

**IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

---

SAS INSTITUTE INC.,  
*Plaintiff-Appellant,*

v.

WORLD PROGRAMMING LIMITED,  
*Defendant-Appellee.*

---

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

---

**BRIEF *AMICUS CURIAE* OF THE COMPUTER &  
COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF  
DEFENDANT-APPELLEE WORLD PROGRAMMING LIMITED  
AND AFFIRMANCE**

---

Matthew Schruers  
Alexandra Sternburg  
Computer & Communications  
Industry Association  
25 Mass. Ave. NW, Suite 300C  
Washington, D.C. 20001  
(202) 783-0070

Jonathan Band  
*Counsel of Record*  
Jonathan Band PLLC  
21 Dupont Circle NW, Suite 800  
Washington, D.C. 20036  
(301) 770-0822  
jband@policybandwidth.com

*Counsel for Amicus Curiae*

August 30, 2021

## CERTIFICATE OF INTEREST

I certify that the following information is accurate and complete to the best of my knowledge.

**Date:** August 30, 2021    **Signature:** /s/ Jonathan Band  
**Name:**                    Jonathan Band

<b>1. Represented Entities.</b>	<b>2. Real Party in Interest.</b>	<b>3. Parent Corporations and Stockholders.</b>
Computer & Communications Industry Association	None/Not Applicable	None/Not Applicable

<b>4. Legal Representatives.</b>
None/Not Applicable

<b>5. Related Cases.</b>
None/Not Applicable

<b>6. Organizational Victims and Bankruptcy Cases.</b>
None/Not Applicable

## TABLE OF CONTENTS

CERTIFICATE OF INTEREST .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES.....	iv
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT .....	4
I.    SASII Failed to Establish a <i>Prima Facie</i> Case of Infringement .....	4
II.   The District Court Properly Considered Whether WPL Infringed Protected Expression.....	6
A. The Plaintiff Has the Burden of Showing that the Defendant Copied Protected Expression .....	7
B. The Presumption of Validity Does Not Create a Presumption That the Entire Work Is Protected Expression.....	8
III.  The Court of Justice of the European Union Found the SASII Input Formats and Output Designs to be Uncopyrightable.....	13
CONCLUSION .....	16
CERTIFICATE OF COMPLIANCE .....	17
CERTIFICATE OF SERVICE.....	18

## TABLE OF AUTHORITIES

### Cases

<i>Airframe Sys., Inc. v. L-3 Comm ’ns Corp.</i> , 658 F.3d 100 (1st Cir. 2011)....	13
<i>Bridgmon v. Array Sys. Corp.</i> , 325 F.3d 572 (5th Cir. 2003) .....	13
Case C-406/10, <i>SAS Inst. Inc. v World Programming Ltd.</i> , 2012 R.P.C. 31 .....	3, 14
<i>Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.</i> , 499 U.S. 340 (1991).....	7
<i>Google LLC v. Oracle America, Inc.</i> , 141 S. Ct. 1183 (2021).....	7
<i>Guzman v. Hacienda Records &amp; Recording Studio, Inc.</i> , 808 F.3d 1031 (5th Cir. 2015) .....	7, 8
<i>SAS Inst. Inc. v. World Programming Ltd.</i> , 64 F. Supp. 3d 755 (E.D.N.C. 2014), <i>vacated</i> , 874 F.3d 370 (4th Cir. 2017).....	5
<i>SAS Inst. Inc. v. World Programming Ltd.</i> , 874 F.3d 370 (4th Cir. 2017) .....	5, 6, 15
<i>Siegler v. Sorrento Therapeutics, Inc.</i> , 2021 WL 3046590 (Fed. Cir. July 20, 2021) .....	8

### Statutes and Regulations

17 U.S.C. § 102(b).....	2, 7
37 C.F.R. § 202.20(c)(2)(vii)(A) .....	11

### Other Authorities

Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) .....	15
Directive 2009/24/EC, 2009 O.J. (L 111) .....	13, 14, 15

Transcript of Copyrightability Hearing, *SAS Inst. Inc. v. World Programming Ltd.*, No. 18-cv-00295 (E.D. Tex. Oct. 14, 2020)..... 12

U.S. Copyright Office, Compendium of U.S. Copyright Office Practices (3d ed. 2021)..... 10

World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1996)..... 15

## **INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Computer & Communications Industry Association (“CCIA”) is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.<sup>2</sup>

CCIA members have a large stake in the rules of software copyright being properly designed: effective intellectual property protection encourages developers to create new applications, but the improper extension of copyright law to functional elements will discourage innovation, inhibit competition in the industry, and harm consumers.

## **SUMMARY OF ARGUMENT**

The World Programming Limited (“WPL”) software at issue in this case ensures that SAS Institute Inc. (“SASII”) customers are not locked-in to

---

<sup>1</sup> No counsel for any party authored this brief in whole or part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Fed. R. App. P. 29(a), all parties consented to the filing of this brief.

<sup>2</sup> A list of CCIA members is available at <https://www.ccianet.org/members>.

the SASII environment; it provides SASII customers an alternative platform on which they can run the programs they wrote in the SAS Language.

SASII, seeking to hold its customers captive, alleged that WPL infringed its copyright in SAS Learning Edition by copying the program's input formats and output designs.<sup>3</sup> Consistent with overwhelming precedent, the court below found that WPL did not infringe SASII's copyright. On appeal, SASII claims without merit that the district court committed both procedural and substantive errors.

The district court should be affirmed for three reasons. First, SASII failed to show that there was any similarity between the code, structure, or user interfaces of SASII Learning Edition and WPL's software. WPL never saw SAS Learning Edition's code, and SASII's expert never reviewed the code for WPL's program. All SASII proved was that WPL's program replicated the functionality of SASII Learning Edition, which is not the basis for a cognizable copyright claim. Under the idea-expression dichotomy codified in 17 U.S.C. § 102(b), the copyright in a computer program extends only to the program's expressive elements and not its functionality.

---

<sup>3</sup> As WPL explains in its brief, throughout this litigation SASII has been evasive concerning exactly which work (or works) WPL allegedly infringed. Because WPL admittedly studied SASII's Learning Edition program, this brief will treat SASII Learning Edition as the allegedly infringed work.

Second, the district court correctly recognized that in copyright cases, the plaintiff bears the ultimate burden of showing that what the defendant copied constituted protected expression. Contrary to the suggestion of SASII and its *amici*, the presumption of validity conferred by registration simply means that the registered work contains a non-*de minimis* quantum of protected expression; it provides no indication of which (or how many) elements within the work constitute the registrant's protected expression. Registering the work does not and cannot mean that every sentence or every part of it is endowed with *prima facie* validity.

Third, the district court correctly concluded that the SASII input formats and output designs do not constitute elements of protected expression in SASII Learning Edition. In assessing WPL's arguments on this issue, this Court should take into account the determination by the highest court in the European Union that the copyright in SASII Learning Edition does not extend to the program's input formats and output designs. Although SASII admits that the UK courts rejected the same claims SASII makes here, SASII neglected to mention that the UK courts did so at the direction of the Court of Justice of the European Union, the EU's Supreme Court. Case C-406/10, *SAS Inst. Inc. v World Programming Ltd.*, 2012 R.P.C. 31 ("*SAS I*").



## ARGUMENT

### I. SASII Failed to Establish a *Prima Facie* Case of Infringement.

In the district court, SASII altogether failed to show that there is any similarity whatsoever between the code or structure of SAS Learning Edition and that of WPL's software. As WPL explained in its opening brief, WPL never saw the code of SAS Learning Edition. SASII's expert never looked at the code of SAS Learning Edition, and he never compared the code and structure of SAS Learning Edition with the code or structure of WPL's program, World Programming System ("WPS"). SASII's expert thus could not point to a single line or module in WPS that corresponded to a similar line or module in SAS Learning Edition.<sup>4</sup> Further, WPS never displays commands in the SAS Language and has no user interfaces similar to those of SAS Learning Edition. When SASII asserts that WPL copied the SASII input formats, SASII Br. at 25, it actually means that WPL's software is capable of running user-written programs in the SAS Language, *i.e.*, it is capable of understanding and responding to inputs in the SAS Language. SASII's failure to show any similarity—let alone actionable similarity—between SASII Learning Edition and WPS provides this Court a sufficient

---

<sup>4</sup> SASII *amici* MathWorks and Oracle wrongly state that WPL's code is "identical" to SASII's. *See* MathWorks Br. at 5.

basis to affirm dismissal of SASII's complaint.

Significantly, the federal district court for the Eastern District of North Carolina granted summary judgment to WPL on precisely this basis in *SAS Inst. Inc. v. World Programming Ltd.*, 64 F. Supp. 3d 755, 776 (E.D.N.C. 2014), *vacated*, 874 F.3d 370 (4th Cir. 2017) ("*SAS II*"). SASII claimed that WPL infringed the same program elements as in this litigation, and the district court there reached the same result as the district court here. Because WPL had no access to SAS's source code, the *SAS II* court found that WPL did not copy any SAS code, nor the structure, sequence, and organization of that code. Indeed, the *SAS II* court found that "there is no evidence that defendant has copied specific strings of SAS Language, or specific strings of source code for plaintiff's software, only that its software can function with these SAS Language elements." *Id.* at 778. This caused the district court to reason that "in essence, by asking the court to find that defendant's software infringes its copyright through its processing of elements of the SAS Language, plaintiff seeks to copyright the idea of a program which interprets and compiles the SAS Language—a language anyone may use without a license." *SAS II* at 776.

The Fourth Circuit ultimately vacated the district court's judgment on this issue on the grounds of mootness. *SAS Inst. Inc. v. World Programming*

*Ltd.*, 874 F.3d 370, 389 (4th Cir. 2017) (“*SAS III*”).<sup>5</sup> However, the fact remains that the Eastern District of North Carolina concluded that WPL did not copy the code or structure of SASII Learning Edition.

Imposing copyright liability on a developer merely for replicating the functionality of another program would have dire consequences for competition in all technology industries. Firms in effect would be able to use copyright to obtain patent-like protection without going through a patent examination. Indeed, plaintiff here dropped its patent claims. Plaintiffs such as SASII must be required to demonstrate exactly which elements of the plaintiffs’ programs were copied within the defendants’ programs. Merely showing the ability to process the same inputs to produce the same outputs must be insufficient to prove copyright infringement.

## **II. The District Court Properly Considered Whether WPL Infringed Protected Expression.**

Assuming for the sake of argument that WPS did incorporate SASII program elements, the district court’s decision should still be upheld. SASII and its *amici* attempt to manufacture an error in the process by which the district court determined that WPL did not infringe. The district court

---

<sup>5</sup> When rejecting SASII’s request for an injunction on the basis of its copyright claim, the Fourth Circuit observed that it was “far from certain that the district court made an error of law by granting summary judgment to WPL on SAS’s copyright claim.” *SAS III* at 388.

committed no such error.

**A. The Plaintiff Has the Burden of Showing that the Defendant Copied Protected Expression.**

Under 17 U.S.C. § 102(b), copyright protection in a work does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery.” Thus, “copyrights protect ‘expression’ but not the ‘ideas’ that lie behind it.” *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1196 (2021). Similarly, in *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991), the Supreme Court held: “The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.”

In other words, in a copyrighted work, the copyright protection does not apply to the entire work; it applies only to the elements of the work that constitute the plaintiff’s original expression. It is not sufficient for the plaintiff to show that the defendant copied from the plaintiff’s work; rather, the plaintiff must show that what the defendant copied constituted protected expression. In *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1037 (5th Cir. 2015), the Fifth Circuit held: “To prevail on his copyright infringement claim, Guzman bore the burden at trial to prove that:

(1) he owns a valid copyright; and (2) Hacienda copied constituent elements of Triste that are original.” *See also Siegler v. Sorrento Therapeutics, Inc.*, 2021 WL 3046590, at \*9 (Fed. Cir. July 20, 2021) (affirming dismissal where the plaintiff failed to plead the “critical element” of their copyright claim, namely which part of the allegedly infringed works was protected subject matter). As this Court must apply Fifth Circuit law, *Guzman* requires that SASII meet its burden of proving both that WPL copied and that what it copied was SASII’s original expression.

Here, the district court found that SASII failed to meet that burden. There is no question that the SASII Learning Edition as a whole is entitled to copyright protection. But WPL did not copy the entire SASII Learning Edition program; indeed, it did not copy a single line of code. Even assuming that WPL reimplemented some nonliteral elements found in SASII Learning Edition, SASII failed to convince the district court that those elements fell on the expression side of the idea-expression dichotomy.

**B. The Presumption of Validity Does Not Create a Presumption That the Entire Work Is Protected Expression.**

SASII and its *amici* protest that by determining that SASII failed to meet its burden, the court below somehow undermined the presumption of validity accorded by SASII’s copyright registration for SASII Learning

Edition. *See* SASII Br. at 40; Copyright Scholars Br. at 7-8; Oman Br. at 13-16; MathWorks Br. at 11. From there, they make the leap that somehow the district court's determination places all copyright protection for all works in grave jeopardy. *See* SASII Br. at 42, 47; Copyright Scholars Br. at 5; Oman Br. at 4; Creators' Rights Groups Br. at 6; Copyright Alliance Br. at 6.

SASII and its *amici* grossly overstate the effect of a copyright registration's presumption of validity. All the presumption of validity means is that a work registered with the Copyright Office is presumed to contain some minimum but unspecified amount of original expression. The registration conveys absolutely nothing about the strength or scope of the copyright in the registered work; that is, it says nothing about which elements of the work constitute protected expression.<sup>6</sup> If registration conferred a presumption of validity on every element of the registered work, then the registration for a chemistry textbook would vest the registrant with *prima facie* validity for all of the formulas contained therein. Registration of a history textbook would do the same for all of the facts and dates contained therein. But such non-expressive elements are clearly outside the scope of

---

<sup>6</sup> The Copyright Scholars *amici* seem to agree: "The presumption under 410(c) is not that every element of a work is independently copyrightable in isolation, but that the work, as registered, is copyrightable." Copyright Scholars Br. at 11.

protection.

Unlike the U.S. Patent and Trademark Office (“PTO”), which grants patents, the U.S. Copyright Office (“the Office”) does not grant copyrights; rather, it merely records them. Therefore, the Copyright Office’s examination process is different from that of the PTO, and fairly perfunctory. Section 602.4(D) of the Compendium of U.S. Copyright Office Practices (3d ed. 2021) notes, “when examining a claim to copyright, the U.S. Copyright Office generally does not compare deposit cop[ies] to determine whether the work for which registration is sought is substantially similar to another work.” U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 602.4(D) (3d ed. 2021). Section 602.4(C) further states: “As a general rule, the U.S. Copyright Office accepts the facts stated in the registration materials, unless they are contradicted by information provided elsewhere in the registration materials or in the Office’s records.” *Id.* § 602.4(C). Section 602.4(B) observes that the Office will accept for registration a claim “where the work contains copyrightable subject matter,” *Id.* § 602.4(B), which means *any* copyrightable subject matter. An examiner reviewing a novel does not read the whole novel: they merely read enough to be satisfied that there is *some* protectable material. Once that *de minimis* threshold is met, the claim is stamped and the

examiner moves on to the next claim. This is the same for all categories of works. No examiner has time to read an entire novel, watch an entire movie, or listen to an entire album.

This situation is greatly exacerbated for software since examiners are not trained in computer science. The Office has long carved out deposit copies for software given the inability of examiners to understand the deposit copy; if they can't understand the deposit copy, what are they examining? Reflecting long-standing Copyright Office practice, 37 C.F.R. § 202.20(c)(2)(vii)(A) requires deposit not of the whole work, but merely that of an "identifying portion" of the source code, which can be as little as the first and last 25 pages of source code. For computer programs that run into the thousands of pages, this is only a tiny fraction of the whole work. These minimal requirements were adopted at the request of the software industry, which was concerned about the disclosure of trade secrets. When coupled with the inability of Copyright Office examiners to understand source code and the Office's limited recordation role, the limited deposit requirements for software make sense. They leave the issues of originality and infringement where they belong: in the courts and the adversary system, with discovery and cross-examination.



The idea that the statutory presumption of validity can extend to material not deposited with the Copyright Office and therefore not examined by the Office is counter to fundamental principles of copyright. This is all the more important in this case, where SASII failed to put any deposit copy into the record and failed to specify both which work was allegedly infringed and which registrations it was suing over. At the copyrightability hearing, plaintiff's witness Dr. Storer, upon examination by the court, admitted he had no idea how many registrations were at issue in the case. Transcript of Copyrightability Hearing at 132, lines 21-22, *SAS Inst. Inc. v. World Programming Ltd.*, No. 18-cv-00295 (E.D. Tex. Oct. 14, 2020). Instead, the claim is over a vague "SAS System." Transcript of Copyrightability Hearing at 132, lines 4-5. This "system" is not identified as being embodied in any registered work, and therefore cannot be encompassed by any registration. How a defendant could challenge a presumption of validity for unknown registrations *and* unknown material not in the record or ever presented to the Copyright Office was a complete mystery to the district court, which observed incredulously that plaintiff's witness didn't know "the precise version or versions of the SAS software that's at issue in this case." Transcript of Copyrightability Hearing at 135, lines 19-21.

Given SASII’s failure to present sufficient evidence supporting its claims, it is not surprising that it and its *amici* attempt instead to misrepresent the effect of the registration process. Waving around a bunch of registrations, SASII asserts that because there are so many, one of them must cover the material it claims, and WPL should bear the burden of rebutting its imprecise claims. The First Circuit rejected a similar effort to bootstrap an earlier registration into covering later works in *Airframe Sys., Inc. v. L-3 Comm’ns Corp.*, 658 F.3d 100, 106-07 (1st Cir. 2011), where there were unregistered works and the plaintiff, as here, failed to show that what was copied was from a registered work. Significantly, the First Circuit interpreted the Fifth Circuit’s opinion in *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572 (5th Cir. 2003), as coming to the same conclusion. This court should as well.

### **III. The Court of Justice of the European Union Found the SASII Input Formats and Output Designs to be Uncopyrightable.**

SASII acknowledges that the UK courts found that the elements of SASII programs allegedly copied by WPL were not protected by UK copyright law. SASII Br. at 29. SASII, however, fails to mention that the UK courts reached this determination only after the Court of Justice of the European Union (“CJEU”)—the EU’s Supreme Court—ruled that these elements were not protectable under Article 1(2) of the EU Software

Directive. Directive 2009/24/EC, art. 1(2), 2009 O.J. (L 111). Article 1(2) provides that “ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.” The UK High Court asked the CJEU to clarify whether the SASII program’s functionality and input formats were protectable under Article 1(2).

In May 2012, the CJEU ruled that Article 1(2) “must be interpreted as meaning that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for purposes of that directive.” *SAS I* at ¶ 71. The CJEU explained that “to accept that the functionality of a computer program can be protected by copyright would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development.” *Id.* at ¶ 40. The CJEU observed that “the main advantage of protecting computer programs by copyright” as opposed, presumably, to patents, “is that such protection covers only the individual expression of the work and thus leaves other authors the desired latitude to create similar or even identical programs.” *Id.* at ¶ 41.

To be sure, certain features of EU copyright law differ from U.S. law. As the Fourth Circuit correctly found in *SAS III*, the Software Directive renders unenforceable a contract term prohibiting reverse engineering, while such a term is enforceable under North Carolina contract law. However, the basic contours of the idea-expression dichotomy, which Article 1(2) of the Software Directive embodies, are a matter of international law. Thus, Article 2 of the World Intellectual Property Organization Copyright Treaty, which the United States has ratified, provides that “copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.” World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65, art. 2 (1996). Likewise, Article 9(2) of the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property, also joined by the United States, provides that “copyright protection shall extend to expressions and not to ideas, procedures, methods of operation, or mathematical concepts as such.” Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197, art. 9(2) (1994). Accordingly, this Court should take into account the CJEU’s views on the protectability of the same program elements at issue in this litigation.

## CONCLUSION

For the forgoing reasons, the decision below should be affirmed.

Respectfully submitted,

/s/ Jonathan Band

Jonathan Band

*Counsel of Record*

Jonathan Band PLLC

21 Dupont Circle NW, Suite 800

Washington, D.C. 20036

(301) 770-0822

jband@policybandwidth.com

Matthew Schruers  
Alexandra Sternburg  
Computer & Communications  
Industry Association  
25 Mass. Ave. NW, Suite 300C  
Washington, D.C. 20001  
(202) 783-0070

*Counsel for Amicus Curiae*

August 30, 2021

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,363 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Jonathan Band  
Jonathan Band  
Jonathan Band PLLC  
21 Dupont Circle NW, Suite 800  
Washington, D.C. 20036  
(301) 770-0822  
jband@policybandwidth.com  
*Counsel of Record*

August 30, 2021

## CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2021, a true and correct copy of the foregoing Brief of *Amicus Curiae* the Computer & Communications Industry Association was timely filed electronically with the Clerk of the Court using CM/ECF, which will send notification to all counsel registered to receive electronic notices.

/s/ Jonathan Band

Jonathan Band

Jonathan Band PLLC

21 Dupont Circle NW, Suite 800

Washington, D.C. 20036

(301) 770-0822

[jband@policybandwidth.com](mailto:jband@policybandwidth.com)

*Counsel of Record*