

Nos. 26-1317, 26-1355

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

→→←←

SPLUNK INC.

Plaintiff-Appellant,

v.

CRIBL, INC.,

Defendant-Cross-Appellant

*On Appeal from the United States District Court
for the Northern District of California, No. C 22-07611 WHA, Judge William Alsup*

DEFENDANT-CROSS-APPELLANT CRIBL, INC.'S REPLY BRIEF

Tigran Guledjian
Christopher Mathews
Valerie Roddy
Amy T. Chau
Sara R. Miller
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
865 South Figueroa St., 10th
Floor
Los Angeles, CA 90017
(213) 443-3000

John F. Bash
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
300 West 6th St., Suite 2010
Austin, TX 78701
(737) 667-6100

William Patry
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
295 5th Ave., 9th Floor
New York, NY 10016
(212) 849-7000

Attorneys for Defendant-Cross-Appellant Cribl, Inc.
September 16, 2026

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	3
I. CRIBL WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW REGARDING COPYRIGHT INFRINGEMENT	3
II. CRIBL WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW REGARDING WILLFULNESS	14
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

<i>Cartoon Network LP, LLLP v. CSC Holdings, Inc.</i> , 536 F.3d 121 (2d Cir. 2008)	6, 7
<i>Castillo v. G&M Realty L.P.</i> , 950 F.3d 155 (2d Cir. 2010)	7
<i>CDK Glob. LLC v. Brnovich</i> , 16 F.4th 1266 (9th Cir. 2021)	3, 5, 6, 8
<i>Chi-Boy Music v. Charlie Club, Inc.</i> , 930 F.2d 1224 (7th Cir. 1991)	19
<i>Computer Assocs. Int’l, Inc. v. Altai, Inc.</i> , 982 F.2d 693 (2d Cir. 1992)	4
<i>Costar Grp., Inc. v. Loopnet, Inc.</i> , 373 F.3d 544 (4th Cir. 2004)	8
<i>Erickson Prods., Inc. v. Kast</i> , 921 F.3d 822 (9th Cir. 2019)	16
<i>Global-Tech Appliances, Inc. v. SEB S.A.</i> , 563 U.S. 754 (2011)	16
<i>Ho v. Carey</i> , 332 F.3d 587 (9th Cir. 2003)	15
<i>Impression Prods., Inc. v. Lexmark Int’l, Inc.</i> , 581 U.S. 360 (2017)	5
<i>Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.</i> , 658 F.3d 936 (9th Cir. 2011)	1
<i>MAI Sys. Corp. v. Peak Comp., Inc.</i> , 991 F.2d 511 (9th Cir. 1993)	6

<i>Oracle USA, Inc. v. Rimini St., Inc.</i> , 879 F.3d 948 (9th Cir. 2018), <i>rev'd in part on other grounds</i> , 586 U.S. 334 (2019).....	13
<i>Syufy Enters. v. Am. Multicinema, Inc.</i> , 793 F.2d 990 (9th Cir. 1986)	3, 15
<i>Triad Systems Corp. v. Southeastern Express Co.</i> , 64 F.3d 1330 (9th Cir. 1995)	6
<i>Viavi Sols, Inc. v. Platinum Optics Tech. Inc.</i> , 698 F. Supp. 3d 1145 (N.D. Cal. 2023)	16-17
<i>Yellow Pages Photos, Inc. v. Ziplocal, LP</i> , 795 F.3d 1255 (11th Cir. 2015)	19

STATUTES

17 U.S.C. § 101	3, 4
17 U.S.C. § 102	3

OTHER AUTHORITIES

2 NIMMER ON COPYRIGHT § 8.08 (2024).....	8
--	---

INTRODUCTION

At trial, Splunk failed to present any evidence at all with respect to how long any portion of Splunk Enterprise code persists in RAM when it is executed. Nor did it marshal any evidence that Cribl had the requisite mental state for willful infringement with respect to Cribl's limited use of Splunk Enterprise to show customers that Cribl Stream and Splunk Enterprise worked together.

Although substantial-evidence review is deferential to the jury's verdict, it is not a rubber stamp. A verdict cannot be sustained when the prevailing party submitted literally no evidence to support necessary findings. *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 941-42 (9th Cir. 2011). Cribl was accordingly entitled to judgment on willful copyright infringement.

Splunk's arguments on appeal lack merit. With respect to the duration of the RAM copies, Splunk claims that the question is whether the software program persisted long enough to be perceived by a human being, but that is not the standard, and none of Splunk's cited precedents support it. Rather, to qualify as a "fixed" copy under the Copyright Act, a software program must persist for more than a transitory period in RAM. The caselaw sets the lower bound on that at several minutes, or long enough for a human being not only to perceive information but to process and analyze it. There is no evidence here that Splunk Enterprise persists that long in RAM when it is executed with Cribl Stream and all of the other programs necessary

to test and troubleshoot or operate a sandbox demonstration. None of the disparate witness testimony that Splunk cites speaks to that question.

Although Splunk, as anticipated, argues in the alternative that Cribl's downloading of Enterprise separately provides the necessary infringing copies, those downloads were authorized by the SGT and so could not constitute copyright infringement. Splunk offers no coherent explanation of how those initial, authorized downloads could be infringing based on later violations of the use restrictions in the SGT.

With respect to willfulness, Splunk appears to concede that its state-of-mind evidence related solely to Cribl's reverse-engineering activities, not its marketing or testing and troubleshooting activities. Splunk's principal argument is that because reverse-engineering supposedly presented a stronger case for fair use, Cribl necessarily must have known or acted in reckless disregard of the risk that the marketing uses were infringing. But the record contains no evidence that the non-attorneys at Cribl had any expertise in copyright law or appreciated the nuances of the fair-use doctrine, and it would be far from self-evident to a layperson that reverse-engineering the communication protocol for a competitor's product presents less legal risk than merely showing customers that two products work together. Splunk also argues that if this Court were to reverse the district court's fair-use finding, evidence of Cribl's state of mind for reverse-engineering would suffice to

sustain the verdict. But that is clearly wrong: Instructed that reverse engineering and testing and troubleshooting were fair use, the jury was tasked only with deciding whether Cribl’s marketing activities—if infringing at all—constituted willful infringement. A verdict cannot be affirmed based on a theory that was not before the jury. *Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986).

Accordingly, to the extent the Court disturbs the judgment or injunction below with respect to any copyright-related issues, it should reverse the district court denial of Cribl’s motion for judgment as a matter of law as to willful copyright infringement.¹

ARGUMENT

I. CRIBL WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW REGARDING COPYRIGHT INFRINGEMENT

Splunk does not dispute (Resp. Br. 48-50) that to establish that executing Splunk Enterprise results in “fixed” copies within the meaning of the Copyright Act, 17 U.S.C. §§ 101, 102(a), Splunk was required to demonstrate that during execution the software persists in RAM “for a period of more than transitory duration.” *CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1276 (9th Cir. 2021) (quotation marks

¹ Cribl’s principal brief contains an error at page 64 urging the Court to reach the conditional-cross appeal if it disturbs the judgment with respect to Splunk’s contract claims as well. As stated earlier in that brief (at pages 5 and 18), the Court should reach the cross-appeal only if it disturbs the judgment or injunction with respect to the copyright claims.

omitted). But it contends (Resp. Br. 49) this requirement is so “flexible” that the jury could have inferred a sufficient duration without any testimony addressing that question at all. That is not correct. The Court should hold Splunk to its evidentiary burden and direct the entry of judgment for Cribl on Splunk’s object-code copyright infringement claim.

A. As an initial matter, Splunk’s attempt to whittle the duration requirement down to essentially nothing would remove an important guardrail in the Copyright Act. It is well recognized that, despite the Copyright Act defining a computer program as a “literary work,” 17 U.S.C. § 101, applying copyright law to software can often be an “attempt to fit the proverbial square peg in a round hole.” *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 712 (2d Cir. 1992). As relevant here, because running software can itself be an act of copying insofar as the software code is technically copied into a computer’s RAM, a person who obtains a copy of a software program from an authorized channel may be unable to lawfully run that program unless it obtains a further license to do so from the copyright holder. As a result, copyright holders can exercise considerable power to control the uses of software post-distribution. That stands in marked contrast not only to traditional literary works—an author cannot prohibit a purchaser from reading her novel—but also patent law, where the first-sale doctrine prevents patent holders from controlling

the use of a device validly purchased except through contractual arrangements. *Impression Prods., Inc. v. Lexmark Int’l, Inc.*, 581 U.S. 360, 370 (2017).

The duration requirement places real limits on the authority of copyright holders to wield copyright law to control the use of lawfully acquired software programs. The copyright holder who wishes to restrain use must establish an unauthorized embodiment in a computer’s RAM that is more than transitory in duration. *CDK Glob.*, 16 F.4th at 1276. That requirement ensures that many common uses of software programs—from a router momentarily holding a packet in transit, to a streaming app briefly buffering video to smooth out a network hiccup, to a processor’s cache holding data for a fraction of a second mid-calculation—will not be deemed copyright infringement. To enforce that limitation on the reach of copyright law, courts place the burden on plaintiffs to demonstrate that the defendant’s use of the software program resulted in a more than transitory reproduction in a computer’s RAM.

B. Splunk failed to carry its burden here because it simply made no attempt at trial to satisfy the duration requirement. In an effort to overcome that complete evidentiary failure, Splunk artificially narrows the standard articulated by the Ninth Circuit, claiming (Resp. Br. 49) that the standard “requires copies to exist long enough for a human technician to perceive them,” a standard that could presumably be satisfied by as little as a fraction of a second. Yet Splunk provides no citation for

that claim, because it has no support in precedent. In the case from which Splunk seems to draw its standard, *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), the computer software persisted long enough for a technician to “view the systems error log” and “diagnose [a] problem.” *Id.* at 518. That is a far longer duration than mere human perception of any transitory RAM copies. As the Second Circuit has noted, “it seems fair to assume that in [*MAI Systems*] the program was embodied in the RAM for at least several minutes.” *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 128 (2d Cir. 2008). And *MAI Systems* contained no analysis of the duration requirement, because “the duration requirement was not disputed.” *CDK Glob.*, 16 F.4th at 1276; *see Cartoon Network*, 536 F.3d at 127.

Splunk also cites (Resp. Br. 49) *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995), but there the defendant’s technician used the software to service a computer. *Id.* at 1333. Nothing in the case suggests that a moment of perception is sufficient. If anything, *Triad Systems*, *MAI Systems*, and *CDK Global* all indicate that the RAM copy must persist sufficiently long for a human to conduct some level of analysis based on the information perceived.

Splunk relies (Resp. Br. 49-50) on the Second Circuit’s decision in *Cartoon Network*, but that case confirms why Splunk is wrong. In *Cartoon Network*, “no bit of data remain[ed] in any buffer for more than a fleeting 1.2 seconds,” and “[a]nd unlike the data in cases like *MAI Systems*, which remained embodied in the

computer's RAM memory until the user turned the computer off, each bit of data" was "rapidly and automatically overwritten as soon as it [wa]s processed." 536 F.3d at 129-30. Splunk presented no evidence below that the RAM copies here worked differently, and its expert admitted that the information is overwritten as needed, Appx3099-3100. Although Splunk emphasizes (Resp. Br. 50) that the Second Circuit has indicated that "several minutes" can be sufficient, *see Castillo v. G&M Realty L.P.*, 950 F.3d 155, 168 (2d Cir. 2020), Splunk presented no evidence here that the copies persist for that length of time (or any other) in the use scenarios at issue. And nothing in the Second Circuit decisions support the view that a mere moment of human perception is enough.

Splunk also caricatures (Resp. Br. 48) Cribl's argument as requiring evidence regarding "precisely how long Splunk's object code stays fixed in RAM" during execution and demanding "a specific number quantifying retention." But Cribl never demanded a specific degree of precision in quantifying the duration. The problem here is not one of degree; Splunk presented no evidence at all as to how long any copyrighted portions of Enterprise code are stored in RAM during execution, even in general or imprecise terms, while admitting that portions ("pages") of the code are regularly cycled in and out of RAM during execution. Cribl Principal Br. 66-67. If zero testimony on duration is nevertheless sufficient to uphold a verdict of copyright infringement, the duration requirement becomes a dead letter.

C. Apart from its erroneous legal standard, Splunk cites the testimony of four trial witnesses to argue that the jury had sufficient evidence of duration. But none of those witnesses directly testified as to that issue. Splunk’s principal argument seems to be that if anyone used Enterprise in any scenario, that necessarily means that Enterprise persisted in a computer’s RAM for more than a transitory duration. That is legally incorrect. The Ninth Circuit explained in *CDK Global* that “embodiments in a computer’s memory may perform some useful function despite being transitory.” 16 F.4th at 1276 (holding plaintiff failed to establish all embodiments—including ones performing useful functions—were necessarily non-transitory) (citing *Cartoon Network*, 536 F.3d at 130 (buffering); and *Costar Grp., Inc. v. Loopnet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (Internet hosting service)). As the section of the Nimmer treatise that Splunk cites explains, the Ninth Circuit has held that the duration requirement is not met where “a transitory embodiment in a computer’s memory allows a useful function to be performed.” 2 NIMMER ON COPYRIGHT § 8.08 (2024) (emphasis omitted). Here, mere evidence that Splunk Enterprise is used, without any testimony as to how long any copyrighted portions of the software persist in RAM to facilitate that use, is insufficient to sustain the verdict.

Dr. Michael Mitzenmacher. Splunk’s technical expert, Dr. Michael Mitzenmacher, conducted experiments that he claimed established the percentage of

“pages,” or segments of code, that are sequentially loaded into RAM upon execution of Splunk Enterprise. Appx3096-3099. He also testified that with large programs like Enterprise, pages initially loaded into RAM would be copied over as needed to make room for other instructions. *See, e.g.,* Appx3099-3100. But Dr. Mitzenmacher’s testimony did not address the duration during which these portions of Enterprise are stored in RAM during execution for the limited infringing purposes in this case. Dr. Mitzenmacher testified only that pages “typically” are not unloaded “while the program is running” and “*may* not be unloaded until some other program [] comes along that says, wait, I need the [RAM] to run my program.” Appx3099-3100 (emphasis added). Those statements do not address how long any substantial portion of copyrighted Enterprise code is present in RAM, which was particularly important given Dr. Mitzenmacher’s confirmation that only portions of Enterprise are loaded into RAM upon execution (and then replaced as needed for space). Appx3099-3100.

Dr. Owen Astrachan. Splunk next cites the testimony of Dr. Astrachan, Splunk’s industry expert, about the use of Enterprise in certain of Cribl’s demonstration sandboxes for marketing.¹ But that testimony only underscores the gaps in Dr. Mitzenmacher’s testimony, because it establishes that many different

²¹ Although Dr. Astrachan referenced “training,” Splunk has not sought any finding on appeal regarding uses of Enterprise for training.

software programs are competing for limited RAM space when Enterprise is executed in the use scenarios at issue here.

Dr. Astrachan testified about the alleged marketing use of Enterprise, in which prospective customers could “test Cribl to see, ‘Hmm, maybe I’d like to buy this.’” Appx3048. Users of Cribl sandboxes would enter the URL “sandbox.cribl.io” into their browsers, which would allow them to run software in a Cribl sandbox in “[an] Amazon Cloud instance.” *Id.* Dr. Astrachan described a scenario in which a user runs Enterprise from self-contained, standalone container software in a protected sandbox environment along with Cribl Stream, hosted on a virtual machine in Amazon Cloud, all viewable through a user’s browser running on the user’s computer. In that scenario, once Enterprise is launched in the Cribl sandbox, it has to compete for RAM storage space with at least *six other software programs* running simultaneously: (1) the computer operating system running the user’s computer and communicating over the Internet; (2) the user’s browser; (3) Amazon Cloud communication software; (4) the Cribl sandboxing environment; (5) Cribl Stream; and (6) the container software used to launch both Cribl Stream and Splunk Enterprise. Appx3046-3049.

Despite those simultaneous, competing demands on RAM, Dr. Astrachan did not testify about the duration that copyrighted Enterprise code remains in RAM versus any other software he acknowledges the user to be employing at the same

time. That is because, like Dr. Mitzenmacher, he simply did not analyze the question. His testimony cannot support the verdict.

Cribl Employees. Splunk cites the testimony of Cribl marketing manager Brendan Dalpe, who was a fact witness, not an expert on computer processes. But Dalpe said absolutely nothing about how long Splunk Enterprise runs in the Cribl sandbox environments, much less how long any copyrighted code remains in RAM in light of the competing demands on RAM identified in Dr. Astrachan's testimony—the pertinent question here. *See id.* Splunk also cites the testimony of Cribl's Chief Technology Officer, Ledion Bitincka, but he likewise was not an expert and said nothing about how long the copyrighted portions of Enterprise code are stored in RAM during execution of the software. His testimony that Cribl runs Splunk Enterprise to troubleshoot customer issues with its software, Appx2721, did not address the competing demands on RAM that occur in running Cribl and Splunk together or provide any indication of how long copyrighted code persists in RAM.

In sum, none of the testimony cited by Splunk—or the reasonable, non-speculative inferences that can be drawn from that testimony—indicates that any of the relevant uses of Enterprise in conjunction with Cribl requires that copyrighted Enterprise code persist in RAM for a non-transitory period of time. Splunk failed to present anything on this element of copyright infringement, much less substantial evidence. That is not sufficient to establish copyright infringement.

D. Splunk argues (Resp. Br. 53-54), as an alternative basis for affirmance, that the jury’s verdict of copyright infringement is supported by Cribl’s direct downloads of Splunk Enterprise. Cribl’s opening brief identified (at pages 68-69) the problems with that theory, and Splunk’s response barely addresses them.

As Cribl explained, although downloads are “copies,” those copies were authorized by Splunk via the SGT and so could not qualify as copyright infringement. Splunk does not dispute that the SGT applied to all downloads of Splunk Enterprise (and Splunk forwarders); indeed, the assertion that the SGT applied to all such downloads was a prominent part of Splunk’s case since the filing of its complaint. *See, e.g.*, Appx338. And the SGT expressly authorized the downloads because it defined the act of downloading as the acceptance of its terms. Appx4169 (SGT Preamble) (“By clicking on the appropriate button, or by downloading, installing, accessing or using the Offerings, you agree to these General Terms.”).

Splunk argues on appeal that “Cribl never carried its burden of showing its conduct was licensed” and could not do so “because the SGT directed Cribl not to ‘download . . . [Splunk Software]’ absent agreement and licensed only ‘Internal Business Purposes.’” Resp. Br. 53-54 (quoting SGT § 1(A) & SGT Preamble) (alterations in Splunk’s brief). That argument is mistaken. The agreement does not state that a later violation of the use restriction retroactively renders the downloading

unauthorized. And no provision states that the downloading is unauthorized if the user contemplates a future breach of a use provision at the time of the download. While the preamble states that “[i]f you do not agree to these General Terms . . . do not download, install, access, or use any of the Offerings,” Appx4169, that merely indicates that the act of downloading will bind the user to the contract’s terms. A party can “agree to these General Terms” while contemplating a future action that would breach one of those terms. That is particularly true where, as here, the party had good-faith arguments that the activity in question was in fact permitted by the contract. *See* Cribl’s Principal Br. 68-69.

Given that lack of explicit textual support in the text of the SGT, Splunk’s argument ultimately reduces to the proposition that accepting the terms of a click-wrap or browse-wrap agreement with the intent to breach them in the future—even in ways that do not themselves amount to copyright infringement—is itself an act of copyright infringement. On that view, for example, a social-media company could sue a user for copyright infringement for mere intent to violate a use restriction in the terms of service. Indeed, even the intent to breach minor or technical terms of an agreement would render the user liable for copyright infringement on the theory that the initial download was unauthorized.

Splunk cites no support whatsoever for that sweeping theory. In *Oracle USA, Inc. v. Rimini St., Inc.*, 879 F.3d 948, 952-54 (9th Cir. 2018), *rev’d in part on other*

grounds, 586 U.S. 334 (2019), the accused copyright infringer had no license at all. And Splunk never grapples with the practical problems that such a theory of liability would produce, such as how to determine a user’s intent and whether a good-faith but mistaken belief that conduct is authorized would render the download an act of copyright infringement. Splunk’s novel theory of copyright infringement therefore provides no ground to affirm the judgment.

* * *

In short, Splunk failed to adduce substantial evidence that the purported “copies” made in RAM as a result of using Splunk Enterprise meet the duration requirement, and the initial licensed downloads do not constitute copyright infringement. If this Court is otherwise inclined to disturb the judgment on the copyright claims, it should direct the district court to enter judgment for Cribl on the copyright claims.

II. CRIBL WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW REGARDING WILLFULNESS

Assuming copyright infringement *arguendo*, Splunk also failed to adduce sufficient evidence that Cribl acted willfully in assertedly infringing marketing uses of Splunk Enterprise. *See* Cribl Principal Br. 69-71. Splunk’s arguments do not reconcile the fundamental disconnect between its evidence of willfulness, which all related to reverse-engineering, and the fact that the jury was asked to determine only whether Splunk’s marketing activities amounted to willful copyright infringement.

A. Splunk first argues (Resp. Br. 56-57) that if the Court reverses the district court's fair-use findings, the relevant body of evidence of willfulness would be broader than that pertaining to marketing-related infringements. That is clearly wrong. The jury that rendered the willfulness finding was instructed that reverse-engineering and testing and troubleshooting uses were fair use. Because reviewing courts presume that juries follow their instructions, *Ho v. Carey*, 332 F.3d 587, 594 (9th Cir. 2003), the jury's willfulness finding necessarily rested on the marketing uses. Splunk cannot obtain an affirmance on substantial-evidence review based on a finding that the jury did not make. *Syufy Enters.*, 793 F.2d at 1001. There is thus no "logical inconsistency" (Resp. Br. 57) in arguing that even if the Court reverses the fair-use finding, it should hold that the jury had insufficient evidence of willfulness.

B. On the merits, Splunk essentially concedes that all of the evidence for willfulness related to reverse-engineering, not marketing or even testing and troubleshooting, the other activity Splunk contends on appeal is not a fair use. *See* Resp. Br. 54-55, 57. But it argues (Resp. Br. 54, 57) that a jury could reasonably have concluded that concern about reverse-engineering meant that Cribl "recognized" the "risk" that marketing would not be fair use as well, since reverse-engineering is supposedly "the harder case for infringement and the stronger candidate for fair use."

That is pure *ipse dixit*. Splunk presented zero testimony that anyone at Cribl had expertise in copyright law or regarded marketing uses as presenting greater legal

risk than reverse-engineering. There is simply nothing in the record to permit the jury to make the logical leap that Cribl's concern about litigation risk for reverse-engineering revealed actual knowledge or recklessness with respect to marketing uses, especially given that the marketing uses were merely customer demonstrations to show that Cribl Stream and Splunk Enterprise worked together, *see* Appx3046-3049. There is no common-sense reason to believe that laypersons would surmise that reverse-engineering a communication protocol for a competitor's product poses less legal risk than such limited demonstrations of functionality. Tellingly, Splunk cites no precedent ever holding that evidence of willfulness as to one use is sufficient to show willfulness for a different use.

Splunk suggests almost in passing (Br. 57-58) that the jury had sufficient evidence that Cribl "'specifically avoided' learning more about the risks associated with marketing before engaging in that conduct anyway" and so was willfully blind (quoting Appx65). But willful blindness requires evidence that the defendant "subjectively believe[d] that there is a high probability that a fact exists" and took "deliberate actions to avoid learning of that fact." *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011); *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 833-34 (9th Cir. 2019). The record contains no evidence either that Cribl had such a subjective belief or that it made "active efforts . . . to avoid knowing about the infringing nature of the activities," *Global-Tech*, 563 U.S. at 770. Mere inaction is

not sufficient. *See, e.g., Viavi Sols, Inc. v. Platinum Optics Tech. Inc.*, 698 F. Supp. 3d 1145, 1149 (N.D. Cal. 2023) (“For example, ‘[w]illful blindness requires not just a failure to ask whether any sales infringed, but an affirmative act to remain ignorant of infringing sales.’”) (citation omitted).

Even as to reverse-engineering, moreover, the evidence at most showed Cribl’s cognizance of litigation risk, not knowledge, reckless disregard, or willful blindness as to whether reverse-engineering actually infringed. *See* Resp. Br. 55. That evidence merely anticipated that Splunk might file a lawsuit and thus speaks to Cribl’s understanding of Splunk’s playbook and corporate mindset, not the merits of Cribl’s fair-use defense. Likewise, that Cribl was willing to risk *litigation* to provide a product that would “delight[] customers,” Appx3358-3359, is fully consistent with Cribl’s belief that its use of Splunk Enterprise was protected fair use. But even if this evidence would have been sufficient to show willfulness as to reverse-engineering, it is far too thin of a reed to support a verdict of willfulness on different uses altogether.

Splunk also points to testimony concerning talking points for Splunk’s 2018 customer conference to claim that it showed Cribl was trying to conceal its S2S integration *from Splunk*. Resp. Br. 55 (citing Appx2681, Appx2683). As the talking points themselves make clear, however, Cribl’s concern was with the time that would be consumed discussing legal risk with prospective customers to whom it

would be demonstrating Cribl Stream, Appx5199, *not* with concealing anything from Splunk. Resp. Br. 55. Indeed, Cribl was candid with Splunk about its S2S integration. *See* Cribl Principal Br. 10-12. And in any event, this early analysis of risk related to reverse-engineering Cribl’s integration with Splunk via S2S. The district court ultimately found that integration to be fair use, and Splunk does not challenge that fair-use finding on appeal.

Finally, Splunk relies (Resp. Br. 58-59) on the termination of the TAP Agreement to suggest that Cribl knew that the marketing uses authorized by that agreement were not authorized by the SGT and the fair-use doctrine, but nothing in the testimony it cites supports that inference. For example, Bitincka stated in the cited testimony—which, contrary to Splunk’s claim in its brief, did not address marketing—that there were in fact other grounds beyond the TAP Agreement to allow testing and troubleshooting. Appx2696.

Splunk also cites an email from Cribl’s CEO to employees stating that “[n]othing is materially different” after termination of the TAP Agreement, apparently to suggest that Cribl was intentionally deceiving employees about its legal authorizations to continue marketing. But Splunk divorces the statement from its context. Other than an initial reference to the termination of the TAP Agreement, the bulk of the email (including the paragraphs preceding the concluding statement in question) is devoted to Splunk’s threatening correspondence to Cribl employees

and Splunk’s “baseless allegations.” Appx4269. In other words, the CEO was saying that *Splunk’s behavior* did not change anything. Any reasonable reading of the email (which the CEO was barely asked about, Appx3384-3385) in its entirety confirms that his statement shows nothing about Cribl’s state of mind as to copyright infringement by marketing or any other activity.

In short, the cited portions of the trial record do not suggest that Cribl believed the termination of the TAP Agreement materially affected the legal landscape with respect to the legality of its conduct, or that Cribl believed anything other than that conduct once protected by license was now protected only by fair use or a different license. Splunk’s cited (and non-binding) authorities are therefore inapposite, because they each involved unlicensed conduct with no claim of fair use. In the Seventh Circuit’s decision in *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224 (7th Cir. 1991), for example, the only claimed defense was that the infringer was unaware it required a license. And in *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255 (11th Cir. 2015), the defendant did not claim that fair use applied to the conduct at issue.

Here, by contrast, Cribl asserted fair use, and Splunk presented no evidence to the jury that Cribl knew the marketing uses would not qualify as fair use, or that its position was so unreasonable as to suggest reckless disregard. Splunk simply did

not put on any evidence at all about Cribl's mental state with respect to marketing uses. Cribl is accordingly entitled to judgment on that issue.

CONCLUSION

To the extent the Court disturbs the judgment or injunction below with respect to any copyright-related issues, it should reverse the district court's denial of Cribl's motion for judgment as matter of law on the grounds set forth above.

DATED: September 16, 2026 Respectfully submitted,

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By: /s/ John F. Bash

John F. Bash
*Attorneys for Defendant-Cross-Appellant
Cribl, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: September 16, 2026

By: /s/ John F. Bash

John F. Bash

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Circuit Rules 28.1(b)(3)(A) and 32(b)(1) because it contains 4,688 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: September 16, 2026

By /s/ John F. Bash
John F. Bash