738,587, 8,738,629, 8,751,486, 8,793,225, 8,904,389, 8,972,992, 9,015,716, 9,043,332, 9,047,181, 9,052,938, 9,122,746, 9,142,049, 9,164,786, 9,185,007, 9,275,338, 9,323,557, 9,417,774, 9,419,870, 9,426,045, 9,471,362, 9,495,187, 9,514,189, 9,594,828, 9,596,253, 9,733,974, 9,754,395, 9,762,443, 9,836,502, 9,838,512, 9,916,367, 9,916,379, 9,916,385, 9,921,733, 9,923,767, 9,934,309, 9,935,864, 9,940,336, 9,959,015, 9,990,265, D946,024, D946,025, D946,026

Splunk® Technology

The following patents as well as others apply to Splunk Technology:

10,026,204, 10,055,312, 10,061,680, 10,089,143, 10,115,126, 10,204,450, 10,388,067, 10,403,041, 10,409,668, 10,419,528, 10,425,300, 10,432,497, 10,460,519, 10,469,346, 10,482,493, 10,497,019, 10,545,838, 10,554,788, 10,599,529, 10,628,603, 10,628,771, 10,652,261, 10,657,680, 10,684,934, 10,692,299, 10,735,296, 10,740,970, 10,776,818, 10,789,279, 10,789,613, 10,810,796, 10,831,648, 10,887,157, 10,891,792, 10,909,772, 10,911,369, 10,922,493, 10,922,892, 10,937,052, 10,938,634, 10,949,253, 10,949,420, 10,977,222, 11,010,970, 11,017,764, 11,023,511, 11,037,192, 11,048,760, 11,074,152, 11,080,641, 11,102,095, 11,113,294, 11,127,223, 11,144,336, 11,145,123, 11,182,576, 11,194,647, 11,212,207, 11,216,511, 11,217,023, 11,226,964, 11,237,813, 11,237,922, 11,240,348, 11,263,268, 11,269,859, 11,269,871, 11,276,236, 11,276,240, 11,288,319, 11,302,083, 11,303,503, 11,316,749, 11,379,670, 11,386,113, 11,386,158, 11,409,645, 11,410,403, 11,416,285, 11,430,196, 8,978,036, 8,990,637, 9,009,539, 9,208,000, 9,313,177, 9,324,022, 9,355,006, 9,514,021, 9,660,930, 9,747,152, 9,753,818, 9,807,192, 9,836,358, 9,838,292, 9,838,346, 9,838,467, 9,853,946, 9,916,326, 9,990,769

Finally, even assuming Cribl knowingly used and copied Splunk software *after* Splunk terminated the TAP agreement, this does not suggest that Cribl was aware of the five specific asserted patents and that it was infringing them. That Cribl employees could have visited the patent-marking webpage under such circumstances is insufficient to create a plausible inference of pre-suit knowledge (or "willful blindness").

This order recognizes that one circumstance in which willful and indirect patent infringement may be properly alleged despite the absence of a notice letter is when the alleged infringer "may have had a prior license, but the license ran out." *Sonos*, 591 F. Supp. 3d at 644. The license that ran out here, however, derives from the TAP agreement between

Splunk and Cribl. It would be unfair to suggest that Cribl's pre-suit knowledge of the five specific asserted patents could derive from the termination of this agreement.

The agreement itself expressly states, *inter alia*, that Splunk grants Cribl "a non-exclusive, non-transferable, worldwide, non sublicenseable license during the Term to download (and make up to five (5) copies) and use the Splunk Software" (Compl. ¶ 27 (quoting Exh. B § 3.3)). In other words, pursuant to the TAP agreement, Cribl received a software license — an authorization to use Splunk software under Splunk's intellectual property rights. But the TAP agreement and its license grant never enumerate those intellectual property rights or name the patents-in-suit. The only use of the word "patent" in the agreement is in reference to "remov[ing] or obscur[ing] any copyright, trademark, patent, or other proprietary notices, legends or symbols from the Splunk Software," which is forbidden. The agreement otherwise only broadly refers to Splunk's "intellectual property" and "intellectual property rights," which "nothing in the Agreement transfers or assigns" (Exh. B §§ 4, 5.1). If Cribl had a license that expressly covered the five specific asserted patents, and that license ran out, it would give rise to a plausible inference that Cribl had pre-suit knowledge of the five specific asserted patents and their infringement. But the TAP agreement was no such license.

In sum, Splunk's allegations are insufficient to plead pre-suit knowledge, as required for willful and indirect patent infringement. The motion to dismiss as to Splunk's willful and indirect patent infringement claims against Cribl is therefore **GRANTED**. This order does not reach alleged infringers' alternative arguments regarding Splunk's allegedly insufficient pleadings of specific intent and lack of substantial non-infringing uses.

2. INELIGIBILITY OF ASSERTED PATENTS.

Next, alleged infringers move to dismiss all of Splunk's patent claims against Cribl based on ineligibility of the five asserted patents under Section 101 of the Patent Act. 35 U.S.C. § 101. When there are no plausible factual disputes after drawing all reasonable inferences in favor of the non-movant, patent eligibility can be determined at the Rule 12 stage. *Coop. Ent.,*

Inc. v. Kollective Tech., Inc., 50 F.4th 127, 130 (Fed. Cir. 2022). This order finds that appropriate here.

A. THE LEGAL STANDARD.

Section 101 addresses the preemption concerns underlying patent law. It provides that whoever "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." 35 U.S.C. § 101. The implicit corollary is that laws of nature, natural phenomena, and abstract ideas are not patent eligible. *Mayo Collab. Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70–71 (2012). After all, "monopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it." *Ibid.*

"Short and unadorned, [Section] 101 appears deceptively simple on its face, yet its proper application to computer-implemented inventions and in various other fields of technology has long vexed [the Federal Circuit] and other courts." *CLS Bank Int'l v. Alice Corp. Pty.*, 717 F.3d 1269, 1276 (Fed. Cir. 2013) (*en banc*) (Judge Alan D. Lourie, concurring), *aff'd*, 573 U.S. 208 (2014). In *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208 (2014), the Supreme Court set out our two-step inquiry for evaluating patent claims under Section 101. Patent eligibility is assessed by reference to *Alice* and cases engaging in the *Alice* two-step analysis. *See In re Killian*, 45 F.4th 1373, 1383 (Fed. Cir. 2022).

At step one, the district court evaluates whether patent claims are directed to an abstract idea. *Alice*, 573 U.S. at 218. The Federal Circuit has explained that the district court should consider whether the claims "focus on a specific means or method that improves the relevant technology" or are instead "directed to a result or effect that itself is the abstract idea and merely invoke generic processes and machinery." *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229, 1241 (Fed. Cir. 2016). The district court should also consider whether the claims purport to improve the functioning of a computer or merely require generic computer implementation. *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1338–39 (Fed. Cir. 2016); *Alice*, 573 U.S. at 221–25. Claims that merely carry out a longstanding commercial practice

with the benefit of a computer are directed to abstract ideas, as are those that merely gather, analyze, and display information. *See Alice*, 573 U.S. at 219; *Intell. Ventures I LLC v. Cap. One Fin. Corp.*, 850 F.3d 1332, 1340–41 (Fed. Cir. 2017) (*Capital One*); *Intell. Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1313–14 (Fed. Cir. 2016) (*Symantec*); *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1354 (Fed. Cir. 2016). When there are "close calls about how to characterize what the claims are directed to," "an analysis of whether there are arguably concrete improvements in the recited computer technology could take place under step two." *Enfish*, 822 F.3d at 1339.

At step two, if the patent claims are directed to an abstract idea, the district court evaluates whether the claimed elements recite an inventive concept that transforms an otherwise abstract idea into a patent-eligible invention. *Alice*, 573 U.S. at 221. A patent claim must do more than state an abstract idea and say "apply it" or "apply it with a computer." *Id.* at 223–24. "[S]imply appending conventional steps, specified at a high level of generality, to laws of nature, natural phenomena, and abstract ideas cannot make those laws, phenomena, and ideas patentable." *Mayo*, 566 U.S. at 82. Thus, the district court should consider whether the claims merely recite generic computer processes and machinery or whether the non-generic arrangement of such processes and machinery gives rise to an inventive concept. *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349–50 (Fed. Cir. 2016). The step two "[i]nquiry therefore must turn to any requirements for *how* the desired result is achieved." *Two-Way Media Ltd. v. Comcast Cable Commc'ns, LLC*, 874 F.3d 1329, 1339 (Fed. Cir. 2017) (quoting *Elec. Power Grp.*, 830 F.3d at 1355) (emphasis in original). Crucially, the district court may not rely on conclusory statements from the complaint or "technological details set forth in the patent's specification and not set forth in the claims to find an inventive concept." *Symantec*, 838 F.3d at 1322 (citation omitted); *see Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Although the pleadings and the specification can illuminate the inventive concept, they cannot supply it. *See Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 967 F.3d 1285, 1293 (Fed. Cir. 2020); *ChargePoint, Inc. v. SemaConnect, Inc.*, 920 F.3d 759, 769 (Fed. Cir. 2019).

A. THE REPRESENTATIVE CLAIMS.

The claims mapped in Splunk's complaint and analyzed in alleged infringers' motion to dismiss are claim 1 of each asserted patent (*see* Compl. ¶¶ 120–22, 148–50, 175–77, 204–06, 227–29; Br. 7 n.3, 11 n.5, 15 n.6, 17 n.7, 21 n.10). In its opposition, Splunk argues that these claims are "*not* representative of all claims in the patents, given meaningful differences in other claims" (Opp. 10) (emphasis in original). Upon review, this order disagrees.

In carrying out an *Alice* analysis, the district court need not address every claim of the patents-in-suit. It may select representative claims where the patentee "does not present any meaningful argument for the distinctive significance of any claim limitations not found in the representative claim" or other claims recited in a patent are "substantially similar and linked to the same abstract idea." *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1365 (Fed. Cir. 2018); *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n*, 776 F.3d 1343, 1348 (Fed. Cir. 2014) (citation omitted). Splunk mapped the first claim of each asserted patent — and *only* the first claim of each asserted patent — in the complaint. Its cursory comments on a few independent and dependent claims in the opposition do not present meaningful arguments for meaningful differences. Accordingly, this order finds claim 1 of each asserted patent representative. Even so, it will briefly explain why those scattered other claims mentioned in Splunk's opposition are substantially similar and linked to the same abstract idea as the representative claims in its analysis of those representative claims.

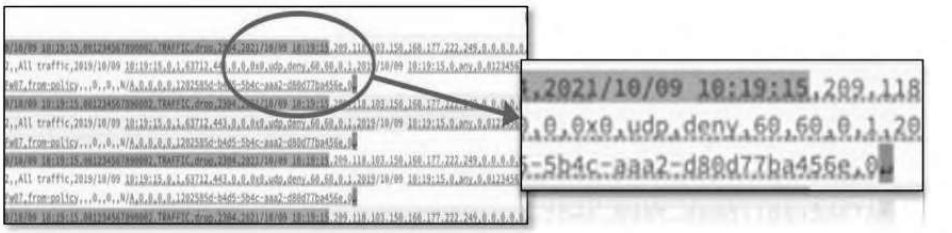
Although Splunk argues it would be premature to address patent eligibility at this juncture, dropping a footnote that says "analysis of the total number of infringed claims in this case is ongoing" and that estimates "disclosures will identify over 50 [infringed] claims" cannot postpone this day of reckoning (Opp. 10 n.2). Indeed, this action is not analogous to *Krush Technologies LLC v. Zoom Video Communications, Inc.*, 2019 WL 8107871 (N.D. Cal. July 23, 2019), where the undersigned declined to resolve Section 101 issues at the Rule 12 stage. Here, the complaint specifies claims that are infringed, and the question of eligibility is not intertwined with questions of fact, as will be discussed in detail below. *Id.* at *2.

Having determined that claim 1 of each asserted patent is representative, this order takes up the representative claims.

B. THE '206 PATENT.

Let's begin with the '206 patent, entitled "Selecting Parsing Rules Based on Data Analysis." The representative claim discloses a method for "selecting a portion of raw data from at least one data source"; "analyzing [it] to find a match . . . corresponding to a parsing rule in a plurality of stored parsing rules"; "parsing [it] into a set of searchable, time-stamped events . . . using the parsing rule"; "causing display of a preview . . . in a graphical user interface"; and "in response to user input received via the graphical user interface," "processing" at least some data not in the selected portion "using the parsing rule . . . to create searchable, time-stamped events" ('206 patent, col. 20:46–53, 57–59, 60–63; *see generally id*. at col. 20:45–67). The final limitation is that the method "is performed by one or more computing devices" (*id*. at col. 20:66–67).

Translating the jargon, "raw data" refers to data before it has been processed (*id*. at col. 3:24–26). Although "parsing rule" is not expressly defined, the specification and complaint provide numerous demonstrative examples (*see, e.g.*, *id*. at col. 3:14–20; Compl. ¶ 187). The complaint, for instance, points to a parsing rule in Cribl's documentation that separates raw data into events by looking for a new line symbol ("↵") and a timestamp (*e.g.*, "2021/10/09 10:19:15"):



Parsed raw data with timestamp, Complaint, ¶187

(Reply Br. 2 (citing Compl. ¶ 187)).

Per *Alice* step one, alleged infringers argue that the representative claim is directed to a patent-ineligible abstract idea of "selecting a subset of test data from a larger data set,"

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"applying a rule to look for a pattern match within the test data," and "if the rule works, applying that rule to the larger data set" (Br. 6). They emphasize that this mental process has been performed, albeit less efficiently, by humans for many years, and that any alleged improvement results from "user input" (determining the stored parsing rule works before applying it to the larger data set) (Br. 7–8). Splunk counters that this claim and others are not directed to an abstract idea because they are "'necessarily rooted in technology in order to overcome a problem specifically arising in the realm of' computer search engine indexes" (Opp. 10–11 (quoting *SRI Int'l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295, 1303 (Fed. Cir. 2019)). According to Splunk, mental processes like pattern-matching "bear no resemblance to software that improves the construction of search engine indexes from raw machine data" (Opp. 11).

Recall, however, that unclaimed features are irrelevant to the *Alice* analysis. *Am. Axle & Mfg., Inc.*, 967 F.3d at 1293; *ChargePoint, Inc.*, 920 F.3d at 769. The specification explains that if "improper index data may be added to an index store it may pollute the index reducing the quality of search results that may be produced" ('206 patent, col. 1:38–40). But the claim language itself does not describe technologically rooted improvement. Although Splunk states in its opposition that "the claims describe software techniques that better define events before indexing occurs, in conjunction with improved rule selection," the only recited improvement is supplied by the user (Opp. 11).

Note the representative claim does not specify *how* to select parsing rules based on data analysis. The rules are already "stored," and the user decides whether parsing a broader portion of data using a stored rule is appropriate after parsing a smaller portion of data using that stored rule. The claim does not "focus on a specific means or method that improves the relevant technology" but is rather "directed to a result or effect that itself is the abstract idea and merely invoke[s] generic processes and machinery." *Apple*, 842 F.3d at 1241 (citation omitted). It is the user who "better define[s] events before indexing occurs" and "improve[s] rule selection," not any software technique disclosed.

What's more, a "software technique" is not even disclosed here. Unlike in *Enfish*, the representative claim does not purport to improve the functioning of a computing device — it

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merely requires generic computer implementation "wherein the method is performed by one or more computing devices." This claim "at most recite[s] abstract data manipulation" and is "recited at such a level of result-oriented generality that [it] amount[s] to a mere implementation of an abstract idea." *Hawk Tech. Sys., LLC v. Castle Retail, LLC*, 60 F.4th 1349, 1358 (Fed. Cir. 2023) (citation omitted).

Here (and elsewhere), Splunk analogizes to *SRI*, which rejected likening a computer method to one which could be performed in the human mind, because the "human mind is not equipped to detect suspicious activity by using network monitors and analyzing network packets as recited by the claims." *SRI*, 930 F.3d at 1304. According to Splunk, a human mind is likewise not equipped to "analyze raw machine data to select a parsing rule to segment that data into events" (Opp. 11). But that is what the human mind is asked to do here, as Splunk itself acknowledges (*see, e.g.*, Opp. 12 (explaining "the claims describe creating events from raw data based on a parsing rule, and previewing what those events look like via a graphical interface, to allow for modifying events based on the *user's input* at that interface") (emphasis added)). True, a human mind is not equipped to "graphically preview how those events would be formed" using a graphical user interface and "build searchable events for a time-searchable search engine index," but these are the generic processes and machinery used in generic computer implementation. *Apple*, 842 F.3d at 1241; *Enfish*, 822 F.3d at 1337–39.

At bottom, unlike the representative claim in *SRI*, the representative claim here does not improve the functioning of a computer by reciting a specific technique. Nor do any of the '206 patent claims, for that matter. As observed by Splunk, independent claims 19, 26, and 33 respond to user input indicating a "preference *not* to use the" parsing rule that generated a preview, but this does not render the focus of these claims any less abstract (Opp. 6) (emphasis in original). Each still involves parsing a broader selection of data pursuant to *another* parsing rule based on user input after previewing the application of that parsing rule on a smaller selection of data ('206 patent, cols. 22:65–67; 23:1–28, 59–76; 24:1–27, 58–67; 25:1–22).

This order finds that the representative claim is directed to the abstract idea of previewing a data analysis rule on a test sample before applying the rule to a broader sample. As the

claim's final limitation suggests, the claim is not "directed to a specific implementation of a solution to a problem in the software arts." *Enfish*, 822 F.3d at 1339. Humans have been previewing data analysis rules on test samples for time immemorial. The associated organizing, displaying, and manipulating of data are all directed to this abstract idea. *See Capital One*, 850 F.3d at 1340–41.

Turning to *Alice* step two, alleged infringers argue that the representative claim fails to recite a saving inventive concept because it merely recites abstract information and mental steps processing this abstract information, which are purely functional (Br. 9). Thus, although Splunk "may tout the inherent benefits of better data filtering or improved mental processes," the representative claim "doesn't even go that far" (Br. 10). Splunk responds that its allegations create a plausible factual issue regarding the inventiveness of the claims at *Alice* step two sufficient to survive a motion to dismiss. It also points out that its claims include "more implementation detail" than claims in other actions in which the Federal Circuit has found a factual dispute (Opp. 13). This order finds the representative claim fails to recite a saving inventive concept.

Splunk is correct that eligibility is ultimately a question of law that may be based on underlying questions of fact. *Berkheimer*, 881 F.3d at 1365. And the Federal Circuit has held that whether a claimed invention is "well-understood, routine, and conventional" under *Alice* step two is "a question of fact." *Id*. at 1368. But "not every [Section] 101 determination contains genuine disputes over the underlying facts material to the [Section] 101 inquiry." *Ibid*. And conclusory allegations of factual disputes do not themselves make factual disputes.

Here, as explained above, "the purported improvements have not been captured in the claim language." *Voip-Pal.com, Inc. v. Apple Inc.*, 375 F. Supp. 3d 1110, 1145 (N.D. Cal. 2019) (Judge Lucy H. Koh), *aff'd sub nom. Voip-Pal.com, Inc. v. Twitter, Inc.*, 798 F. App'x 644 (Fed. Cir. 2020). "Nothing in the claims, understood in light of the specification, requires anything other than off-the-shelf, conventional computer, network, and display technology for gathering, sending, and presenting the desired information." *Elec. Power Grp.*, 830 F.3d at 1355. "At bottom, then, the validity of the Patents-in-Suit does not turn on the factual issue

of whether the alleged improvements are 'well-understood, routine, and conventional.'" *Voip-Pal.com, Inc. v. Apple Inc.*, 411 F. Supp. 3d 926, 974 (N.D. Cal. 2019) (Judge Lucy H. Koh), *aff'd*, 828 F. App'x 717 (Fed. Cir. 2020). Moreover, the fact that there is more implementation detail here has no bearing on this analysis. "Even a specification full of technical details about a physical invention may nonetheless conclude with claims that claim nothing more than the broad law or abstract idea underlying the claims, thus preempting all use of that law or idea." *ChargePoint, Inc.*, 920 F.3d at 769. The elements of the representative claim of the '206 patent thereby fail to add something more and transform the claimed abstract idea into a patent-eligible invention.

The analysis of '206 patent provides a helpful framework for assessing the other patents-in-suit. The parties make substantially similar arguments about all of the representative claims: Splunk asserts that they are rooted in technology in order to overcome technical problems identified in the associated specifications, and alleged infringers highlight a disconnect between the claim language and the specification language. Although this order will speak to the specifics of the subsequent representative claims, the reader should bear in mind that these patents are ineligible for essentially the same reasons.

C. THE '438 AND '443 PATENTS.

Next, this order turns to the '438 and '443 patents, which are entitled "Configuring the Protocol-Based Generation of Event Streams" and "Transformation of Network Data at Remote Capture Agents," respectively. The '438 and '443 patents are taken up together because Splunk takes them up together (Opp. 6–7; 13–17).

The representative claims of the '438 and '443 patents disclose methods implemented in a distributed arrangement involving at least one configuration server and one remote capture agent ("RCA"). Reductively, a configuration server (computer) sends configuration data (instructions) to an RCA (computer) to generate time-stamped events from monitored network packets. Stripped of excess verbiage, the '438 patent discloses a method that enables an RCA to "generate [an] event [data] stream based on the network traffic monitored . . . according to the configuration data" that is generated by a configuration server ('438 patent, col. 24:26, 43–

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44; *see generally id*. at col. 24:26–46). The configuration server "receiv[es] input" that "indicat[es] a protocol to be associated with the event stream" and "an event attribute associated with the protocol," and it sends configuration data to the RCA based on this input (*id*. at col. 24:29, 32–33, 36–37, 40–42). Note RCAs "can be physical hardware servers or virtual machines running in the cloud" and "capture network data originating from numerous distributed network servers" (*id*. at cols. 4:65–67; 5:1–2). The '443 patent, on the other hand, discloses a method for an RCA to "generat[e], based on [] configuration information, time-stamped event data from at least one network packet of [a] plurality of network packets," "transforming" the time-stamped event data by "performing an operation" on it ('443 patent, col. 26:38–40, 45–49; *see generally id*. at col. 26:27–49).

Per *Alice* step one, alleged infringers argue that Splunk has engaged in "broad, functional claiming," "the hallmark of abstractness" (Reply Br. 4 (citing *Voip-Pal.com*, 375 F. Supp. 3d at 1133)). With regard to the representative claim of the '438 patent, they emphasize that the specification acknowledges the prior art included network elements that could monitor, capture, and transform data, thereby indicating the purported improvement is to configure the network elements in a centralized manner over a distributed network (Br. 15). Alleged infringers aver that courts routinely find claims for distributed computing, including coordination to break up tasks across multiple computers, directed to abstract ideas and ineligible (Br. 15–16). As for the representative claim of the '443 patent, alleged infringers point out that it merely recites (functional) steps of "monitoring," "segmenting" and "transforming" network data, without reciting steps for processing network traffic any differently than conventional network capture devices beyond, again, incorporating distributed computing (Br. 11–12).

Meanwhile, according to Splunk, both patents "claim specific techniques for using configurable 'remote capture agents'" and address problems arising from "challenges with conventional network capture and analysis technologies" that were "'fixed,' 'built . . . to serve a specific purpose,' and unamenable to reconfiguration (among other problems)" (Opp. 14 (quoting '443 and '438 patents, col. 1:19–20, 26)). Splunk once again cites *SRI* and contends

the claims "do not automate a conventional idea, but instead claim techniques to solve problems with the conventional, inflexible approach to capturing and analyzing network data" (Opp. 14). According to Splunk, alleged infringers oversimplify the claims and "ignore specific requirements of the independent claims, including regarding the data that must be provided to the server to accomplish configuration of the related remote capture agent" (Opp. 15 (citing '438 patent, col. 24:32–39)).

This order finds the representative claims merely invoke generic processes and machinery, and that they are directed to results that are, in essence, abstract ideas. *See Apple*, 842 F.3d at 1241. "Here, the claims themselves do not disclose performing any 'special data conversion' or otherwise describe how the alleged goal" — "fixing the conventional, inflexible approach to capturing and analyzing network data" (Opp. 14) — "is achieved." *Hawk Tech. Sys.*, 60 F.4th at 1357. As observed by alleged infringers, for both patents, "neither the claims nor the specifications provide guidance on *how* the RCA monitors the network packets, *how* it obtains the configuration information remotely, *how* the server generates configuration information that the RCA can use remotely to generate timestamped event data from the network packets, and *how* the RCA performs operations on the event data to transform it" (Reply Br. 4) (emphasis in original). In other words, neither the claim language nor the specification language provides guidance on *how* the claims achieve their functional results. The Federal Circuit has repeatedly found claims that did "not sufficiently describe how to achieve these results in a non-abstract way" to be directed to abstract ideas. *Two-Way Media*, 874 F.3d at 1337 (citing *Affinity Labs of Tex., LLC v. DIRECTV, LLC*, 838 F.3d 1253, 1258–59 (Fed. Cir. 2016); *Elec. Power Grp.*, 830 F.3d at 1351)).

The representative claim of the '438 patent is directed to the abstract idea of generating (event) data by applying (configuration) data it receives to (network) data it monitors. The representative claim of the '443 patent is directed to the abstract idea of monitoring (network) data and applying (configuration) data received to generate and transform (event) data. Note claim 7 of the '443 patent is "substantially similar and linked to the same abstract idea" as claim 1 of that patent because the fact that the configuration data can be generated by an

"application" that "access[es] the transformed event data" does not render the abstract idea any less abstract; (network) data are still monitored, (configuration) data are still received, and (event) data are still generated and transformed.[1] Moreover, that the methods call for an RCA does not render the focus of the representative claims any less abstract (*see* '438 patent, col. 24:27, 41–45; '443 patent, col. 26:29). As noted by alleged infringers, Splunk's patents acknowledge "conventional" capture devices already processed network packet data into separate events (Reply Br. 6 (citing, *e.g.*, '438 patent, cols. 1:41–67, 2:1–19)). Whereas the representative claims in *SRI* were directed to more than an abstract idea and "over[ode] [a] routine and conventional sequence of events," the representative claims here "merely require[] a 'computer network operating in its normal, expected manner.'" *SRI*, 930 F.3d 1295, 1304 (Fed. Cir. 2019) (quoting *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1258 (Fed. Cir. 2014)). Unlike the representative claims in *SRI* and *DDR*, the representative claims here do not offer specific technical solutions to specific technical problems identified in the specifications.

Turning to *Alice* step two, Splunk argues that the specifications indicate the components are not generic and, even if they were, "useful improvements to computer networks are patentable regardless of whether the network is comprised of standard computing equipment" (Opp. 16 (quoting *Kollective*, 50 F.4th at 135)). Moreover, according to Splunk, it is "entitled to the plausible inference of an inventive concept from the allegations in its Complaint regarding the existence of technological problems in the prior art and the solutions the claims offer to address those problems" (Opp. 16–17). This order agrees with alleged infringers, however, that unlike the claims disclosing particular enhancements to computer technology the Federal Circuit has found eligible at step two, the representative claims here merely apply result-oriented, abstract ideas without specifying any non-conventional way to accomplish or practice them (Reply Br. 8). Again, the eligibility of the representative claims does not turn on

[1] Splunk only discusses other independent claims in the '438 and '443 patents in conjunction with the representative claims, so it "does not present any meaningful argument for the distinctive significance" of these claims in its opposition. *Berkheimer*, 881 F.3d at 1365.

the factual issue of whether the alleged improvements are well-understood, routine, and conventional because no alleged improvement is captured in the claim language. Again, "[n]othing in the claims, understood in light of the specification, requires anything other than off-the-shelf, conventional computer, network, and display technology for gathering, sending, and presenting the desired information." *Elec. Power Grp.*, 830 F.3d at 1355. As such, the elements of the representative claims of the '438 and '443 patents fail to add something more and transform the claimed abstract ideas into patent-eligible inventions.

D. THE '312 PATENT.

This order now considers the '312 patent, entitled "Time Stamp Creation for Event Data." The representative claim discloses a method for "creating a set of searchable events by segmenting raw time series machine data from at least one data source" ('312 patent, col. 17:11–13; *see generally id*. at col. 17:9–48). According to the specification, "[s]egmentation rules describe how to divide event data into segments" (*id*. at col. 10:59–60). In order to create a set of searchable events, the claimed method calls for "detecting whether time information is present in the raw time series machine data" (*id*. at col. 17:23–24). It provides two paths for creating events based on whether time information is present or not:

- If "time information is present in the event," it is "extract[ed]" and used to "determin[e] a time zone"; the time zone is used "generat[e] an offset," thereby "normalizing the extracted time information"; and a "time-stamp based on the offset" is "associated with the event."
- If "time information is not present in the event," a time stamp is "calculated" by "using one or more stored time stamps . . . from one or more earlier processed events selected on a periodic basis in order to facilitate time stamp creation"; and a "time stamp is "associate[ed] with the event."

(*id*. at col. 17:26–46). The associating of time stamps "enabl[es] the events to be searched" (*id*. at col. 17:35, 45). The final limitation is that "the method is performed by one or more computing devices" (*id*. at col. 17:47–48).

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Per *Alice* step one, alleged infringers argue that the representative claim cites a patent-ineligible mental process. According to alleged infringers, this mental process is analogous to that of an assistant

> who receives a collection of pages reflecting meeting minutes, and separates ("segments") those pages into individual reports, one report for each meeting. The assistant then reorganizes the reports chronologically, using the time and date written at the top of each report. The assistant can take into account the geographic location of a meeting, adjusting the meeting's time and date based on its time zone. If a report lacks time or date information, the assistant can assign a time and date "based on its context," using other information in the report, such as the meeting attendees, meeting location, and topics discussed.

(Br. 18). That this mental process is untethered from a technical environment is purportedly demonstrated by the failure to incorporate any computer or computing components until the final limitation (*ibid.*). Further, according to alleged infringers, the functional language is unbounded, with no technical details explaining how the steps are to be accomplished. And alleged infringers emphasize that any benefits arising from the claimed invention flow not from improved technology but from performing an abstract idea in conjunction with well-known computer technology and functional components (Br. 19). Meanwhile, Splunk once more emphasizes that the patent claims are necessarily rooted in technology rather than a mental process. According to Splunk, the attempt to analogize to an assistant is inapt because humans cannot "segment raw time series machine data received from at least one data source in an information technology environment into searchable events," "perform the claimed timestamping techniques on each event," and "thereby enable time-based searches across an index of events created from the raw data" (Opp. 18 (internal quotations and citations omitted)). Moreover, the claims "recite sufficient implementation detail to perform the claimed steps in a non-abstract way," with the specification "provid[ing] even more implementation detail" (Opp. 19).

Like the preceding representative claims, the representative claim of the '312 patent does not disclose a technologically rooted improvement but rather another generic computer implementation "wherein the method is performed by one or more computing devices." Note

the representative claim does not disclose how to "calculat[e] a time stamp for [an] event using one or more stored time stamps," which are "selected on a periodic basis in order to facilitate time stamp creation," when time information is unavailable ('312 patent, col. 17: 39–43). It "merely carr[ies] out a longstanding commercial practice with the benefit of a computer" and "manipulates data but fails to do so in a non-abstract way." *Alice*, 573 U.S. at 219; *Two-Way Media*, 874 F.3d at 1338. This order finds the assistant analogy is appropriate. The representative claim is directed to the abstract idea of creating time-searchable output by determining whether time information is available in a given input, and using time information from earlier inputs as a proxy if time information is unavailable. Splunk underscores that this input could "include unstructured data" per claims 6, 10, and 14 (Opp. 18). But adjusting the given input to encompass different data does not render the claimed idea any less abstract. *Cf. BSG Tech LLC v. BuySeasons, Inc.*, 899 F.3d 1281, 1288 (Fed. Cir. 2018) ("[A]n improvement to the information stored by a database is not equivalent to an improvement in the database's functionality.").

Turning to *Alice* step two, again, the representative claim and the alleged improvement discussed in the complaint and specification are misaligned. *Voip-Pal.com*, 375 F. Supp. 3d at 1145; *Elec. Power Grp.*, 830 F.3d at 1355. The representative claim simply does not capture how to "improv[e] machine data analysis" given "problems with the way conventional computer search engines handled analysis and indexing of raw time series machine data" (Opp. 17). Not only are the claim language and specification language misaligned here, but they also appear to be mismatched. Although the representative claim (and each independent claim) discloses using a stored time stamp "from one or more *earlier* processed events" if time information is not available, the specification discusses an implementation in which "further earlier *and/or later* events can be used for interpolation" (*compare* '312 patent, col. 17:41–41, *and id*. at cols. 18:37–38, 20:1–2, *with id*. at col. 9:37–40). Meanwhile, in isolation, the use of generic computer components in conventional ways do not provide an inventive concept. The elements of the representative claim of the '312 patent thereby fail to transform the claimed abstract idea into a patent-eligible invention.

A. THE '467 PATENT.

Finally, this order turns to the '467 patent, entitled "Dynamically Instantiating Dual-Queue Systems." The representative claim discloses a method for implementing a "multi-tenant dual-queue system" that "receiv[es] . . . live data" and "rout[es] the live data to [a] dual-queue node" if, "based on determining that [the node] . . . is uninstantiated," the node is "dynamically instantiat[ed]" ('467 patent, col. 24:33, 35–37, 43; *see generally id*. at col. 24:31–43). "[D]ynamically instantiating" initializes "a live data queue and a stale data queue" (*id*. at col. 24:36, 38–39). The "initialized live data queue is enabled to receive the live data for processing," whereas "the initialized stale data queue is enabled to store a persistent backup of the live data" (*id*. at col. 24:39–43). According to the specification, whereas "a single tenant dual-queue system may include one or more servers . . . that have resources continuously or permanently dedicated to incoming or outgoing data of a single customer," "multi-tenant dual-queue systems may include one or more servers . . . that have resources temporarily, ephemerally, or transiently allocated to incoming or outgoing data of each of a plurality of customers on an as-needed or in an on-demand basis" (*id*. at cols. 2:67, 3:1–8). Servers "may be general or special-purpose computers" (*id*. at col. 4:27–28).

Per *Alice* step one, alleged infringers assert that the representative claim is directed to the long-prevalent practice of handling overflow traffic on demand, and that "it recites mere functions and results unlimited by particular structures or acts for how to perform or achieve them" (Br. 22). According to alleged infringers, the representative claim remarkably provides no technical details as to how the otherwise conventional dual-queue node is "dynamically" instantiated (*ibid*.; Reply Br. 12). "Setting up storage of incoming data in a secondary location for later transmission simply implements generic computer functionality of receiving and storing data," which then "fails as an inventive concept" at *Alice* step two (Br. 22). Splunk responds that its claims are directed to a specific improvement in the software arts, not an abstract idea (Opp. 21). Although Splunk's complaint expressly describes the improvement as addressing situations where "streams of live data [] can be generated faster than they can be handled by certain computer hardware and software" (Compl. ¶ 106; *see also* '467 patent, col.

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8:47–59), Splunk's opposition describes it as "instead directed to specific techniques for *instantiating* dual-queue 'nodes' in a 'multi-tenant' environment that improves on conventional software practice" (Opp. 21) (emphasis in original).

Even though this language is rife with what are arguably this order's most technical terms, beneath the surface is arguably this order's most abstract idea. The representative claim here is directed to handling overflow data on demand. No "particular technique for dynamically instantiating dual-queue nodes" is disclosed (Opp. 22). Again, the claim is result-oriented: there are no details as to how the dual-queue node is "dynamically" instantiated, how the live data queue is "enabled" to receive "live data for processing," or how the stale data queue is "enabled" to store a "persistent backup of the live data" ('467 patent, col. 24:36–37, 40, 42); *Apple*, 842 F.3d at 1241. Moreover, the dependent claims referenced in Splunk's opposition do not have any bearing on this determination. Some involve dual-queue nodes "assigned to [a] customer" (*see, e.g.*, '467 patent, col. 24:49). Others involve dual-queue nodes assigned to "an Internet of Things device" (*see, e.g.*, *id*. at col. 24:63). But in any event, the claims are still directed to the abstract idea of handling overflow data on demand (now, for that customer or that device). "[L]imiting the claims to a particular technological environment . . . renders them no less abstract." *People.ai, Inc. v. SetSail Techs., Inc.*, 575 F. Supp. 3d 1193, 1200 (N.D. Cal. 2021) (citing *Capital One*, 850 F.3d at 1340).

Yet again, the inventive concept remains elusive. This order agrees with alleged infringers that Splunk appears to be doing some strategic recasting of purported improvement in its opposition (*see* Reply Br. 11–12). In any event, the representative claim does not disclose an inventive solution to the problem identified in the specification and Splunk's complaint — that of avoiding lost data when incoming live data arrives too quickly — beyond standard caching and storing (Reply Br. 13). Nothing in it addresses increasing the amount of live data that is received or other analogous improvements that could supply an inventive concept. The representative claim only recites generic computer processes and machinery, and a generic arrangement. *Bascom*, 827 F.3d 1341, 1349–50 (Fed. Cir. 2016).

In sum, all of the representative claims of the patents-in-suit are directed to abstract ideas and lack saving inventive concepts. As such, all of the patents-in-suit run afoul of Section 101 and do not qualify as patent eligible. The motion to dismiss as to Splunk's patent infringement claims against Cribl is **GRANTED**.

3. INDIRECT COPYRIGHT INFRINGEMENT.

Turning to copyright law, alleged infringers argue that Splunk's indirect copyright infringement claims against them should be dismissed because Splunk does not adequately allege that Cribl and CEO Sharp had the knowledge and intent required for contributory infringement.[2] According to accused infringers, Splunk makes no allegations regarding Cribl's knowledge and baldly alleges that CEO Sharp acted "with knowledge" and "intentionally" (Br. 24 (citing Compl. ¶¶ 267, 271)). Splunk counters that it expressly alleges both accused infringers materially contributed to or induced copyright infringement, such as when they facilitated the copying, distribution, and creation of derivatives of Splunk's code with each new version of Cribl's software (Opp. 24 (citing Compl. ¶¶ 267 –70)). According to Splunk, it has also alleged the requisite intent:

> [F]or example: "Mr. Sharp copied Splunk's copyrighted source code for S2s [and] created a derivative of that code (go-S2S)" ([Compl.] ¶ 266), with "the intention of using it for his own personal financial gain at a different company," *i.e.*, Cribl (*id.* ¶ 36); [Mr.] Sharp provided this code to Cribl for its use within Stream, and, to this day, has encouraged and induced Cribl's use of this code"; "go-S2S, and/or other source code copied or derived from Splunk's Splunk Enterprise source code, is currently used within Stream and has been used within Stream since its release" (*id*. ¶ 40); and [alleged infringers] "sought to capitalize on their access to the S2S version 3 protocol" (*id*. ¶ 38). This supports a plausible inference that [alleged infringers] had knowledge of, and intended, each other's infringement.

(Opp. 24–25). Here, this order agrees with Splunk that it has plausibly pleaded contributory infringement.

[2] Specifically, alleged infringers assert "Splunk does not adequately allege that Cribl or CEO Sharp had the knowledge or intent required to plead contributory *or induced* copyright infringement," but as explained below, in copyright law (unlike in patent law), induced infringement is housed within contributory infringement. Note that although alleged infringers broadly mention "indirect copyright infringement," they focus solely on contributory infringement, not vicarious infringement.

Contributory copyright infringement is a "a form of secondary liability with roots in the tort-law concepts of enterprise liability and imputed intent . . . . [O]ne contributorily infringes when he (1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement." *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 670 (9th Cir. 2017) (quoting *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 794–95 (9th Cir. 2007)). Because Splunk brings contributory infringement claims against both CEO Sharp and Cribl, this order must consider whether, on the face of the complaint, (1) CEO Sharp had knowledge of others' copyright infringement and materially contributed to or induced it; and (2) Cribl had knowledge of others' copyright infringement and materially contributed to or induced it.

Accepting all factual allegations in the complaint as true and construing the pleadings in the light most favorable to Splunk, it seems CEO Sharp had knowledge of others' infringement because, *inter alia*, he "derived go-S2S from Splunk's copyrighted source code," "provided this code to Cribl . . . with knowledge that go-S2S was an unlicensed derivative of Splunk's copyrighted S2S version 3 code," and "each new version of Cribl's Stream software includes a new copy of this unlicensed derivative of Splunk's copyrighted S2S version 3 code" (Compl. ¶¶ 36, 40–41). Similarly, accepting all factual allegations in the complaint as true and construing the pleadings in the light most favorable to Splunk, it seems CEO Sharp materially contributed to or induced (1) Cribl's infringement because "Sharp provided this code to Cribl for its use within Stream, and, to this day, has encouraged and induced Cribl's use of this code"; and (2) Cribl customers' infringement because "go-S2S, and/or other source code copied or derived from Splunk's Splunk Enterprise source code, is currently used within Stream and has been used within Stream since its release" (Compl. ¶ 40). A corporate officer is personally liable for all torts he authorizes or directs or in which he participates (notwithstanding that he acted as an agent of the corporation and not on his own behalf). *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999).

Turning to Cribl's alleged contributory infringement, accepting all factual allegations in the complaint as true and construing the pleadings in the light most favorable to Splunk, the

complaint clearly provides for the possibility that CEO Sharp's knowledge could be attributed to Cribl as well. According to Splunk's complaint, "Mr. Sharp *and Cribl* sought to capitalize on their access to the S2S version 3 protocol" (Compl. ¶ 38). Similarly, the complaint contains language that could support Cribl's material contribution to or inducement of others' copyright infringement (*see, e.g.*, Compl. ¶¶ 47, 40 (alleging "Cribl has used its illicitly obtained support for the S2S version 3 protocol as a means to convince Splunk's customers to buy software and services from Cribl" and "go-S2S, and/or other source code copied or derived from Splunk's Splunk Enterprise source code, is currently used within Stream and has been used within Stream since its release")). As such, CEO Sharp may have acted as an agent of Cribl at the time he knew of customers' infringement and materially contributed to or induced it. Of course, it may be that CEO Sharp's co-founders had no idea that Cribl's source code was derived from go-S2S or that go-S2S was derived from Splunk's copyrighted code. And it may be that go-S2S is not even a derivative of Splunk's copyrighted code. But Splunk's allegations are sufficient to survive a motion to dismiss.

Because Splunk has plausibly pleaded contributory copyright infringement against CEO Sharp and Cribl, the motion to dismiss as to Splunk's contributory copyright claims is **DENIED**.

4. VIOLATION OF DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 1202.

Lastly, this order considers whether Splunk's claim for violation of Digital Millennium Copyright Act ("DMCA") Section 1202 against CEO Sharp should be dismissed. According to Cribl, this dismissal is warranted for two reasons: (1) Splunk has failed to plead copyright management information ("CMI") with the specificity that courts in this district have required, and (2) Splunk has failed to plead the required scienter for a violation of Section 1202 (Br. 24–25). Splunk counters that it has pleaded CMI and scienter with sufficient specificity. Again, this order agrees with Splunk.

Section 1202(a) prohibits knowingly and intentionally inducing, enabling, facilitating or concealing copyright infringement by (1) providing false CMI and (2) distributing or importing for distribution false CMI. 17 U.S.C. § 1202(a)(1)–(2). Section 1202(b) prohibits (1) intentionally removing or altering CMI, (2) knowingly distributing or importing for

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distribution CMI that has been removed or altered, and (3) knowingly distributing, importing for distribution, or publicly performing works or copies of works whose CMI has been removed or altered. *Id*. § 1202(b)(1)–(3). Splunk alleges that CEO Sharp violated both provisions (Compl. ¶¶ 291–92). The relevant claim language provides, in pertinent part:

> As described above, Clint Sharp created the go-S2S source code by copying copyrighted Splunk source code, which contained Splunk copyright headers indicating authorship and ownership information reflecting Splunk's copyright in this code. Mr. Sharp's derivative go-S2S code, however, did not include headers indicating Splunk's authorship and ownership of the copyright in the go-S2S code; Mr. Sharp therefore provided false CMI and intentionally removed or altered CMI in creating the go-S2S code, without the authority of Splunk.
>
> Mr. Sharp distributed code containing false, removed, and altered CMI for the entire duration of time that he maintained the go-S2S source code repository online, and at least until December 2021. Any time Mr. Sharp's go-S2S source code repository was accessed, Mr. Sharp distributed code containing this false, removed, and altered CMI.
>
> Mr. Sharp also provided and distributed code containing false CMI by uploading an open-source MIT license to the go-S2S github repository, falsely identifying Mr. Sharp as the author and/or owner of the copyright in the go-S2S code, and falsely providing open-source terms for use of the go-S2S code, despite its derivation from Splunk's source code.
>
> Mr. Sharp distributed code containing this false CMI from December 2018 at least until December 2021. Any time Mr. Sharp's go-S2S source code repository was accessed, Mr. Sharp distributed code containing this false, removed, and altered CMI.

(Compl. ¶¶ 294–97). These facts are also set out in the complaint's "General Allegations" (Compl. ¶¶ 37, 42–44).

Starting with specificity of pleading CMI, this order agrees with Splunk that it adequately described the CMI at issue and that alleged infringers cite cases that do not suggest more is required (Opp. 25). Whereas in *Free Speech Systems, LLC v. Menzel*, 390 F. Supp. 3d 1162, 1175 (N.D. Cal. 2019) (Judge William H. Orrick), the copyright owner failed to provide "any facts to identify which photographs had CMI removed or to describe what the removed or altered CMI was," there is no question here that, as alleged, the CMI was removed from the go-S2S code and the CMI was code that "indicat[ed] authorship and ownership information

reflecting Splunk's copyright" (Compl. ¶ 294). Whereas in *SellPoolSuppliesOnline.com, LLC v. Ugly Pools Arizona, Inc.*, 804 F. App'x 668, 670–71 (9th Cir. 2020), the CMI "allegedly removed by [alleged infringers] did not identify [the copyright owner] as the owner or author of any content on the website," Splunk has expressly alleged that the removed copyright headers indicated authorship and ownership (Compl. ¶ 294). And whereas in *Logan v. Meta Platforms, Inc.*, 2022 WL 14813836, at *8 (N.D. Cal. Oct. 25, 2022) (Judge Charles R. Breyer), the CMI was "separated from the rest of the content on the webpage," here Splunk specifically stated that the headers were removed from the go-S2S code itself (Compl. ¶ 292). The Court may later determine that the CMI was not, in fact, CMI (as defined in Section 1203); or that the copyright headers did not, in fact, identify Splunk as an owner or author; or that they were not, in fact, removed from the go-S2S code; or that the go-S2S code was not, in fact, a derivative of Splunk's copyrighted source code. For now, however, the CMI is sufficiently pleaded to survive a motion to dismiss.

As for the argument that Splunk has failed to plead the required scienter for a violation of Section 1202, that is foreclosed by the language in Splunk's complaint. According to the complaint, "[i]n or around December 2018, Mr. Sharp added an open-source MIT license to the go-S2S source code on his personal [G]it[H]ub webpage, falsely identifying himself as the author and/or owner of the copyright in the go-S2S code, and falsely providing open-source terms for use of the go-S2S code, despite its derivation from Splunk's proprietary source code" (Compl. ¶ 42). CEO Sharp allegedly "added this false license to the go-S2S code to obscure his own unlawful copying of Splunk's copyrighted source code" (Compl. ¶ 43). Alone, this is sufficient to plead a violation of Section 1202(a) (involving false CMI).

True, Splunk does not directly allege that CEO Sharp's removal of the copyright headers indicating authorship and ownership information was "knowing." But the complaint states that "Mr. Sharp derived go-S2S from Splunk's copyrighted source code with the intention of using it for his own personal financial gain at a different company," that "[t]he Splunk S2S version 3 code that Mr. Sharp copied contained Splunk copyright headers indicating authorship and ownership information, reflecting Splunk's copyright in and ownership of this code," and that

"Mr. Sharp removed this information from the derived files that he posted on his personal [G]it[H]ub page" (Compl. ¶¶ 36–37). Construing this in the light most favorable to Splunk, that CEO Sharp removed these headers from proprietary source code and posted that source code to a personal, publicly accessible webpage supports a plausible inference that he did so knowingly — especially when he later added an open-source license that "falsely identif[ied] [CEO Sharp] as the author and/or owner of the copyright in the go-S2S code" (Compl. ¶ 42). As such, the language in the complaint is sufficient to plead a violation of Section 1202(b) (involving removed or altered CMI) as well.

Because Splunk has plausibly pleaded a violation of DMCA Section 1202 against CEO Sharp, the motion to dismiss as to that claim is **DENIED**.

CONCLUSION

For the foregoing reasons, the motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** as to all claims for willful and indirect patent infringement against Cribl, as well as all claims for infringement of the five asserted patents against Cribl based on their ineligibility. The motion is **DENIED** as to all claims for indirect copyright infringement against Cribl and CEO Sharp, as well as the claim for violation of DMCA Section 1202 against CEO Sharp. Alleged infringers' answer is due in **FOURTEEN DAYS**.

Splunk may move for leave to amend its complaint. Such motion must be filed within **FOURTEEN DAYS** and include as an exhibit a redlined version of the proposed amendment that clearly identifies all changes. This order highlighted certain deficiencies, but merely adding sentences to address these deficiencies may not justify leave to amend. If Splunk moves for leave to file an amended complaint, it should be sure to plead its best case and consider all criticisms made by alleged infringers, including those not reached by this order.

IT IS SO ORDERED.

Dated: March 17, 2023.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

United States District Court
Northern District of California

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC. and CLINT SHARP,

Defendants.

No. C 22-07611 WHA

ORDER DENYING MOTION FOR LEAVE TO AMEND

INTRODUCTION

Following the order granting in part and denying in part defendants' motion to dismiss, plaintiff moves for leave to file an amended complaint. For the reasons stated herein, plaintiff's motion is **Denied**.

STATEMENT

The order on the motion to dismiss described the purported facts at issue (Dkt. No. 55 at 1–3). Briefly, they are as follows.

Patent and copyright owner Splunk Inc. was founded in 2003 and runs a platform for analyzing large volumes of data. Its flagship product, Splunk Enterprise, ingests flows of data from disparate sources and indexes that data, allowing customers to interact with and monitor their data in real time. Through its Technology Alliance Partner ("TAP") program, Splunk grants partners a license to use its software development tools and a limited license to run Splunk Enterprise (Compl. ¶¶ 1, 17, 25).

Alleged infringer Cribl, Inc. was founded in 2017 by former Splunk employees, including alleged infringer and Cribl CEO Clint Sharp. In 2018, Cribl launched its first product, now known as Stream, and joined the TAP program by entering into a TAP agreement with Splunk. In 2021, Splunk terminated Cribl's membership in the TAP program and their TAP agreement. Roughly one year later, it filed a complaint against Cribl and CEO Sharp in the District of Delaware. After Cribl and CEO Sharp indicated that they intended to raise challenges related to personal jurisdiction and venue, the parties agreed that Splunk would voluntarily dismiss its complaint and refile in the Northern District of California (Compl. ¶¶ 2, 38–39, 67; Br. 2, Exhs. S–T).

According to Splunk's complaint, Cribl infringed patents awarded to Splunk for its foundational innovations, developed and marketed products by making unlicensed copies of Splunk's copyrighted software, and used misappropriated information to compete unfairly. Relevant here, Splunk asserted five patents: U.S. Patent Nos. 9,208,206; 9,762,443; 10,805,438; 10,255,312; and 9,838,467. The applications were filed between 2014 and 2019, and the patents issued between 2015 and 2020. Once Splunk refiled its complaint in this district, Cribl and CEO Sharp moved to dismiss patent and copyright claims (Dkt. No. 31).

The prior order granted the motion to dismiss with respect to Splunk's patent claims and denied it with respect to Splunk's copyright claims. Specifically, that order granted the motion as to all claims for direct patent infringement against Cribl based on ineligibility, as well as all claims for willful and indirect patent infringement against Cribl based on separate grounds. Meanwhile, it denied the motion as to all claims for indirect copyright infringement against Cribl and CEO Sharp, as well as the claim for violation of Digital Millennium Copyright Act Section 1202 against CEO Sharp (Dkt. No. 55).

The order on the motion to dismiss allowed Splunk to move for leave to amend its complaint, which Splunk has now done. This order follows full briefing and oral argument.

ANALYSIS

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend shall be freely given when justice requires it. "[A] district court should consider several factors including

undue delay, the movant's bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility." *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "Futility of amendment can, by itself, justify the denial of a motion for leave to amend. If no amendment would allow the complaint to withstand dismissal as a matter of law, courts consider amendment futile." *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 815 (9th Cir. 2020) (internal quotation and citations omitted).

Splunk's position is that amendment would not be futile because its proposed amended complaint "supplies additional substantial factual detail and evidence that preclude dismissal at the Rule 12(b)(6) stage of Splunk's (1) direct patent infringement claims under [Section] 101 and (2) willful and indirect patent infringement claims" (Br. 1). Upon review, this order disagrees.[1]

* * *

Recall that under the Supreme Court's *Alice* test for patent ineligibility, a claim falls outside of Section 101 of the Patent Act if (1) it is directed to a patent-ineligible concept, like an abstract idea, and (2) it lacks elements sufficient to transform it into a patent-eligible application. *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208, 217–18 (2014). And, patent eligibility is a question of law that may contain underlying questions of fact. *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1365 (Fed. Cir. 2018). "[A]t step two of the *Alice* test, whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact. However, of course, not every [Section] 101 determination contains genuine disputes over the underlying facts material to the [Section] 101 inquiry." *Sanderling Mgmt. Ltd. v. Snap Inc.*, 65 F.4th 698, 703 (Fed. Cir. 2023) (internal quotations and citations omitted). When there are no factual allegations that, taken as true,

[1] In their opposition, Cribl and CEO Sharp argue that amendment would be futile and, separately, that amendment would cause undue prejudice because Cribl has yet to file petitions for *inter partes* review ("IPR") of the asserted patents and only has a few months left to do so. But it was Cribl's choice not to file petitions for IPR. As such, this is not cognizable prejudice. At the hearing, the undersigned rejected the prejudice argument, and it will not be discussed further (Tr. 8:5–9:9, 10:5–18; *see* Opp. 23–25).

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prevent resolution of patent-eligibility disputes as a matter of law, they may be resolved on a Rule 12 motion. *Uniloc USA, Inc. v. LG Elecs. USA, Inc.*, 957 F.3d 1303, 1306 (Fed. Cir. 2020).

Splunk argues that its amended factual allegations prevent resolution of this action's patent-eligibility disputes as a matter of law at this juncture because they "further explain how the claims capture improvements over conventional technology and differ from conventional practices associated with that technology" (Br. 1) (emphasis omitted). In its motion, Splunk walks through language it seeks to add to its complaint with respect to each asserted patent (*see* Br. 4–23). According to Splunk, its amended allegations raise factual disputes underlying the *Alice* analysis, so amendment would not be futile.

At the hearing, in support of using factual allegations to prevent resolution of patent-eligibility disputes on a Rule 12 motion, counsel for Splunk quoted a passage from *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306 (Fed. Cir. 2019) (*see* Tr. 20:8–21:10). In that case, the Federal Circuit explained that it had "repeatedly cited allegations in the *complaint* to conclude that the disputed claims were potentially inventive" in *Aatrix*, and "[w]hile [it] d[id] not read [that case] to say that any allegation about inventiveness, wholly divorced from the claims or the specification, defeats a motion to dismiss, plausible and specific factual allegations that aspects of the claims are inventive are sufficient." *Cellspin*, 927 F.3d at 1317 (citing *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1128 (Fed. Cir. 2018)). Counsel for Cribl and CEO Sharp responded by quoting the very next sentence in *Cellspin*: "*As long as what makes the claims inventive is recited by the claims*, the specification need not expressly list all the reasons why this claimed structure is unconventional." *Ibid.* (emphasis added) (*see* Tr. 21:21–23:18).

Therein lies the rub. True, "plausible and specific factual allegations that aspects of the claims are inventive are sufficient" to defeat a motion to dismiss, but that requires "what makes the claims inventive" to be "recited by the claims," and it was not here. *Cellspin*, 927 F.3d at 1317. "No amendment to a complaint can alter what a patent itself states." *Sanderling*, 65 F.4th at 706. As observed in the prior order and explained at greater length in this order,

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there is (still) a mismatch between what was broadly claimed by the five asserted patents and what the specifications and Splunk's (proposed amended) complaint *say* was claimed (*see* Dkt. No. 55 at 15–16). Because the alleged improvements have not been captured in the claim language, the validity of the claims does not turn on the factual question of whether the alleged improvements are unconventional. The amended allegations, taken as true, do not prevent resolution of this action's patent-eligibility disputes.[2]

Consider the '206 patent, entitled "Selecting Parsing Rules Based on Data Analysis." It describes a method for previewing the application of a parsing rule on a selection of raw data in a graphical user interface and, in response to user input, processing a broader selection of raw data with that parsing rule to create searchable, time-stamped events, "wherein the method is performed by one or more computing devices" ('206 patent 20:45–67). The proposed amended complaint provides historical context on search engine indexing to further support arguments Splunk had made previously about the problem of "polluting" an index store if events are not "well-defined" that the claimed invention ostensibly solved (*see* PAC ¶¶ 127–31). None of the claims recite a mechanism for ensuring events are well-defined, however. It is the *user* who decides if the rule should be applied based on the preview.

Recognizing this, Splunk now alleges that the claims are directed to software that "employs a non-conventional technique wherein index data is generated *before and separately from* that data being stored in an index" (PAC ¶ 129; *see* Br. 16 (quoting PAC ¶¶ 129, 131)). But the claims themselves do not even mention index data, let alone differentiate its generation and storage. Elsewhere, Splunk contends that "[t]he graphical user interface contemplated by these claims represents an important advance over conventional technology" and facilitates the user's data analysis decision-making (PAC ¶ 132; *see* Br. 17 (citing PAC ¶ 132); PAC ¶¶ 133–34). Yet the Federal Circuit has made clear that the mere addition of a graphical user interface does not transform an abstract idea (like previewing a data analysis rule before applying it) into

[2] One instance in which allegations can prevent resolution of patent-eligibility disputes is when a patent owner alleges that claim construction is required before patent eligibility can be assessed. *See Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1300 (Fed. Cir. 2016). Counsel confirmed at the hearing that Splunk is not alleging this (Tr. 19:18–24).

a patent-eligible application. "Automation or digitization of a conventional method of organizing human activity . . . does not bring the claims out of the realm of abstractness." *Weisner v. Google LLC*, 51 F.4th 1073, 1083 (Fed. Cir. 2022).

The '443 patent, entitled "Transformation of Network Data at Remote Capture Agents," describes a method for a remote data capture agent to obtain configuration data, monitor network data comprised of network packets, and generate and transform at least one network packet into time-stamped event data based on the obtained configuration data ('443 patent 26:28–49). The '438 patent, entitled "Configuring the Protocol-Based Generation of Event Streams by Remote Capture Agents," describes a method for such an agent to generate an event data stream based on the network data it monitors in accordance with the configuration data it received identifying a protocol and associated event attribute ('438 patent 24:26–45). The prior order took these patents up together because Splunk took them up together (Dkt. No. 55 at 16 (citing MTD Opp. 6–7, 13–17)). Although Splunk offers amended allegations to differentiate the claimed technology from conventional technology, the alleged improvements are not captured in the claims themselves, which are directed to abstract data manipulation.[3]

Splunk now identifies "configuration information" as "[a]t the core" of the claims' advances and emphasizes that the ability of the configuration information to be "changed at any time," "user-modifiable," and adjusted "during runtime" reflects improvement in network capture technology (Br. 6–8, 12–15 (quoting PAC ¶¶ 101, 118, 123)). The claims themselves, however, do not call for this dynamic reconfiguration.[4] As the prior order explained, the '443 patent simply describes monitoring (network) data and applying (configuration) data received to generate and transform (event) data. Meanwhile, the '438 patent simply describes generating (event) data by applying (configuration) data received to (network) data monitored.

[3] The prior order said remote capture agents "can *be* physical hardware servers or virtual machines running in the cloud" when it should have said remote capture agents "may *be installed* on a physical server and/or in a virtual computing environment" (Dkt. No. 55 at 17 (quoting '438 patent 4:65–5:2); '438 patent 7:48–49) (emphases added). This does not affect any analysis, however.

[4] Meanwhile, another asserted patent, entitled "Dynamically Instantiating Dual-Queue Systems," claims "dynamically instantiating [a] dual-queue node" ('467 patent 24:36–37).

What's more, specification language provides that "most" (not all) conventional network capture technologies operate in a fixed manner, and "generally" (not always) cannot be dynamically or easily modified ('443 patent 6:60–64). In other words, the patent itself betrays that this is not the claimed invention.

Hedging, Splunk points to other purported inventive concepts. For the '443 patent, it focuses on the transformation of data at the remote capture agent, which "constitutes a further technical advance" and ostensibly enables a more efficient, flexible usage of network resources and a reduction of network traffic (PAC ¶¶ 105–06; *see* Br. 7 (citing PAC ¶¶ 104–06)). But the only usage of network resources and reduction of network traffic *claimed* is that which occurs as a result of transmitting event data in lieu of network packets, and the specification makes clear that this was not itself unconventional (*see* '443 patent 1:37–41). For the '438 patent, Splunk again highlights the addition of a graphical user interface, which facilitates "further configurability improvements" (Br. 12–14 (citing PAC ¶ 119)). This order has already explained that the addition of such an interface is alone insufficient to transform an abstract idea into a patent-eligible application. *See Weisner*, 51 F.4th at 1083. "[N]othing in the patent contains any suggestion that the displays needed for th[is] purpose are anything but readily available." *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1355 (Fed. Cir. 2016).[5]

The '312 patent, entitled "Time Stamp Creation for Event Data," describes a method for creating a set of time-searchable events by segmenting machine data into event data and associating that data with a given time stamp, "wherein the method is performed by one or more computing devices" ('312 patent 17:9–48). The proposed amended complaint alleges that "challenges stood in the way of building an index for a true 'time series search engine' for raw time series machine data," which "would require the ability to index arbitrary sets of machine data, ranging from server logs to network packets to sensor data" (Br. 20 (quoting

[5] Splunk attached to its motion a presentation that it alleges CEO Sharp prepared and that "confirms that [the claimed technology] was neither routine nor conventional" (Br. 4, 9–11, Exh. Q). It incorporated this presentation into its proposed amended complaint (PAC ¶¶ 107–12). Again, because the alleged improvements have not been captured in the claim language, this does not move the needle.

PAC ¶ 154)). In other words, "data from these heterogeneous sources needed to be homogenized" (*ibid.*). Yet no such improvement is captured by the claim language. All that is claimed is creating time-searchable events by determining whether time information is available in segmented machine data, using time information from earlier processed events as a proxy if time information is unavailable, and doing this on a computer. *Cf. Alice*, 573 U.S. at 223. The proposed amended complaint states that the claims provide "a technique to facilitate indexing raw time-series machine data regardless of its format or the presence of time information within that data," but no such technique is provided (PAC ¶ 158). The claims do not even disclose how to calculate a time stamp when time information is unavailable.

Splunk now contends that the claims "set forth a particular algorithm" (Br. 20 (quoting PAC ¶ 158; *see* PAC ¶¶ 154, 158–62)). Calling this an algorithm does not make it any less abstract, however. Moreover, Splunk avers that the claims "create searchable events *suitable* to create an index for a time-based machine data search engine" and recite techniques "by which the index that underpins such a search engine *could be* created" (Br. 20 (quoting PAC ¶¶ 158, 163)) (emphasis added). As noted by Cribl and CEO Sharp, however, "tortuously alleging an 'improvement' that is, at best, two steps removed from the claim language only highlights the disconnect between the claimed invention and Splunk's purported advance" (Opp. 13). The Section "101 inquiry must focus on the language of the Asserted Claims themselves." *ChargePoint, Inc. v. SemaConnect, Inc.*, 920 F.3d 759, 769 (Fed. Cir. 2019).

Finally, the '467 patent, entitled "Dynamically Instantiating Dual-Queue Systems," describes a method for routing live data to a dual-queue node that, upon dynamic instantiation, initializes a live data queue and a stale data queue, wherein the live data queue receives live data for processing and the stale data queue stores a persistent backup ('467 patent 24:31–43). The proposed amended complaint asserts that the claimed invention prevents the "over-instantiation" of (pre-existing) dual-queue nodes, instantiating them "only when needed" (PAC ¶ 147; *see* Br. 21 (citing PAC ¶¶ 137–39)). But all that is claimed is the dynamic instantiation of a dual-queue node, with no limit on the number of instantiated dual-queue nodes and no detail on why a dual-queue node may (or may not) be instantiated.

According to Splunk, the proposed amended complaint "adds supplemental allegations to clarify that the claims are not directed to 'handling overflow traffic,' but instead are directed to how to efficiently manage dual-queue data structures in a computer system that are used to handle such traffic" (Br. 22 (quoting PAC ¶ 148)). Yet the claims do not disclose a solution to the management problem identified in the specification (and Splunk's original complaint) — that of avoiding lost data when incoming live data arrives too quickly — beyond standard caching and storing. Acknowledging the claimed invention relates to caching and storing, Splunk now emphasizes that the claims "focus on problems associated with providing dual-queue systems to many tenants" based on scalability and affordability (Br. 23 (citing PAC ¶ 139); *see* PAC ¶¶ 138–39, 141–42). A concrete solution to those multi-tenant problems, however, is not captured in the claim language, which merely "implement[s] a multi-tenant dual-queue system" ('467 patent 24:31–32).

* * *

The Federal Circuit has recognized that "the specification cannot be used to import details from the specification if those details are not claimed. Even a specification full of technical details about a physical invention may nonetheless conclude with claims that claim nothing more than the broad law or abstract idea underlying the claims, thus preempting all use of that law or idea." *ChargePoint*, 920 F.3d at 769. Likewise, the Federal Circuit has recognized that a complaint cannot be used to import details from the specification or elsewhere if those details are not claimed. *Cellspin*, 927 F.3d at 1317. Otherwise, a carefully drafted complaint could always push patent-eligibility disputes to summary judgment or trial, which would delay invalidation and waste considerable resources.

During the hearing, counsel for Splunk stated that "[w]hat *Cellspin* is about is you don't have to look at the patent, itself, to determine if it's unconventional or not" and that "in fact, prosecutors are trained not to be too specific about what's new here, to leave some room in litigation" (Tr. 23:13–17). That patent prosecutors draft broadly for a strategic advantage may be true, albeit lamentable, but this order should draw into relief the risk they run in doing so. Patents must specifically claim what they invent. Splunk reaped what it sowed.

Accordingly, Splunk's amended allegations do not preclude dismissal of its direct patent infringement claims, and amendment of Splunk's complaint would be futile. Because the patent claims remain ineligible, this order does not reach Splunk's new arguments with respect to willful and indirect infringement.[6]

CONCLUSION

For the foregoing reasons, Splunk's motion for leave to file an amended complaint is **DENIED**.

IT IS SO ORDERED.

Dated: June 23, 2023.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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[6] Suffice to say, the undersigned is opposed to the idea that Cribl became knowledgeable of the asserted patents and their infringement on account of the complaint that Splunk filed in the District of Delaware before it refiled in this district. Splunk recognizes that the parties agreed upon dismissal and refiling to conserve resources (Br. 2). Surely Cribl never would have agreed to this had it known that this would impute knowledge.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SPLUNK INC.,

Plaintiff,

v.

CRIBL, INC.,

Defendant.

No. C 22-07611 WHA

JUDGMENT

Pursuant to the jury verdicts and the orders in this case (including the jury charges and memorandum opinion on fair use), and as to all claims and defenses not previously dismissed (*see* Dkt. No. 115; Mar. 7, 2024 Tr. 3:22–4:6), the Court's final judgment is as follows:

1. JUDGMENT IS ENTERED in favor of defendant/counter-plaintiff Cribl, Inc. and against plaintiff/counter-defendant Splunk Inc. on Count I of Splunk's complaint (Dkt. No. 1) with respect to infringement of U.S. Patent No. 9,762,443;

2. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Count II of Splunk's complaint with respect to infringement of U.S. Patent No. 10,805,438;

3. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Count III of Splunk's complaint with respect to infringement of U.S. Patent No. 9,208,206;

4. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Count IV of Splunk's complaint with respect to infringement of U.S. Patent No. 9,838,467;

5. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Count V of Splunk's complaint with respect to infringement of U.S. Patent No. 10,255,312;

6. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Count VII of Splunk's complaint with respect to infringement of Splunk's copyright in Splunk Enterprise source code;

7. JUDGMENT IS ENTERED in favor of Splunk and against Cribl on Count VIII of Splunk's complaint with respect to infringement of Splunk's copyright in past and present (as of the date of the second-phase jury verdict in this litigation) versions of Splunk Enterprise object code;

8. JUDGMENT IS ENTERED in favor of Splunk and against Cribl that Cribl's copyright infringement under Count VIII of Splunk's complaint (*supra* ¶ 7) was willful;

9. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Cribl's Second Affirmative Defense, raised in Cribl's answer (Dkt. No. 60), of fair use;

10. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Count X of Splunk's complaint with respect to violation of the anticircumvention provisions of 17 U.S.C. § 1201(a);

11. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Count XI of Splunk's complaint with respect to breach of the Technology Alliance Partner contract;

12. JUDGMENT IS ENTERED in favor of Splunk and against Cribl on Count XII of Splunk's complaint with respect to breach of the Splunk General Terms (SGT) contract;

13. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Count XIII of Splunk's complaint with respect to tortious interference with prospective business relations under California law;

14. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Count XIV of Splunk's complaint with respect to violations of Section 17200 of California's Business and Professions Code;

15. JUDGMENT IS ENTERED in favor of Cribl and against Splunk on Cribl's Sixth Affirmative Defense of statute of limitations precluding an award of damages for copyright

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infringement more than three years before this suit was filed and for breach of contract more than four years before this suit was filed;

16. JUDGMENT IS ENTERED in favor of Splunk and against Cribl on Cribl's Twelfth Affirmative Defense of unclean hands;

17. JUDGMENT IS ENTERED in favor of Splunk and against Cribl on Cribl's Thirteenth Affirmative Defense of equitable estoppel;

18. JUDGMENT IS ENTERED in favor of Splunk and against Cribl on Cribl's Fourteenth Affirmative Defense of waiver;

19. JUDGMENT IS ENTERED in favor of Splunk and against Cribl on Count II of Cribl's counterclaims with respect to violations of Section 17200 of California's Business and Professions Code;

20. JUDGMENT IS ENTERED in favor of Splunk and against Cribl on Count III of Cribl's counterclaims with respect to a declaration of unenforceability of the SGT contract as applied to Cribl on the facts of this case;

21. JUDGMENT IS ENTERED in favor of Splunk and against Cribl awarding nominal damages of $1;

22. JUDGMENT IS ENTERED in favor of Splunk and against Cribl awarding an injunction, the scope of which itself resolved all other issues in the case.

Pursuant to parties' stipulation (Dkt. No. 374), as amended,

IT IS SO ORDERED.

Dated: August 23, 2024.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California