No. 2021-1542

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
No. 2:18-cv-295, Hon. J. Rodney Gilstrap

NONCONFIDENTIAL RESPONSE BRIEF OF APPELLEE WORLD PROGRAMMING LIMITED

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	No. 21-1542
Short Case Caption	SAS Institute Inc. v. World Programming Limited
Filing Party/Entity	World Programming Limited

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 08/23/2021

Signature: /s/ Jeffrey A. Lamken

Name: Jeffrey A. Lamken

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
World Programming Limited	See Attachment	

☑   Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐   None/Not Applicable   ☑   Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑   None/Not Applicable   ☐   Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑   None/Not Applicable   ☐   Additional pages attached

CERTIFICATE OF INTEREST – ADDENDUM TO QUESTIONS 2 AND 4

2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2). Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

World Programming Limited does not believe there is another real party in interest. For full disclosure, it notes that SAS Institute Inc. in other proceedings has argued that D2S Limited, a non-party to this case, is a real party in interest. While D2S Limited owns certain intellectual-property rights that it licenses to World Programming Limited, this action was brought against World Programming Limited, the maker and seller of the accused software in this case.

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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CONFIDENTIAL MATERIAL OMITTED

This brief redacts materials that were designated as confidential under the protective order entered by the district court. The material omitted includes affidavits and depositions of Plaintiff-Appellant's employees; Plaintiff-Appellant's principal expert's declarations, reports, and deposition; and Plaintiff-Appellant's supplemental interrogatory responses. The material omitted also includes materials from an expert report and other filings that WPL filed under seal pursuant to the protective order in this case, including material designated as "RESTRICTED – ATTORNEYS' EYES ONLY" and "RESTRICTED CONFIDENTIAL SOURCE CODE" under the protective order. WPL applied those designations because the expert report and the other filings contained information derived from documents that SASII had designated under the Protective Order. The redacted material appears on pages 5-10, 14-17, 19, 22, 41, 43-44, 47-55, 57-58, and 61-62.

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STATUTES, REGULATIONS, & RULES

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STATEMENT OF RELATED CASES

No appeal in or from this civil action was previously before this or any other appellate court. Counsel are not aware of any case pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in this appeal.

PRELIMINARY STATEMENT

This is the third time SAS Institute Inc. ("SASII") has sued World Programming Limited ("WPL") for copyright infringement. It is also the third time courts have rejected SASII's copyright claims. This most recent loss stems from SASII's refusal to provide the district court—or WPL—with information critical to determine the scope of SASII's copyrights, and SASII's reliance on an expert who engaged in egregious conduct and offered unreliable opinions unhelpful to any jury. The district court properly rebuffed SASII's effort to litigate through obfuscation.

ISSUES PRESENTED

1. Whether a plaintiff carries its burden of identifying a copyrighted computer program's *protected elements* when it simply assumes every element is protected, even after evidence shows elements are unprotected.

2. Whether copyrights over a computer program protect (a) the functionality of executing programs written by users in a free-to-use computer language or (b) outputs dictated by user-written programs.

3. Whether a plaintiff must introduce evidence showing the copyrighted work expresses the allegedly copied elements.

4. Whether the district court erred in requiring SASII to define the scope of its copyrights before trial.

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5.   Whether the district court manifestly erred by excluding expert testimony where the expert's report (a) was not prepared by the expert, (b) did not disclose critical information, and (c) failed to undertake legally required analysis.

6.   Whether the district court properly exercised its discretion in excluding undisclosed expert testimony.

STATEMENT OF THE CASE

This case concerns nonliteral-infringement claims involving copyrighted computer programs—literary works expressed and registered as source code.

I.   LEGAL BACKGROUND

A.   Copyright Protection for Literary Works

Copyright protects "original works of authorship fixed in any tangible medium of expression," including "literary works." 17 U.S.C. §102(a). Computer programs—the "set of statements or instructions" a computer "use[s]" to "bring about a certain result"—can be protected as "[l]iterary works." §101. "[C]opyright protection," however, does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . embodied in such work[s]." §102(b). Only the author's fixed *expression* is protected. *See Golan v. Holder*, 565 U.S. 302, 328 (2012).

"To establish a prima facie case of copyright infringement," a copyright owner must not only prove "'ownership of a valid copyright'" but also "'copying . . . of *constituent elements* of the work *that are original*,'" *i.e.*, "actionable copy-

ing." *General Universal Sys., Inc. v. Lee*, 379 F.3d 131, 141 (5th Cir. 2004) (per curiam) (emphasis added). The owner must conduct a "'side-by-side comparison'" between the accused work and "*protectable elements* of the infringed work" that shows "substantial[] similar[ity]." *Id*. at 142 (emphasis added).

B.   The Abstraction-Filtration-Comparison Framework

The "first step" in performing the required side-by-side comparison is "to distinguish between protectable and unprotectable elements of the copyrighted work." *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 550 (5th Cir. 2015). That must be done because the "mere fact that *a work* is copyrighted does not mean that *every element of the work* may be protected." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (emphasis added). Protected elements can include a work's literal text. *See General Universal*, 379 F.3d at 142. They can also encompass nonliteral elements, such as structure, sequence, and organization (*e.g.*, a novel's plot). *See id.* But nonliteral elements "hover . . . more closely" to unprotected ideas, particularly in "utilitarian works" like computer programs. *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 704 (2d Cir. 1992).

To "'defin[e] the scope of plaintiff's copyright'" in such cases, the Fifth Circuit uses the abstraction-filtration-comparison—or *Altai*—method. *Altai*, 982 F.2d at 707; *see Eng'g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1340 (5th Cir. 1994). That method requires courts to "dissect the program

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according to its varying levels of generality," which typically include its purpose, architecture, modules, algorithms and data structures, source code, and object code. *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 834-35 (10th Cir. 1993) (endorsed by *Eng'g Dynamics*, 26 F.3d at 1342). At each level, courts must "filter out" unprotected elements of the program, such as "ideas, processes, facts, public domain information, merger material, [and] *scenes a faire* material." *Id.* at 834. Courts "should then compare the *remaining protectable elements* with the allegedly infringing program" to determine whether they are "substantial[ly]" similar. *Id.* (emphasis added).

II.   FACTUAL BACKGROUND

A.   The Free-To-Use SAS Language

This case concerns software (sometimes called "compiler" software) that *executes* programs users write in a free-to-use programming language. Initially developed at a public university, the SAS Language is a high-level programming language used to write programs for conducting statistical analysis. Appx1712(26:3-9); Appx12732(108:12-19); Appx12746-12748(¶¶5-9). As the language's original creator and SASII's witnesses have testified, it is "free for public use" without a license. Appx16; *see* Appx1672(266:15-25); Appx1713(32:13-18); Appx12749 (¶¶16-17); *SAS Inst. Inc. v. World Programming Ltd.*, 64 F. Supp. 3d 755, 776

(E.D.N.C. 2014), *aff'd in part and vacated in part as moot*, 874 F.3d 370 (4th Cir. 2017).

"Like any language," the SAS Language "has its own vocabulary and syntax." S. Schlotzhauer & R. Littell, *SAS System for Elementary Statistical Analysis* 19 (SAS Institute Inc., 2d ed. 1997). It has ███language features███ ██ and ███language features███ Appx1967(¶63)—██number██ taken directly from ███a source██████, Appx2044-2055(¶¶158-160); *see* Appx1478(143:19-144:8). Anyone who writes a SAS-Language program must ██verb██, and ████description of requirements████████ with it must ███verb███, those ██noun██ and ██noun██ Appx1567(8:9-9:2); *see* Appx1569-1577(10:12-18:15); Appx1578-1580(22:7-24:13); Appx1583(30:13-23).

SAS Language programs have ███features██████—███features██████ and ███features█████ Appx1967(¶63). ███Features█████ are used to ███functions████; ██Feature██ ██ are used to ██function██ and ██function██. Appx1967-1968(¶63). For example, "PROC SURVEYSELECT" invokes a well-known method for taking "a random sample" from data. Appx3356(53:1-5); *see* Appx2066(¶174). Users write complex programs in the SAS Language using PROC and DATA commands together with their data to generate useful information. Appx7-8.

B.   Software for Executing SAS-Language Programs

Users can write SAS-Language programs with any program .

Appx1713(32:8-12). Computers, however, cannot description of requirement

until they are converted into object Appx1961(¶54).

Software that can convert and execute SAS-Language programs was first

developed in the 1960s at a public university. Appx12748(¶¶9-10). Improved

with government funding, a version was released as "SAS 76." *S & H Comput.*

Sys., Inc. v. SAS Inst., Inc., 568 F. Supp. 416, 418 (M.D. Tenn. 1983); Appx12749-

12750(¶¶19-24). SAS 76 came with a manual on "the SAS Language,"

Appx2888; *see* Appx12750(¶¶23-24), which solidified a description for the

language's features Appx2005(¶123). All

information developed with government funding was "expressly" consigned by

contract to "the public domain." *S & H*, 568 F. Supp. at 418-19.

1.   *SASII's Software*

SAS 76's developers nonetheless founded a for-profit company, SAS Insti-

tute Inc., to sell SAS 76. Appx12751(¶¶25-26). While SAS 76 was held to be

public domain, SASII rewrote the source code sufficiently to obtain a copyright in

a new version. *See S & H*, 568 F. Supp. at 418-19; *SAS Inst., Inc. v. S & H Com-*

put. Sys., Inc., 605 F. Supp. 816, 819 (M.D. Tenn. 1985). Today, SASII markets

software for executing user-written SAS-Language programs. Appx7-8; Appx1666

(181:11-16); Appx12733(110:23-111:20). SASII uses the umbrella term "SAS System" for various versions, components, and editions of SASII software products. Appx315(¶¶17-18). SASII has registered some, but not all, of these products with the Copyright Office by depositing 50 pages of source code. Appx315(¶¶17-18); Appx1665(172:2-173:7). SASII has not obtained registered copyrights in outputs or displays separate from that code. Appx315-316(¶¶17-22).

As with SAS 76, users do not typically operate SASII's software by "clicking a mouse" or selecting from drop-down menus. Appx311-312(¶¶5-6). Instead, they write SAS-Language programs and provide them to the software as "text files." *Id.*; *see* Appx7. Those programs tell SASII's software what data to analyze and "what data analysis algorithms to run." Appx7-8; *see* Appx1667(185:4-21); Appx1669(222:11-18). SASII's software supports "[m]any of the PROCs" supported by SAS 76, together with newer additions to the SAS Language. Appx8.

After user-written programs are executed, SASII's software displays the results in charts, tables, and other outputs. Appx8-9; Appx1941-1942(¶13). Outputs are a [description] Appx1474(60:8-10), which allows [description], Appx1668(210:25-211:3); *see* Appx2112(¶224). SASII's witness identified even this supposed [characterization of exhibit]:

Image from exhibit
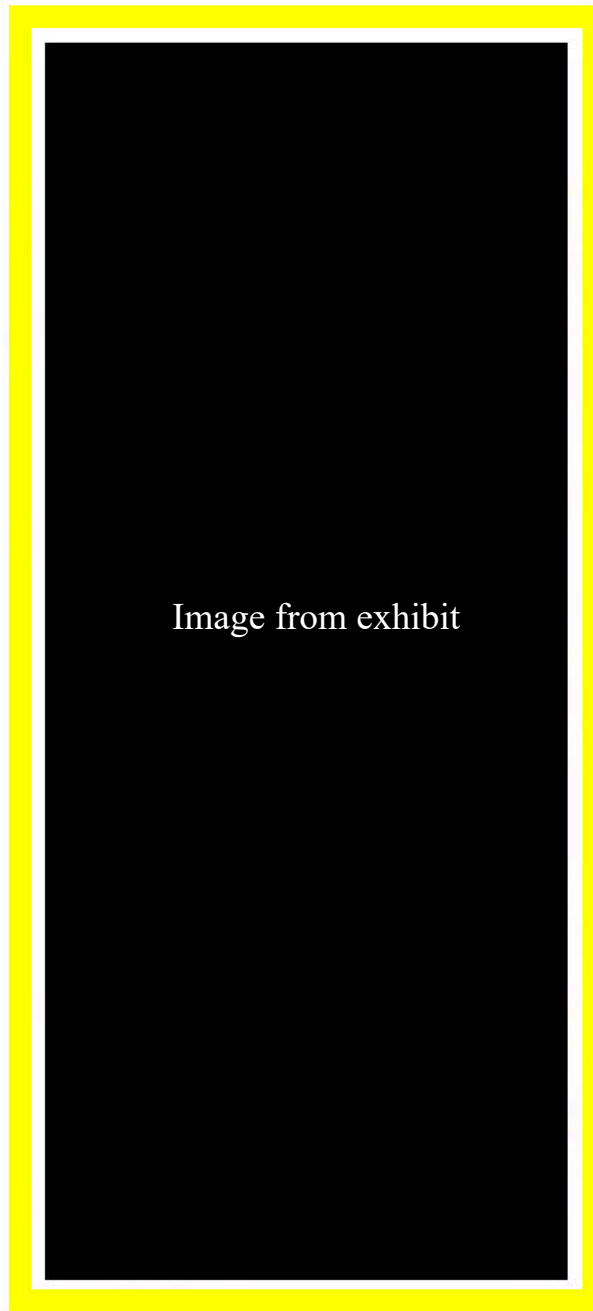
Appx12741; *see* Appx1104. If a user ███action███████████████, SASII's software can ███response█████ Appx1669(222:11-18). ███Condition██████ ████ however, it ███response███████████ Appx1669(221:18-21).

2.   *WPL's Software*

For decades, SASII enjoyed a de facto monopoly over the software needed to execute programs written in the free-to-use SAS Language. *SAS Inst. Inc. v. World Programming Ltd.*, [2010] EWHC 1829 ¶2. Customers who invested "many man years" in writing SAS-Language programs had no alternative. *Id.* That changed when, in 2003, a small U.K. startup, World Programming Limited, wrote software called the World Programming System ("WPS") that can understand and execute SAS-Language programs. *SAS*, 64 F. Supp. 3d at 763-64.

WPL *never* ███action███ any of ███description███. Appx1963(¶60); Appx2114-2118(¶¶235-238); Appx3318-3319(15:22-16:1). As permitted under E.U. and U.K. law, WPL studied how Learning Edition versions of SASII's software operated. *SAS*, 64 F. Supp. 3d at 764; pp. 11-12, *infra*. But WPL wrote its ███description███, using a different ███technique███ and employing a unique ███description███ Appx1962-1964(¶¶59-60); Appx2121-2122(¶247); *see* Appx1665(172:25-173:2).

While sometimes casually dubbed a "clone" of SASII's software given its ability to execute user-written SAS-Language programs, Appx9, WPS supports different elements, Appx2136-2138(¶¶271-273); Appx2252-2256. WPS is narrower in part, supporting a limited set of PROCs, but broader because it supports

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PROCs SASII software does not. *Id.* When the same user-written program is run

for supported elements, the graphics can look different:
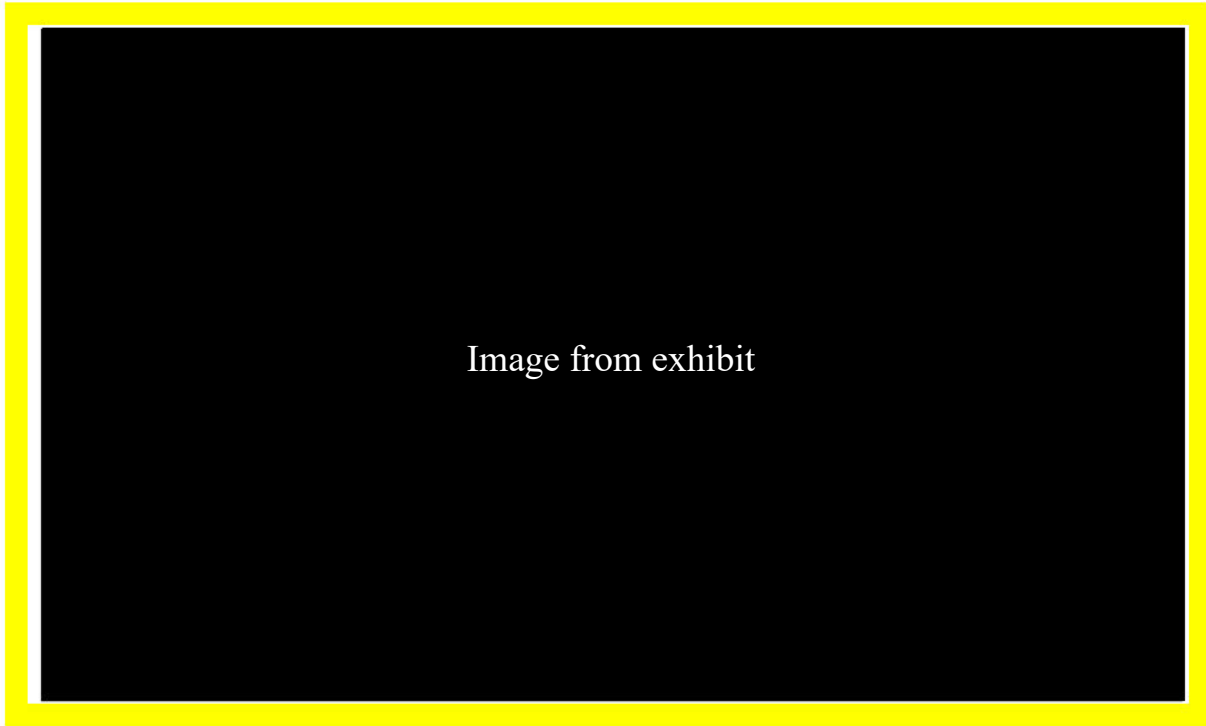
Appx2124-2125 (¶254).
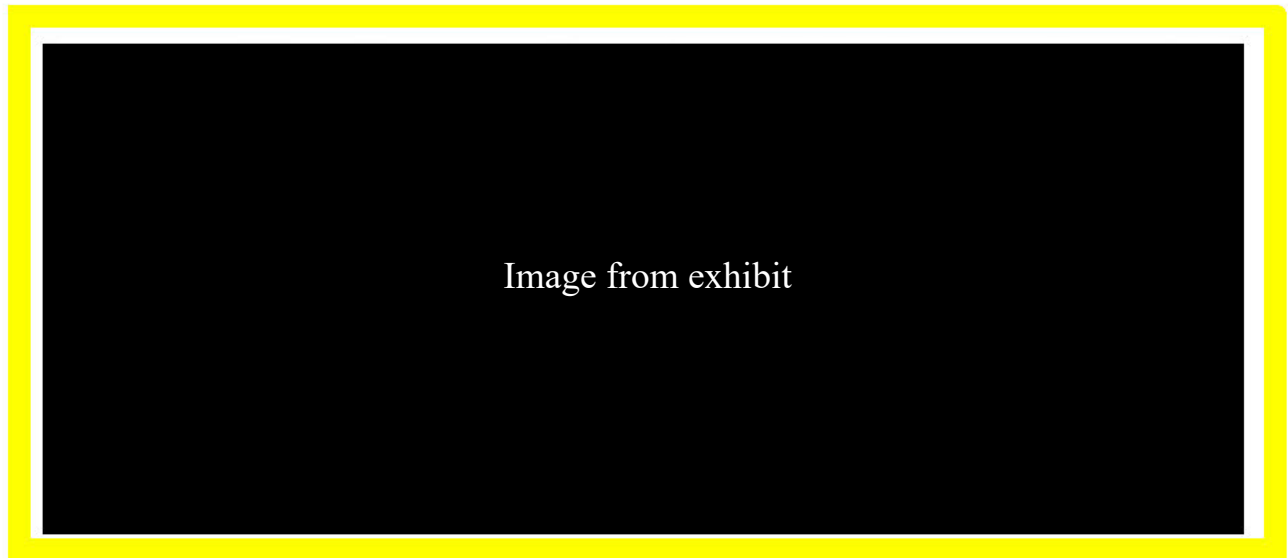
Appx2127-2128 (¶255).

III. SASII'S PRIOR COPYRIGHT LOSSES

This is the third time SASII has sued WPL for copyright infringement—and the third time courts have rejected that accusation.

A. SASII Sues in the U.K. and Loses

SASII first sued WPL in England in 2009. [2010] EWHC 1829 ¶¶5, 7. Then, as now, it was undisputed that WPL never "copied any of the text" of SASII's source code or "any of [its] structural design." *Id.* ¶3; *see* Appx1482(¶3). SASII claimed infringement because WPL's software, like SASII's, could understand SAS-Language programs and produce similar outputs. Appx1481-1482(¶¶1-4); Appx1489-1490(¶¶15-16). SASII argued that its copyrights gave it exclusive rights to the "SAS Language." Appx1490(¶17).

The English court disagreed. Like U.S. law, E.U. and English law protect creative expression in computer programs, but not "the ideas and principles which underlie" them. Appx1487(¶12). The English court ruled that the SAS Language was not itself a copyrightable "work." Appx1493(¶33). The court was "sceptic[al]" that the SAS Language was even an "abstraction"—a nonliteral element—of SASII's copyrighted software. Appx1493(¶32). It observed that SASII's software merely "implement[s]" users' SAS-Language programs. *Id.*

The English court dismissed SASII's claim that WPL breached its Learning Edition license, holding that any terms prohibiting WPL from studying software

functionalities were "null and void" under English and E.U. law. Appx1496(¶55); Appx1499(¶79); [2010] EWHC 1829 ¶¶268-271. The judgment was affirmed. *See SAS Inst. Inc. v. World Programming Ltd.*, [2013] EWCA Civ 1482.

B.   SASII Asserts Copyrights in North Carolina and Again Fails To Identify Protected Material

While SASII's English lawsuit was pending, SASII sued WPL in North Carolina for the same conduct, asserting copyright, contract, and tort claims. *SAS*, 64 F. Supp. 3d at 760. SASII alleged copyright infringement because WPS could understand and execute the same "input formats" as SASII's software—the "statement name, command structure, syntax, and default parameters" of the SAS Language—and generated similar "output formats" in response to user programs. Appx1518-1520; *see SAS*, 64 F. Supp. 3d at 776.

The district court granted summary judgment to WPL in relevant part. 64 F. Supp. 3d at 774-79. Executing SAS-Language inputs written by users, the court held, is not copyright infringement. *Id.* at 776. SASII "has testified that anyone can write a program in the SAS Language, and that no license is needed to do so." *Id.* The court ruled that generating similar outputs in response to *user* commands is not infringement either. *Id.* "Insofar as . . . outputs are similar," the court explained, "this only serves to establish" that WPL's software "properly" "compiles and interprets SAS Language programs input by users." *Id.* SASII was

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impermissibly seeking to "copyright *the idea* of a program which interprets and compiles the SAS Language." *Id.* (emphasis added).

The district court ruled the English court's dismissal of SASII's contract claim did not require dismissal of SASII's contract and related tort claims. 64 F. Supp. 3d at 768-74. On those claims, SASII obtained a treble-damages $79 million judgment. *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 377 (4th Cir. 2017). The Fourth Circuit upheld the award but vacated the copyrightability ruling as moot, explaining that SASII could not receive relief on its "copyright claim that it has not already received." *Id.* at 375, 389-90.

On remand, the district court dismissed SASII's copyright claims without prejudice but observed that "this does not mean that plaintiff will be able to" bring them again. Appx12706. SASII conceded that it "'could not simply refile the next day the very same copyright infringement complaint'" seeking the "'very same relief.'" Appx12706 n.1 (emphasis omitted).

IV. SASII's THIRD COPYRIGHT ACTION—AND LOSS—IN TEXAS

Seventy-six days later, SASII filed this action in Texas—its third copyright suit for the same conduct. Appx88. SASII alleged that WPS infringed "non-literal elements" of SASII software and publications because WPS accepts the same "input formats" and generates similar "output designs." Appx102-120 (¶¶ 72-154); Appx140-141 (¶¶ 252-261). SASII alleged it held "over 100 Copyright Registra-

tions," but the complaint nowhere identified *which* were asserted. Appx102 (¶72).

SASII asserted patent claims, later abandoned. Appx145-150 (¶¶294-313); *see*

Appx3310-3311 (7:3-8:4).

A. SASII Obfuscates Throughout Fact Discovery

WPL repeatedly sought clarification of SASII's copyright claims.

Appx3339-3342 (36:7-39:21); Appx13741-13766. Interrogatories asked SASII to

identify each "copyrighted work by registration number," the portions "entitled to

copyright protection and infringed," and why those portions were protected.

Appx12626. SASII refused. As "[e]xamples," SASII cited Bates numbers cover-

ing *2,139* different works. Appx12627-12628; *see* Appx3315 (12:20-22);

Appx3339 (36:23-25). For no work did SASII identify the protected *portions*

allegedly copied. SASII asserted that it was "impossible" to list "each and every

copyrightable element," and repeated the complaint's generic descriptions of

"input formats" and "output designs." Appx12632; *see* Appx13759 (redline com-

parison). The district court denied a motion to compel without prejudice because it

was "early" in discovery. Appx12639.

As discovery concluded, WPL again sought answers. Appx12644. SASII

again refused. SASII cited Bates numbers covering ██ number ██ and claimed it

██ description of SASII's assertions ██

Appx12662-12663; *see* Appx12645. As ██ description ██ of ██ description ██

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███████████ SASII pointed to ████████description of SASII's assertions████████
██████████████████████████████. Appx12663-12664 (empha-

sis added). But SASII nowhere identified where the allegedly copied "input for-

mats" were expressed in *its copyrighted works*. For output designs, SASII stated it

would ███future action███████████ later. Appx12665. WPL again moved

to compel, Appx12641—a motion later denied without prejudice when the court

ordered SASII to show which asserted elements are protected, *see* pp. 18-19, *infra*.

B. SASII Obfuscates Throughout Expert Discovery

As the district court found, SASII's "obfuscation" continued through expert

discovery. Appx10. The report of SASII's infringement expert, Dr. James Storer,

purported to apply the Fifth Circuit's abstraction-filtration-comparison framework

to ████description of asserted material███████████████████.

Appx715; Appx722-753. The report asserted that the "SAS System" could be

abstracted into layers that included "collection[s]" of "[i]nput formats," "collec-

tion[s]" of "[o]utput designs," and "[n]aming and syntax." Appx722-723.

The report opined that ███description███ within the ███opinion███ of ████

███description of opinion███ and ██feature██ and ██feature██ was protected. Appx726-

727; Appx732; Appx735. The report did not list the asserted "collections'"

contents, articulate how the full collections' constituent members were arranged, or

identify where they were expressed in the "set of statements or instructions"—the

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code—constituting SASII's copyrighted software. The report did not filter out unprotected elements. It claimed that the [description of report] in developing the SAS System [description of report], even if [description of report]. Appx727; Appx729; *see* Appx734-736.

Asserting [description of report] between [features] of SASII's and WPL's works, Appx737, the report pointed to an exhibit listing [elements], Appx740 (emphasis added); *see* Appx739-741. The report also cited WPL's efforts to [alleged conduct] Appx746. But it did not identify how or where any elements are expressed in the code constituting SASII's copyrighted software.

C. Storer Refuses To Answer Deposition Questions

When deposed, Storer "refus[ed] to directly answer questions." Appx12671. For hours, Storer [description of deposition testimony], Appx13480-13486(40:1-46:2), and [description of deposition testimony] Appx13489-13491(49:16-51:5); *see* Appx13448-13574(8:9-134:16); Appx13118-13138(144:7-164:18). He was so consistently evasive that a magistrate judge finally ordered him to "answer the questions propounded." Appx12671-12672; *see* Appx13163-Appx13165(189:1-191:7).

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Storer eventually admitted he prepared his report █description of testimony█

█████████████ where █description of deposition testimony█

██

Appx13480 (40:1-16). Storer did not know █description of deposition testimony█

Appx13483 (43:10-25), or who █description of testimony█ to the report, guessing a

█description of deposition testimony████████. Appx12973-12976

(439:25-442:1); *see* Appx13564-13567 (124:9-127:19); Appx12981-12984 (447:11-

450:18).

Storer admitted that he █description of deposition testimony█

██

████████. Appx13557-13558 (117:24-118:13); Appx13370 (396:10-15). He con-

ceded his report did not █description of deposition testimony█

████, Appx12956 (422:3-14), which not only █description of works█ but also ████

█description of works██████████, Appx13120-13121 (146:16-147:17);

see Appx715; Appx722-752. Asked where his report made a ██████████████

█description of question███████████████, Storer directed WPL to

█description of answer████████ Appx12964-12965 (430:7-431:25);

Appx12969-12970 (435:19-436:2). Storer eventually conceded that he had not

█description of deposition testimony█████

████. Appx13127-13131 (153:23-157:25); *see* Appx13132-13133 (158:6-159:24).

D.   The District Court Requires the Parties To Identify the Asserted Works' Protected Elements

Both sides moved for summary judgment. Appx272; Appx12708. WPL urged in part that preclusion barred SASII's third lawsuit for the same conduct. Appx12679. WPL also moved to exclude Storer under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and for violations of Federal Rule of Civil Procedure 26. Appx12918; Appx13619.

At the ensuing hearing, the district court expressed concern about the "tremendous amount of work" that remained to identify the asserted works' protected elements. Appx13662(17:17-20). The court warned SASII it would "have to narrow [its] case on copyrightability." Appx13661(16:13-17). A "jury can't compare the works fairly until the Court has identified that core of expressive thought by stripping away the extraneous and the immaterial." Appx13659(14:17-20); *see* Appx13666(21:18-25). The court advised it would conduct a "copyright-ability hearing" to "determine as to each asserted copyrighted work whether there is a core of expressive thought, identify it, and clarify it so that the jury" knows which elements to compare to the accused work. Appx13660(15:1-12).

The court ordered both parties to "present evidence in support of the abstraction and filtration steps of the abstraction-filtration-comparison" test, which would allow the court to determine "the *core protectable expression*, if any, covered by each asserted work." Appx2. The court denied all pending motions with-

out prejudice, explaining that the copyrightability questions were "in part" ones "of law" and ill-suited to summary judgment. Appx1; *see* Appx13657(12:24-15:16).

SASII then announced it would "limit its asserted work to the SAS System software," dropping claims based on SASII manuals. Appx627-629; *see* Appx3433-3434(130:25-131:3). SASII abandoned all patent claims, which had been devastated by SASII witnesses' testimony. Appx3310-3311(7:3-8:4); *see* Appx22.[1]

E. The Copyrightability Hearing and Resulting Judgment

1. *The Hearing*

<u>Collins.</u> Two days before the copyrightability hearing, SASII announced it would call its former Chief Technical Officer, Keith Collins, to testify. Appx13733. Collins had not been disclosed as an expert or 30(b)(6) witness and had previously testified that "he knew nothing about the copyrights at issue." Appx3382(79:24-25); *see* Appx3312(9:7-23). After WPL moved to exclude, SASII "agree[d]" Collins's "testimony would be admissible [only] to the extent that he was disclosed." Appx4 n.2; *see* Appx3312(9:7-23).

At the hearing, the court reminded the parties that Collins was disclosed only as a fact witness on the "history and operations of SAS[II], including the SAS

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[1] Although SASII changed patent theories up to four times, Appx13787-13789, a SASII inventor admitted knowing ▮description of testimony▮ of one patent, Appx Appx13810(40:15-19). A SASII witness admitted that the ▮description of testimony▮ ▮testimony▮ . Appx12676(19:24-20:3); Appx12677(34:12-21). And Storer could say ▮description of testimony▮ Appx13542(102:2-20).

System." Appx3312(9:7-23); *see* Appx3370(67:20-22); Appx3376(73:1-3); Appx3382(79:22-23). Yet SASII asked Collins to testify about "input formats" and "output designs"—"abstraction layers" defined by SASII's expert through an *Altai* analysis. Appx3356-Appx3361(53:9-58:21); Appx3375-3376(72:1-73:14); Appx3377-3380(74:21-77:2); Appx3381-3383(78:6-80:7). The court sustained objections that the questions called for undisclosed expert testimony. *Id.*

Storer. SASII's next witness, Storer, admitted there had been no "source code copying," but opined that WPL copied "non-literal elements" of the SAS System by replicating input formats, output designs, and keywords. Appx3392(89:22-25); Appx3393(90:21-23); Appx3417-3418(114:21-115:4); Appx3425-3426(122:23-123:21). He described "input formats" as "PROCs," and "output designs" as "having the output look a certain way." Appx3399(96:9-23). Storer asserted both were copyrightable because a "lot of creativity" goes into their design. Appx3406(103:10-13); *see* Appx3401-3402(98:18-99:13). He admitted he had not "filter[ed] out anything" as unprotected, including "public domain" and "scènes à faire" material. Appx3459(156:20-22); *see* Appx3461-3464(158:1-161:11).

Although Storer purported to analyze SASII's copyrighted *computer programs*—copyrighted sets of "statements or instructions" expressed as source code, 17 U.S.C. §101—Storer admitted he had never seen "SAS[II]'s source code for any registered work," Appx3440(137:5-8). Storer admitted that an exhibit

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purporting to analyze WPL's code was not "prepared at [his] request," Appx3448(145:4-11), contradicting a SASII affidavit averring it was prepared "at [his] behest," Appx13641-13643(¶¶2, 6-7). For outputs, Storer had "play[ed] around" with two versions of SASII's software: a version that, he conceded, was not disclosed in his report, and what "might have been Version 9.4." Appx3442-3443(139:20-140:20). Storer could not recall whether those versions were "asserted." Appx3433-3435(130:12-132:22). Storer admitted his report "no-where" listed "all of the SAS[II] input formats" asserted, and professed not to understand questions about whether it "list[ed] all of the output designs" being asserted. Appx3452-3454(149:11-151:17).

Jones. WPL offered testimony from Dr. Mark Jones. Appx3486-3504(183:12-201:21). Unlike Storer, Jones used SASII's software *code* as his "starting point" because "the copyrighted work is the program." Appx3490-3491(187:21-188:14). As Jones explained, Storer's analysis was fundamentally flawed because, while he "came up with five [abstraction] layers," he "d[id]n't relate them to the copyrighted work." Appx3491(188:17-21). Storer ignored that any "non-literal elements" must be present in "the copyrighted work." Appx3492 (189:2-4).

Storer's "examples" of input formats were drawn not from the SASII's asserted programs but from *non-asserted* user manuals. Appx3492(189:17-25);

see Appx1939(¶10). The manuals, Jones explained, do not describe the expression or arrangement of materials in *SASII's software code*; they teach users "how to write a user program in the SAS language," which is separate from SASII's software. Appx3493(190:1-20); *see* Appx1939(¶¶9-10); Appx3500-3501(197:25-198:6). Storer had ███description of report███ how ███description of report███ ████████████████████████████████ Appx1941-1942(¶13). Jones disputed Storer's characterization of how outputs are generated: "It's not as if the user is just clicking a button on a menu." Appx3502(199:20-21). Outputs are instead a function of users' programs, data, and preferences. Appx3501-3502(198:19-199:16); *see* Appx1941-1942(¶13).

Jones showed that SASII's asserted "collections" encompassed unprotected material, including "public domain elements," the free-to-the-public "SAS programming language," "Open Source and third-party elements," "mathematical or statistical analysis elements," and "conventional" elements. Appx3512-3513 (209:19-210:5); *see* Appx1988-2113(¶¶108-229). Storer had not filtered out any of that. Appx3459(156:20-22); *see* Appx3461-3464(158:9-161:11). He failed to account for the fact that "anyone" can use the SAS Language to "express a SAS language program." Appx3500-3501(197:20-198:15). And he failed to account for users' "significant" contributions to outputs. Appx3501-3503(198:16-200:8).

2. *The District Court's Decision*

The district court ruled against SASII on two independent grounds. First, SASII lost under the abstraction-filtration-comparison framework "mandated by the Fifth Circuit." Appx12. Copyright plaintiffs must present to the jury a side-by-side comparison of the asserted work's "protect[ed] elements" against the allegedly infringing work. *Eng'g Dynamics*, 26 F.3d at 1343. That makes filtering out unprotected elements essential. Appx12. Without filtering, a jury cannot make "a clear and reliable determination" of whether *protected elements* were copied. *Id.*

WPL had argued that SASII had the burden of filtering unprotected material, but the district court accepted SASII's argument that it initially needed only establish that it "has *something* protectable." Appx15 (emphasis added). According-ing to the court, because SASII "holds a registered copyright" and argued its "works are creative," SASII had shown that much. Appx15-16. WPL then had to come forward "with evidence showing" that some asserted material is not copyright protected. Appx16; *see* Appx15. The court found WPL presented "ample evidence" to that effect, identifying *twelve significant categories* of "unprotect[ed] elements." Appx16. Those included "the SAS Language," which is "free for public use"; "anything ported" over from "SAS 76," which is "in the public domain"; and material that SASII did "not . . . author." *Id.*

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WPL's burden discharged, the court held that SASII had to show either (a) that "what [WPL] alleges as not protectable actually is entitled to protection" or (b) that "there are remaining and identifiable protectable elements." Appx17. SASII "d[id] neither." *Id.* SASII had not "attempted to show what WPL pointed to as unprotectable is indeed entitled to protection." *Id.* Nor had SASII "shown the existence and extent of any *remaining* protectable work." *Id.* (emphasis added). SASII "simply repeated and repeated that the SAS System was 'creative,'" without performing any "filtration." *Id.* "SAS[II]'s failures," the court recognized, "raised the untenable specter" of taking "copyright claims to trial without any filtered showing of protectable material within the asserted work." *Id.*

Second, and "[s]eparately," the court granted WPL's motion to exclude Storer. Appx17-18; *see* Appx4; Appx3388-3389 (85:23-86:12). "[A]t a minimum," the court explained, Storer's "failure to filter out unprotectable elements" rendered his opinions "unreliable and unhelpful to the jury." Appx18. That decision was "reinforced and supported by" Storer's "egregious conduct," "as documented" in WPL's *Daubert* motion, its Rule 26 motion, and the magistrate judge's order. *Id.* Storer's exclusion left SASII "without any supportable copyright claims." Appx18 n.11.

SUMMARY OF ARGUMENT

I. A. Under Fifth Circuit law, plaintiffs asserting nonliteral infringement of a computer program must show *protected elements* were copied. That requires the plaintiff to filter out unprotected program elements to identify the protected expression being asserted. A plaintiff's failure to filter entitles the defendant to judgment. Here, SASII refused to filter unprotected material or even show the extent of the protected expression that remained following WPL's showing that SASII was asserting unprotected material.

SASII stakes its appeal on the assertion that plaintiffs can simply assume protected elements were copied, without performing filtration. That defies Fifth Circuit law, contradicts a wealth of authority, overreads SASII's scattershot cases, and invites gamesmanship. Moreover, plaintiffs still must identify the scope of protected expression that remains after the defendant's showing. SASII refused to do that. SASII cannot excuse that failure by invoking vague notions of creativity in selection and arrangement of materials where it refuses to identify precisely which materials were selected or which selections are protected.

B. SASII's asserted nonliteral elements—putative "collections" of "input formats" and "output designs"—are not protected. SASII's "collection of input formats" is the vocabulary and syntax of a programming language that is free for

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anyone to use. SASII's "collection of output designs" is the unprotected product of user instructions.

C. SASII's failure to show "input formats" and "output designs" are expressed anywhere in its asserted works is independently fatal. SASII asserts computer programs—expressed and registered as code—as its copyrighted works. SASII offered no evidence about what its code expresses. Its expert never even looked at the code.

II. SASII's procedural complaints are meritless. SASII's failures to identify its *protected* expression entitled WPL to judgment as a matter of law. SASII identifies no material disputed facts that would preclude judgment for WPL even if the copyrightability questions here were not pure questions of law.

III. The district court properly excluded SASII's only technical expert under Federal Rule of Civil Procedure 26 for failing to prepare his own report and disclose critical information. SASII does not address those violations. The court properly excluded Storer for failing to review the actual asserted works and undertake legally required analysis. Those failures rendered his opinions unreliable. Without Storer, SASII lacks a triable case.

IV. The district court properly enforced an agreement that Collins would be permitted to testify only as a fact witness about disclosed topics. SASII's ques-

tions about concepts defined by its expert called for undisclosed expert testimony. SASII identifies no prejudice—no fact misapprehended by the court—regardless.

ARGUMENT

This case is less about copyright than SASII's extraordinary litigation tactics. WPL wrote, from scratch, software that can understand and execute programs that third parties write in a free-to-use programming language. WPL did not copy a single line of code from SASII's copyrighted software. WPL never even saw SASII's code.[2] Twice before, SASII accused WPL of copyright infringement. Twice before, courts rejected the accusation. Rather than assert *protected expression* in its software, they ruled, SASII improperly sought to monopolize an *idea* or *function* of reading and executing programs written by users in an unprotected programming language.

Seeking to avoid that same fate here, SASII "obfuscate[ed]." Appx10. The Fifth Circuit requires plaintiffs to identify a copyrighted work's "protect[ed] elements" so they can be compared "'side-by-side'" with the accused work. *General Universal Sys., Inc. v. Lee*, 379 F.3d 131, 141-42 (5th Cir. 2004) (per curiam); *see Eng'g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1343 (5th Cir. 1994). SASII, however, asserted "thousands" of works rife with unprotected material—including public-domain material, third-party expression,

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[2] SASII's amici misrepresent the dispute entirely when they falsely assert that "WPL code" is "'identical'" to SASII's. Oracle Br. 5.

and purely functional elements—and refused to identify the protected portions allegedly copied. Appx3315(12:20-22); *see* Appx16-17. That, the district court observed, made it impossible to "inform a jury as to what to look at and what to compare" to "make a proper factual determination" regarding copyright "infringement." Appx3315-3316(12:1-13:6).

Despite the district court's warning that SASII had "to narrow" its case and "give the [c]ourt specifics," SASII "came back and said, well, we're asserting" three vague categories it called "input formats," "output designs," and "naming and syntax." Appx3316(13:1-10).[3] SASII never identified the protected *expression* in the copyrighted computer programs asserted. SASII did not introduce the "statements or instructions" comprising those programs—its code—into evidence. 17 U.S.C. §101. Its expert never looked at the code. The district court thus had "[no]thing to look at within a particular asserted work" to evaluate SASII's claims. Appx3316(13:17-20). Even in this Court, SASII ignores the copyrighted code it registered. SASII reproduces lines of the free-to-use SAS Language from *non-asserted manuals*, which teach users how to write their own programs using that language. And SASII shows images generated by *user-written* programs. But SASII offers nothing from *its* computer programs.

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[3] SASII abandons "naming and syntax," challenging only the district court's analysis of "Input Formats" and "Output Designs." Br. 2.

As the district court observed, "you can't take thousands of works, come back with three categories or buckets, and say that's enough." Appx3317(14:2-4). Copyright protects only *original expression*—not functions, "ideas, processes, facts, elements dictated by considerations of efficiency, elements required by factors external to the program itself, or items taken from the public domain." *General Universal*, 379 F.3d at 142-43. Infringement occurs only where "*protectable* elements" are copied. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) (emphasis added). To determine what is protected, courts need "to know exactly what" expression from the copyrighted work the plaintiff is "asserting"—something SASII never identified. Appx3317(14:4-5).

Defining a copyright's scope—the protected expression—is particularly important in cases like this one concerning "nonliteral elements." Because nonliteral elements are abstractions of software (much as plots are abstractions of novels), they frequently cross the line from protected expression to unprotected "idea[s], procedure[s]," or "concept[s]." 17 U.S.C. § 102(b). Accordingly, Fifth Circuit law requires plaintiffs to undertake an abstraction-filtration-comparison analysis to exclude unprotected material. *General Universal*, 379 F.3d at 142-43. That allows factfinders to focus on the "protectable expression" that remains. *Id.*

SASII did "no filtration." Appx17. When confronted with "ample evidence" that its "input formats" and "output designs" were unprotected for at least

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twelve reasons, SASII refused to identify the "extent of any remaining protectable work." Appx16-17. Even on appeal, SASII tries to sidestep filtration by repeatedly asserting that some asserted content is "creative." Br.5, 34, 48. But that is true of *all* copyrighted works. It does not displace the filtration requirement, which requires exclusion of unprotected *elements* from copyrighted works. And while SASII contends that input formats and output designs are protected as "collections," Br.49-50, SASII *never* listed the putative collections' contents. SASII failed to show that its "collection of input formats" is something other than the SAS Language—which is free for anyone to use—or that SASII's "collection of output designs" can be separated from independent, creative choices of *users*.

Standard of Review. Regional circuit law governs this copyright case. *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1575 (Fed. Cir. 1990). Factual findings "are reviewed for clear error and legal issues are reviewed *de novo*." *In re Mid-S. Towing Co.*, 418 F.3d 526, 531 (5th Cir. 2005). Rulings on expert testimony's admissibility are reviewed for "[m]anifest"—"plain and indisputable"—"error." *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004). Other evidentiary rulings are reviewed "for abuse of discretion." *S. Pac. Transp. Co. v. Chabert*, 973 F.2d 441, 448 (5th Cir. 1992).

I. **THE DISTRICT COURT CORRECTLY DISMISSED THE CASE FOR FAILURE TO SHOW INFRINGEMENT OF PROTECTED MATERIAL**

To show copyright infringement, a plaintiff must show more than "'ownership of a valid copyright.'" *General Universal*, 379 F.3d at 141. It must show appropriation of "constituent elements . . . that are copyrightable." *Eng'g Dynamics*, 26 F.3d at 1340. The Fifth Circuit "prohibits finding copyright infringement without a side-by-side comparison" of the copyrighted work's protected elements with the accused work's content. *Bridgmon v. Array Sys., Corp.*, 325 F.3d 572, 577 (5th Cir. 2003); *see Eng'g Dynamics*, 325 F.3d at 1343, 1347. "[B]efore comparing the two works," the plaintiff must first "distinguish between [the copyrighted work's] protectable and unprotectable elements." *Nola Spice*, 783 F.3d at 550.

Under Fifth Circuit law, that "first step" is indispensable. *Nola Spice*, 783 F.3d at 550. "[O]nly th[e] protectable elements of plaintiff's work" may support infringement. *Paycom Payroll, LLC v. Richison*, 758 F.3d 1204-05 (10th Cir. 2014); *see Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994). Unprotected elements—including functional, borrowed, and public-domain elements—thus must be "filtered out" to identify the asserted work's "'core of protectable expression.'" *General Universal*, 379 F.3d at 142-43. That is particularly important in cases, like this one, where the plaintiff alleges the appropriation of abstract nonliteral elements like the work's structure or organization. *See Eng'g Dynamics*, 26 F.3d at 1340.

SASII nowhere disputes the district court's finding that it did "no filtration." Appx16-17. Relying on a lone out-of-circuit decision, SASII argues the court should have "'simply assume[d]'" that "everything" was protected until WPL showed otherwise. Br.3; *see* Br.39-43, 47. That defies Fifth Circuit law, which requires *plaintiffs* to identify the "constituent elements of the work that are copyrightable." *Eng'g Dynamics*, 26 F.3d at 1340. Even under the more-lenient approach the district court employed, SASII failed to carry its burden. Once WPL showed that SASII was asserting unprotected material, SASII refused to say what, if any, protected material "remain[ed]." Appx17. The district court properly held SASII accountable for that failure. In any event, WPL showed that SASII's "collections of input formats" are the free-to-use SAS Language and that its "collections of output designs" are inseparable from user commands.

A. The District Court Dismissed the Case for SASII's Failure To Separate Protected from Unprotected Material

1. *Plaintiffs Bear the Burden of Identifying a Work's Protected Elements*

SASII's appeal rests almost entirely on the notion that copyright plaintiffs need not identify the precise expression protected by copyright. *See* Br.39-43, 47. As the district court put it, SASII assumes it can simply "take thousands of works," "come back with three categories or buckets" of nonliteral elements, "and say that's enough." Appx3317(14:2-4). That is not Fifth Circuit law. Where a plain-

tiff asserts appropriation of *nonliteral* elements (as here) from utilitarian works like computer programs (as here), the Fifth Circuit requires the *plaintiff* to identify the "'core of protectable expression'" underlying its case. *General Universal*, 379 F.3d at 142-43; *see Nola Spice*, 783 F.3d at 550 & n.6.

The Fifth Circuit's *General Universal* decision makes that clear. There, the Court held that the defendant was "entitled to judgment" because the plaintiff failed to "complete the *Altai* analysis necessary to evaluate claims that a program's nonliteral elements were copied." 379 F.3d at 141, 143-44. Without that analysis, there was "no evidence in the record" to support the plaintiff's claims of actionable copying. *Id.* at 144, 157. While SASII insists that the "weight" of authority is to the contrary, Br.41, that is neither relevant nor right. Here, *Fifth Circuit* law controls. *See Atari Games*, 897 F.2d at 1575. The Fifth Circuit requires plaintiffs alleging nonliteral infringement of computer programs to provide "'a valid *Altai* analysis.'" *General Universal*, 379 F.3d at 143. In *General Universal*, the district court "properly dismissed" claims when the plaintiff failed to provide that analysis. *Id.* at 144. The district court committed no error in doing likewise here.

Courts and treatises agree: A plaintiff's failure to present *any* filtration analysis is fatal. In *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (6th Cir. 2010), for example, the plaintiff purported to identify numerous similarities between his software and the accused program. Because the plaintiff's evidence

"clearly lacks the abstraction and filtration elements," the court held, the defendant "was entitled" to judgment nonetheless. *Id.* at 275-76. Decision after decision agrees. *See, e.g.*, *Automated Sols. Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 520-21 (6th Cir. 2014) (judgment proper where plaintiff failed to "show which portions" of software were "subject to copyright"); *Paycom*, 758 F.3d at 1207-08 (report lacking a "'filtration analysis'" could not support injunction); *Macro Niche Software, Inc. v. 4 Imaging Sols., L.L.C.*, No. 12-cv-2293, 2013 WL 12140417, at *5 (S.D. Tex. Dec. 18, 2013); *Ford Motor Co. v. Versata Software, Inc.*, No. 15-11624, 2019 WL 355638, at *4-5 (E.D. Mich. Jan. 29, 2019); *Siegler v. Sorrento Therapeutics, Inc.*, No. 18-cv-1681, 2019 WL 3532294, at *10 (S.D. Cal. Aug. 2, 2019), *aff'd*, No. 2020-1435, 2021 WL 3046590 (Fed. Cir. July 20, 2021) (asserting "'entire contents'" was protected, without "plead[ing] the existence of protectable elements," insufficient). As one leading treatise explains, "[t]he abstraction-filtration-comparison test places a special burden *on the copyright owner* to highlight the original and expressive elements that it claims are infringed." *Goldstein on Copyright* §9.3.2 (emphasis added). "The burden is *on the plaintiff* to provide a complete *Altai* analysis." 2 *Scott on Information Technology Law* §2.51 (3d ed. 2021 supp.) (emphasis added).

That reflects background copyright principles. As SASII concedes (Br. 38), plaintiffs bear the burden of showing "actionable copying." *General Universal*,

379 F.3d at 141. Filtration is the *means* by which plaintiffs identify the "protect-

able elements of the infringed work" allegedly appropriated, *id.* at 142—the "first

step" in proving actionable copying, *Nola Spice*, 783 F.3d at 550. Patent law long

ago rejected the disastrous notion that patentholders can refuse to distinguish

between unprotected ideas and the patentee's claimed invention. *See General

Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 368 (1938). Copyright law

requires plaintiffs to make the same distinction.

Copyright attaches to *a work*, but not "every" constituent "element" within

the work is protected. *Feist*, 499 U.S. at 348. When the defendant is not accused

of literally copying software code but instead of appropriating abstractions from

the code—so-called nonliteral elements—"it becomes more difficult to distinguish

between unprotectible ideas, processes, methods or functions . . . and copyrightable

expression." *Eng'g Dynamics*, 26 F.3d at 1341. Filtration is how "'the scope of

plaintiff's copyright'" is "'define[d].'" *Altai*, 982 F.2d at 707. Without eliminat-

ing "unprotectable expression," there is no way to discern the "protectable expres-

sion" to which the defendant's work should be compared. *General Universal*, 379

F.3d at 142-43.

2.   *SASII's Scattershot Authorities Do Not Support Requiring
Defendants To Identify Plaintiffs' Protected Expression*

SASII's contrary argument rests on *Compulife Software, Inc. v. Newman*,

959 F.3d 1288 (11th Cir. 2020). Br. 39-43. In a footnote, SASII speculates that the

Fifth Circuit would follow SASII's understanding of *Compulife* because, 17 years

ago in *General Universal*, the Fifth Circuit "cited approvingly" a different

Eleventh Circuit decision that predates *Compulife* by nearly 25 years. Br. 39 n.3.

SASII's citation proves the opposite. The Fifth Circuit approvingly read

pre-*Compulife* Eleventh Circuit precedent to "*disagree[]*" with the notion that the

"burden" is on "the defendant to prove that the material taken was not copyright-

able." *General Universal*, 379 F.3d at 143 n.26 (emphasis added). It invoked the

Eleventh Circuit's observation that "'[p]erhaps the best approach'" is to "'require

the copyright owner to inform the court as to what *aspects or elements* of its com-

puter program it considers to be protectable.'" *Id.* (emphasis added) (quoting

MiTek Holdings, Inc. v. Arce Eng'g Co., 89 F.3d 1548, 1555 (11th Cir. 1996)).

And *General Universal* ruled the defendant was "entitled to judgment" because the

plaintiff—like SASII here—performed no valid abstraction-filtration-comparison

analysis. *Id.* at 141, 143-44, 157.[4]

SASII's authorities are distinguishable. *Compulife* concerned copying of lit-

eral elements—*i.e.*, portions of actual software code. *See* 959 F.3d at 1301.

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[4] Nor is *General Universal* "distinguishable" because the plaintiff lacked proof of "factual copying." Br. 39 n.3. *General Universal* "assumed . . . factual copying had occurred," and factual copying is disputed here. 379 F.3d at 157. Insofar as *General Universal* reserved any question, it reserved only whether the district court had "misapplied" the abstraction-filtration-comparison framework to "claims that *source code was copied*." *Id.* at 143 & n.26 (emphasis added). As to nonliteral elements like those here, the court held the plaintiff's failure to provide an abstraction-filtration-comparison analysis was dispositive. *Id.* at 143-44.

Compulife had no occasion to ask whether the "practical[]" considerations it invoked support assuming that *nonliteral* elements of software are protected, *id.* at 1305, even though they "hover . . . more closely" to unprotected ideas, *Altai*, 982 F.2d at 704. And SASII's decisions from other appellate courts do not address the abstraction-filtration-comparison test at all.[5]

SASII's reliance on the statutory "presumption of validity" afforded copyrighted works (Br. 40) fails too. Questions of copyright "validity" are not at issue here; this case concerns copyright "scope." *Bikram's Yoga College of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032, 1038 (9th Cir. 2015). Copyright registrations provide *prima facie* evidence of a valid copyright in a "work *as a whole.*" *Nola Spice*, 783 F.3d at 549 (emphasis added); *see* 17 U.S.C. §410(c) ("*prima facie* evidence of the validity of the copyright and of the facts stated in the certificate"). But they do not render all of a work's *elements* "automatically protected." *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 533 (5th Cir. 1994); *see Feist*, 499 U.S. at 348; *Smith v. Jackson*, 84 F.3d 1213, 1219 (9th Cir. 1996), *other parts overruled by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th

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[5] *Boisson v. Banian, Ltd.*, 273 F.3d 262, 269-70 (2d Cir. 2001), held that, where a plaintiff had shown a particular "five-by-six block format" of a quilt "required some minimum degree of creativity," a defendant arguing the layout was public domain needed to provide supporting "proof." And *Society of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 52 (1st Cir. 2012), merely held that a defendant had "waived" an argument about short phrases' copyrightability.

Cir. 2020). Moreover, any presumption would only create a burden of production, not shift the burden of persuasion. *See* Fed. R. Evid. 301.

General Universal proves the point. There, a "certificate" established that the plaintiff "own[ed] a valid copyright." 379 F.3d at 141. But the Fifth Circuit required the plaintiff to prove "actionable copying"—a *separate element* of copyright infringement—by providing a "'valid *Altai* analysis.'" *Id.* at 142-43, 157. Similarly, in *Automated Solutions*, the plaintiff owned a "valid copyright." 756 F.3d at 520 n.7. But the Sixth Circuit entered judgment because the plaintiff never "identified which *portions* of [its software] were subject to copyright protection." *Id.*; *see id.* at 520-21.

That precedent reflects the realities of copyright registration. To register a computer program, the author deposits a mere 50 pages of code. *See* 37 C.F.R. §202.20(c)(2)(vii)(A). The Copyright Office considers whether the "material deposited constitutes copyrightable *subject matter*." 17 U.S.C. §410(a) (emphasis added). But it does not "examine[]" the material "for basic validity," much less for protected nonliteral elements. H.R. Rep. No. 94-1476 at 156-157 (1976); *see Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 430 (4th Cir. 2010); 3 *Patry on Copyright* §9:12. SASII nowhere contends that its "collections" were expressed in the 50 pages of code it deposited or that the Office specifically found them protected.

Requiring plaintiffs to identify the expression they believe protected does not create "impossible" (Br. 7, 41-42) demands. Numerous courts see no difficulties. *See* pp. 32-34, *supra*; *Seng-Tiong Ho v. Taflove*, 648 F.3d 489, 499 (7th Cir. 2011) (plaintiff must prove merger inapplicable); *N.Y. Mercantile Exch., Inc. v. IntercontinentalExch., Inc.*, 497 F.3d 109, 117 (2d Cir. 2007) (same). Even courts in the Eleventh Circuit "require" plaintiffs to "list" the program elements they "consider[] to be protectable." *MiTek*, 89 F.3d at 1555; *see Compulife*, 959 F.3d at 1306 n.8. SASII's complaints about the difficulty of "'preemptively'" negating potential objections (Br. 42) do not explain why plaintiffs asserting works rife with unprotected elements cannot identify the elements they deem protected, remove known unprotected materials, or rebut arguments when raised. Here, SASII did none of that. Even after WPL's showing, SASII never demonstrated the "extent of any remaining protectable" elements. Appx16-17.

What makes no sense is to hold that plaintiffs have *no* obligation to separate protected from unprotected materials. That would incentivize parties to act as SASII did here: to refuse to identify the protected portions of voluminous works allegedly copied, and then to claim victory when those tactics frustrate efforts to analyze "everything." *See* pp. 13-17, *supra*. Defendants, courts, and juries all must "know exactly what [a plaintiff is] asserting" to determine whether actionable copying occurred and to avoid trial by ambush. Appx3317 (14:4-5); *see* Appx17;

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Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 833 (10th Cir. 1993) ("necessary" for plaintiff to "precisely identif[y]" a work's "protected elements"). The Court should not endorse an approach that encourages gamesmanship.

3. *The District Court Properly Held SASII Accountable for Failing To Filter Unprotected Material*

The district court specifically ordered "a copyrightability hearing" at which "*the parties will present evidence* in support of the abstraction and filtration steps of the abstraction-filtration-comparison." Appx2 (emphasis added). The hearing, the court explained, would identify "*protectable expression*, if any, covered by each asserted work," so that a jury can compare protected expression to the accused work. *Id.* That order reflected Fifth Circuit precedent that requires filtration of "unprotectable elements"—including "ideas, processes, facts, public domain information, merger material, [and] *scenes a faire* material"—to "eliminate" them from the comparison. *Eng'g Dynamics*, 26 F.3d at 1343. It reflected that it is "necessary" for a plaintiff to "precisely identif[y]" the "protected elements" it wishes to present to the jury. *Gates Rubber*, 9 F.3d at 833 (endorsed by *Eng'g Dynamics*, 26 F.3d at 1342-43).

SASII's position is that, despite the court's order requiring an abstraction-filtration analysis, it could refuse. SASII's expert admitted he did not "filter out anything" from the asserted input formats and output designs. Appx3459(156:20-22). Although authors receive no protection for elements "already in the public

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domain," *Stewart v. Abend*, 495 U.S. 207, 234 (1990), SASII's expert did not "filter[] out public domain" material like SAS 76, Appx3461(158:9-12); *see* Appx690; Appx729. Nor did he separate protected expression from unprotected materials "not original to SAS[II]" or scènes à faire. Appx3461-3462(158:13-159:5); *see* Appx3462-3465(159:3-162:10); Appx13130-13131(156:22-157:25); Appx13132-13134(158:16-160:14); Appx13134-13138(160:19-164:18).

Even after WPL identified "many 'species of unprotectability,'" SASII did not change course. Appx16-17. As the district court observed, Appx16, evidence showed that ██ program features ██████████████████████████ in SASII's software came from SAS 76, Appx1989-2005(¶¶111-123); that SASII's software borrowed open-source and third-party elements, Appx2020-2030(¶¶139-144); Appx2036-2065(¶¶151-172); that SASII asserted unprotected ideas, including mathematical and statistical formulas, processes, and method elements, Appx2065-2070(¶¶173-184); that SASII asserted myriad "scènes à faire" elements, such as "tables, graphs, plots, colors, or fonts," Appx2082-2083(¶¶205-210); and that SASII's claims were littered with unprotected facts and short phrases, Appx2030-2036(¶¶146-150); Appx2083-2084(¶¶211-214). But SASII *still* did "no filtration" and never identified the "extent" of any protected material that remained after WPL's showing—raising the "untenable specter" of "taking copyright claims to trial without any filtered showing of protectable material." Appx17.

That makes judgment against SASII proper *even if* one credits *Compulife*'s observations about the potential difficulties of "'preemptively'" rebutting arguments about individual elements' protectability. Br. 42. The district court did not require SASII to prove all asserted elements protected in its *prima facie* case. Appx15-16. The court required WPL to identify the "species of unprotectability" within the copyrighted work, leaving SASII with the "manageable task of 're-spond[ing].'" *Compulife*, 959 F.3d at 1306; *see* Appx16-17. SASII needed only to show either that "what [WPL] alleges as not protectable actually is entitled to protection" or to identify the extent of "*remaining and identifiable* protectable elements." Appx16-17 (emphasis added).

SASII did "neither." Appx17. SASII nowhere denies its "input formats" and "output designs"—which include *all* of the "'PROCS, statements,'" and "'other elements available to the user'" and *all* "'content and formatting'" displayed after user programs are run—encompass unprotected material. Appx9; Appx16. SASII merely argues that WPL did not show input formats and output designs unprotected in their "entirety." Br. 50; *see* Br. 51-57. SASII, however, did not identify the "*remaining . . .* protectable elements" after WPL's showing. Appx17 (emphasis added). SASII "nowhere" listed everything within those vague categories *before* WPL showed them rife with unprotected material, Appx3452-3454 (149:11-151:17); *see* Appx12964-12965 (430:7-431:-25); Appx12969-12970

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(435:19-436:2)—much less identified what "remain[ed]" after, Appx17. SASII did "no filtration." *Id.*

Even in this Court, SASII asserts that "everything" WPL did not specifically address is protected. Br. 3. But SASII cites *no document* listing all the specific procedures, options, etc., that "everything" encompasses. SASII reproduces one putative example of an input format and putative outputs from two PROCs. Br. 11-12, 14, 17-18, 26-27. But SASII does not ask to try a case based on only those examples (likely because they are not sufficiently "importan[t]" to the "program as a whole" to establish infringement, *Digital Drilling Data Sys., L.L.C. v. Petrolink Servs., Inc.*, 965 F.3d 365, 374-75 (5th Cir. 2020)). It asks for a jury trial on all "SAS Material"—all putative input formats and output designs—whether or not reproduced in its brief or shown to the district court. Br. 50; *see* Br. 3, 59. And it does so despite undisputed testimony that its putative outputs are not "repre-sentative" of the "infinite" number that can be produced. Appx3521 (218:5-8).

SASII's request is particularly problematic considering WPL's showing. For example, WPL did not merely show that "[m]any" putative input formats and output designs are still "identical or nearly-identical" to public-domain SAS 76. Appx8; *see* Appx1874-1895; Appx1988-2005 (¶¶ 108-123). WPL showed that even █program features█   follow a █description█

███████.   Appx2005 (¶ 123); Appx2121(¶ 245); *see* Appx1897-1907; Appx1932.

And that only scratched the surface. *See* pp. 40-41, *supra*.

SASII's failures make this case the opposite of *Compulife*. There, the plain-

tiff introduced the asserted portion of the copyrighted work—a block of HTML

code. *See* 959 F.3d at 1299; *Compulife Software, Inc. v. Rutstein*, Nos. 9:16-cv-

80808, 9:16-cv-81942, 2018 WL 11033483, at *10 (S.D. Fla. Mar. 12, 2018). In

requiring the defendant to show "the copied portions of [the plaintiff's] code" were

unprotected, the Eleventh Circuit understood the plaintiff had already identified the

specific code believed to be protected and copied. 959 F.3d at 1307. Here, SASII

introduced no code and no code was copied; SASII asserted "non-literal

element[s]." Appx3318-3319 (15:14-16:7). But SASII "nowhere . . . listed . . . all"

the elements allegedly copied *before* demanding that WPL show that every one is

unprotected.   Appx3452-3454 (149:11-151:17); *see* Appx12964-12965 (430:7-

431:25); Appx12969-12970 (435:19-436:2).   SASII demanded that *WPL*, the

defendant, take the Everest-sized haystack of unprotected material in three vague

"buckets," identify their contents, and filter down to any needles of supposedly

protected expression. Appx3317 (14:2-4).

SASII's arguments about the difficulties of " 'preemptively' " rebutting

arguments about protected elements (Br. 42-43) thus ring hollow. The district

court's approach does not allow "a defendant [to] copy the Obi-Wan/Darth Vader

fight scene in *Star Wars* so long as it states that starships are *scènes à faire*." Br.42. It merely requires the plaintiff to show an "identifiable" fight scene "remain[s]" after scènes à faire starships are removed—something SASII never did. Appx17. SASII seeks license to assert that a defendant copied the vague category "action sequences," while refusing to identify *which* were allegedly copied or identify what remains after the defendant shows that reams are recycled from other films. That is especially inappropriate where, as here, a plaintiff asserts nonliteral abstractions of a utilitarian work rather than specific lines of identifiable code.

Even where not mandatory, courts have "wide discretion" to "require[] parties to particularize claims" before trial. *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 28 (1st Cir. 1996); *see Pac. Indem. Co. v. Broward Cnty.*, 465 F.2d 99, 103 (5th Cir. 1972). The district court warned SASII it had to "narrow" its case so the court could identify the protected expression that would be put to the jury. Appx13661(16:13-17); *see* Appx3. The court did not abuse its discretion by entering judgment against SASII where SASII refused, declining to specify what *remained* of SASII's broad categories—"input formats" and "output designs"— once WPL proved them shot-through with unprotectable material. Appx2; Appx17; *see* Appx13660(15:1-16); Appx13661(16:13-17); Appx13663(18:16-21); Appx3317(14:2-15).

4. *SASII's Invocation of "Creativity" and "Collections" Do Not Excuse Its Failures*

SASII seeks to excuse its failure to identify the protected elements that remained by arguing that designing its software required "creativity." Br. 47-49. But creativity establishes only the threshold requirement that a copyrighted *work* is "original." *Feist*, 499 U.S. at 345-46. The copyright's *scope* is "subject to [the] important limitation" that copyright does not protect "every element of the work." *Id.* at 348. A novel's author may not "receive protection" for "story elements . . . already in the public domain." *Stewart*, 495 U.S. at 234. That SASII exercised some "creative" judgment does not displace the filtration requirement. *See* pp. 31-38, *supra*.

SASII argues that input formats and output designs are "compilations" whose "selection and arrangement" are protected even if made from "unprotect[ed]" components. Br. 49-50. But actionable copying of compilations cannot be established without evidence of what the "'entire'" compilation contains. *Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc.*, 893 F.3d 1176, 1186 (9th Cir. 2018). Here, SASII never provided a complete list of the "input formats" and "output designs" within its putative collections. Appx3452 (149:11-16); *see* Appx3454 (151:11-17); Appx3471 (168:11-14). In unchallenged rulings, the district court sustained objections to the SASII expert's belated attempt to state even the *number* of PROCs within them. Appx3422-3423 (119:12-120:18).

Calling something a "compilation," moreover, does not dispense with the need for filtration. 4 *Nimmer on Copyright* § 13.03[E][1][b]; *see BellSouth Advertising & Publ'g Corp. v. Donnelly Info. Publ'g, Inc.*, 999 F.2d 1436, 1441-46 (11th Cir. 1993). SASII did not filter out ███elements of asserted work███ ███description of software███████████████, Appx1988-2005(¶¶108-123), ███ ███description of scientific field███████████, Appx2065-2069(¶¶173-179); Appx2082-2084(¶¶205-214), or ███description of source███, Appx2071-2074 (¶¶185-191). Nor did SASII identify the "extent of any remaining protectable work." Appx17. Those failures are fatal.

Indeed, the protection offered to "compilation[s]" or collections is "thin." *Feist*, 499 U.S. at 349. Liability can be established only if protected choices are duplicated "verbatim." *Experian*, 893 F.3d at 1187. Subsequent arrangements that differ by "more than a trivial degree" do not infringe. *Kregos v. Associated Press*, 937 F.2d 700, 710 (2d Cir. 1991). That makes it essential for plaintiffs to identify putative compilations' scope and protected elements—something SASII never did. Appx17.[6]

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[6] The scant evidence showed that, whatever the content of SASII's "collections," WPL's differed. WPL's expert estimated that WPS supports just a fraction of PROCs supported by SASII's software; testified that WPS supports PROCs that SASII's software does not; and showed WPS supports elements from programming languages besides the SAS Language. Appx2252-2256; Appx2117(¶238); Appx3423(120:4-7); Appx3518(215:5-9). That "can hardly be considered the 'same' selection." *Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Grp.*, 463 F.3d

B. SASII's Input Formats and Output Designs Are Not Protected

Burdens aside, SASII's collections of input formats and output designs are not protected. Undisputed evidence showed that "input formats" are not protected expression in the SASII software that reads or executes SAS-Language programs, but the vocabulary and syntax of the public SAS programming language. SASII has repeatedly conceded the language is free to use without a license. SASII's claim to "output designs" fares no better. SASII's witnesses conceded screen displays are inseparable from *user* input.

1. *SASII's "Input Formats" Are the Free-To-Use SAS Language*

SASII does not seek protection for program elements like graphical user interfaces, a "menu structure," or "long prompts"—the sorts of features *Engineering Dynamics* called "input formats." 26 F.3d at 1344. SASII's software presents users with a "blank [screen] that epitomizes an uncopyrightable idea." *Id.*; *see* Appx2262-2263. Users interact with SASII's (or WPL's) software by feeding it "text files" containing programs the user has "written in . . . the 'SAS

478, 483 (6th Cir. 2006); *see Experian*, 893 F.3d at 1187 (even 80% overlap insufficient). WPL's decision to support different PROCs means its "collection" of output designs was not "the same" either. Evidence also showed that WPL's software can generate ██output██ in response to the ██input██. Appx2124-2132(¶¶253-256); p. 10, *supra*. Even WPL's selection and arrangement of "plots, colors, texts, and fonts" on the images in SASII's brief differ. Br.50. Those images (Br.18, 26-27) exhibit differences in "color[]," "font[]" style, "font[]" size, line thickness, spacing, capitalization, and the number of tables.

Language.'" Appx311-312(¶¶5-6); *see* Br.10. Those user programs can be written in ███████ computer program ███████████ Appx1713(32:8-12).

SASII's "input formats"—the "'collection of PROCs,'" "'options,'" "'global statements,'" and other elements—thus are the "'elements available *to the user*'" for writing SAS-Language programs and the "'syntax'" that governs their combination. Br.12-13 (emphasis added); *see* Appx9. As SASII witnesses have testified, ███ description of testimony ████████████████████

████████████ Appx1712(26:1-2); *see* Appx1347(14:4-16); Appx1348(16:17-25); Appx1567-1568(8:9-9:2); Appx1569-1577(10:12-18:15); Appx1578-1580(22:7-24:13); Appx1583(30:13-23). That is why SASII's only example of an "input format" (Br.14) is from a *manual* ███ description of evidence ████████

████████████, Appx1671(263:7-15); Appx3493(190:3-10), and its putative evidence of ██ allegation ██ concerns the ███ elements of asserted work ████

████████████ Appx738-740; *see* Br.25.

Whether or not designing that language required creativity, Br.15-16, 49, or whether "constructed language[s]" are copyrightable, Br.52-53, SASII representatives have repeatedly "testified that anyone can write a program in the SAS Language, and that no license is needed to do so," *SAS Inst. Inc. v. World Programming Ltd.*, 64 F. Supp. 3d 755, 776 (E.D.N.C. 2014), *aff'd in part and vacated in part as moot* 874 F.3d 370 (4th Cir. 2017); *see* Appx16 (language is "open and free for

public use"). SASII's 30(b)(6) witness testified that users ███████████

███ description of testimony ████████████████████ and that users—*not* SASII—

█ description of testimony ██████████. Appx1671(262:18-263:15); Appx1672(266:15-

267:1); *see* Appx1712(26:3-9); Appx1713(32:8-18). The SAS Language's origi-

nal creator agreed. Appx12746-12749(¶¶5-17). As the North Carolina court

ruled, insofar as WPS reflects elements of "a language anyone may use without a

license," WPL copied nothing protected. *SAS*, 64 F. Supp. 3d at 776.

SASII tries to retract its concessions in a footnote, asserting that the freedom

to "physically" write "text file[s]" in the SAS Language does not imply the free-

dom to write software that understands them. Br.53 n.4. But copyright protects

against *copying* of expression (what users do), not understanding or executing it

(what WPS does). *See* 17 U.S.C. §106. "[F]unctionality" cannot be copyrighted.

Design Basics, LLC v. Signature Constr., Inc., 994 F.3d 879, 889 (7th Cir. 2021);

see 17 U.S.C. §102(b); *Baker v. Selden*, 101 US. 99, 102-04 (1879); *Lotus Dev.*

Corp. v. Borland Int'l, Inc., 49 F.3d 807, 817-19 (1st Cir. 1995), *aff'd* 516 U.S.

233 (1996). WPL, moreover, achieved its *functionality*—"interpret[ing] and com-

pil[ing] the SAS Language"—in a different way. *SAS*, 64 F. Supp. 3d at 776.

WPL wrote code ██ description of past actions ████████████

████   Appx2121-2122(¶247); *see* Appx1962-1965(¶¶59-60); Appx1665(172:25-

173:2).

That distinguishes this case from *Oracle*, a case SASII strains to invoke (*e.g.*, Br. 49). In *Oracle*, the asserted APIs were not elements of the free-to-use Java language but 37 packages of prewritten software code. *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1367 (Fed. Cir. 2014). Google literally copied thousands of lines of the code making up those packages. *Id.* at 1353. Here, by contrast, SASII's "input formats" are *elements* of a language "free for anyone to use," *id.*—not programs written in that language, *cf. id.* at 1368 ("Google may employ the 'package-class-method' structure much like authors can employ the same rules of grammar chosen by other authors without fear of infringement."). SASII's expert tried to ██ description of testimony ██

████ . Appx685(¶22). But as the English court explained, PROCs are merely *user* "commands" to SASII's or WPL's software; they are not "an intellectual creation of the [software's] author." Appx1488-1489(¶14); *see SAS Inst. Inc. v. World Programming Ltd.*, [2010] EWHC 1829 ¶55; Appx3355(52:2-5).

SASII's unsupported assertion that the "term 'SAS language'" lacks "a consistent meaning" (Br. 53 n.4) is no answer. As the English court recognized, *SASII* manuals define the term to include the features SASII now calls "input formats": "statements, expressions, options, formats, and functions similar to those of many other programming languages." [2010] EWHC 1829 ¶48; *see* Appx682. SASII witnesses consistently describe ██ description of testimony ██

███████████████████—putative "input formats"—program input

███   Appx1712(26:1-2); *see* Appx1347(14:4-16); Appx1348(16:17-25);

Appx1567-1568(8:9-9:2); Appx1569-1577(10:12-18:15); Appx1578-1580(22:7-

24:13); Appx1583(30:13-23). That is how SASII publications and the SAS Langu-

age's original creator describe them, too. Appx12746-12749(¶¶5-17), Appx2888;

Schlotzhauer, *supra*, at 19 ("PROC steps are part of the SAS language").

SASII's arguments prove too much. SASII's position is akin to conceding

that the words and grammar of the English language are free to use for composing

novels, but that reading those novels is forbidden. SASII improperly seeks a

monopoly over the *idea* of executing user-written SAS-Language programs. *SAS*,

64 F. Supp. 3d at 776.

2.   *SASII's "Output Designs" Are the Unprotectable Products of User Instructions*

SASII's claim to "output designs" fares no better. According to SASII,

"output designs" are the "'collection of content and formatting, including default

parameters,'" generated "'*in response to the user's input*.'" Appx9 (emphasis

added); *see* Br.16. It is an open question whether copyright in a computer program

reaches outputs. *See Design Data Corp. v. Unigate Enter., Inc.*, 847 F.3d 1169,

1173 (9th Cir. 2017). As SASII concedes (Br.55 n.5), even courts entertaining that

possibility agree that protection attaches only where the software "'does the lion's

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share of the work' . . . and the user's role is so 'marginal' that the output reflects the program's contents." *Design Data*, 847 F.3d at 1173.

The user's role is not "so marginal" here. As SASII's witnesses testified, SASII's software cannot ████function████████████████████████████. Appx1667(185:9-21). Outputs are the ████description of evidence████████

████████████████████████████████ Appx1474(60:8-10); *see* Appx3467(164:11-24); Appx3501-3502(198:16-199:16). As SASII's CEO testified, outputs are ████description of testimony████████ Appx1474(60:23-25) (emphasis added). They represent, Storer testified, ████description of testimony████

██████████████ Appx13256(282:16-22) (emphasis added). A SASII witness even described what Storer called a ████description of testimony████ Appx1104, as ████description of testimony████, Appx1668(210:14-211:13) (discussing Appx12741); *see* Appx2085-2109(¶¶216-221); Appx1758(223:5-224:23); Appx3471(168:20-25). Asked ████question████████ seen when users ████action████

██████████████ SASII's witness responded, ████answer████

██████████ Appx1671(263:1-5) (emphasis added). SASII's contrary assertion (Br. 55 n.5) claims no evidentiary basis. As the North Carolina court observed,

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outputs are a function of software "properly" compiling "programs input by users."

SAS, 64 F. Supp. 3d at 776.[7]

SASII argues that its software contains "default" outputs where no "different SAS[II]-created settings are selected." Br. 17; *see* Br. 55 n.5. But SASII defines its "collection of output designs" to include the "'content and formatting'" of *every* output generated "'in response to the user's input'"—not merely images reflecting supposed "'default parameters.'" Appx9; *see* Br. 16; Appx724. Its "collection" includes images (even ones reflecting putative defaults) where ███████ description of evidence ███████. Appx1668 (210:25-211:3); *see* Appx2112 (¶224); pp. 7-8, *supra*. Its "collection" includes outputs that look "almost indistinguishable" from outputs that other companies' software generates. Appx3521 (218:16-21). A SASII graphics specialist brags that its outputs can be configured to be indistinguishable from competitors'. R. Allison, *Graphs: Comparing R, Excel, Tableau, SPSS, Matlab, JS, Python, and SAS*, SAS Institute Inc. (Dec. 20, 2016), https://blogs.sas.com/content/sastraining/2016/12/20/graphs-comparing-r-excel-tableau-spss-matlab-js-python-and-sas/. As WPL's expert explained, the "infinite number of possibilities for generating graphics" makes it impossible to identify a "representative" output. Appx3521 (218:5-8).

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[7] Far from "tacitly rejecting" that argument, Br. 55 n.5, the district court here ruled that SASII failed to identify *any* asserted elements that were protected, Appx17.

SASII's brief reproduces a handful of user-generated images. Br. 17-18, 26-27. But SASII's expert did not ████████████████████████████ ████████████████████████████████, Appx724; Appx732-735—everything "'the user actually sees,'" Br. 16. Those images do not establish that SASII's software is responsible for "the lion's share" of their "content and formatting" regardless. Content is user defined. Users—not SASII—provide the ███ ██. Appx1940-1942 (¶¶ 12-13).[8] SASII's putative contributions consist of such trivialities as the ████████████████████████████ Br. 50; *see* Appx2106-2107; Appx1474-1475 (61:5-63:1). But many are not ████████: ████████████████████████████████████ ████████████████████████████████████ ████████████████████████. Appx16; Appx2071-2074 (¶¶ 185-191); Appx2132-2136 (¶¶ 256-270).

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[8] SASII's brief (Br. 17) does not even ████████████████ ████████. Appx1934-1938 (¶¶ 5-7). Analysis of a full user-written program for a putative "default" output demonstrates how ████████████████████. Appx1909. SASII's own witness admitted that ████████████████████ Appx1668 (210:25-211:3).

C. SASII's Failure To Show Its Works Express "Input Formats" and "Output Designs" Independently Supports the Judgment

Plaintiffs claiming copyright infringement "necessarily" must "establish the content of the copyrighted work." *Airframe Sys., Inc. v. L-3 Commc'ns Corp.*, 658 F.3d 100, 106 (1st Cir. 2011). Here, SASII's copyrights are in the "source code versions covered by its copyright registrations." *Id.* at 107; *see* Appx1665(172:2-173:7). SASII therefore needed to show that the *code itself expresses* the materials WPL allegedly copied. *See Antonick v. Elec. Arts, Inc.*, 841 F.3d 1062, 1066-67 (9th Cir. 2016); *Airframe*, 658 F.3d at 107-08; *Bridgmon*, 325 F.3d at 576. As WPL explained, SASII never did. Appx1449-1451; Appx1454; Appx1457; Appx13726-13727.

SASII asserts that "input formats" are expressed in its copyrighted software. Br.14-15. But SASII provided no evidence. SASII did not put its software code into evidence, much less identify where it expressed anything asserted. Appx3316 (13:11-21); Appx3347(44:6-13). SASII's expert never examined SASII's code for "*any* registered work." Appx3440(137:5-8) (emphasis added). That's like opining that a novel was infringed without reading a single page. The English courts rebuffed SASII for precisely that tactic. They found it "remarkable" that SASII did "not consider it necessary for either its own expert witness or the court to see the copyright[ed] work." [2010] EWHC 1829, ¶250. Yet SASII repeats the tactic here.

The *only* expert who reviewed SASII's code explained that ██████████

████ description of testimony ████████████████████████

Appx1939-1940(¶¶9-11); *see* Appx3493(190:15-20).   SASII's *only* putative de-

piction of an "Input Format" in its brief (Br. 14) is from an unasserted *user manu-*

al—not copyrighted computer software.   Appx1939; Appx8476.   Those manuals

do not describe SASII's copyrighted code.   They teach users how to write *their*

own programs in a language the software understands—something SASII concedes

██ description of testimony █████.   Appx1671(263:7-15); Appx3493(190:3-10).   As

the English court observed, SASII's claim that manuals provide "'a window into'"

its code is "inaccurate and misleading."   [2010] EWHC 1829 ¶250.

The same problems attend SASII's "output designs."   They encompass an

infinite number of possible displays generated by user programming, making it

essential to identify the portion of SASII's software code responsible for the

images that users see.   Appx3500(197:22-24); Appx3521(218:5-11).   But SASII's

expert never identified ██ description of testimony ████████

████████████████████████████ Appx1941-1942(¶13); *see* Appx3468-3469

(165:21-166:9).   He looked at screenshots ██ description of evidence ██.   Appx2123

(¶249).   That is insufficient: Because "wholly different programs" can generate

the same output, "screen output[s] cannot prove two sets of source code alike." 4

Nimmer on Copyright §130.03[F][1][b] n.282; *see* p. 54, *supra*.

SASII's expert, moreover, ███████████████████ in his

analysis. *See* Appx715 (cross-referencing Appx12656-12657 and Appx12662).

He never ███████████████████████████████

███████████. Appx12951-12960 (417:10-426:24). Plaintiffs cannot establish

a work's contents by indiscriminately blending asserted and irrelevant material.

Airframe, 658 F.3d at 106-07.

Like literal elements, nonliteral elements are protected only if "fixed" in a

"tangible" medium of expression. 17 U.S.C. § 102(a). Just as a novel cannot have

a plot or characters without text, a computer program cannot have nonliteral

elements without code. That is why courts refer to "*program* architecture," *Eng'g*

Dynamics, 26 F.3d at 1341 (emphasis added), "'structure, sequence and organiza-

tion' *of the software*," *Gates Rubber*, 9 F.3d at 840 (emphasis added), or products

"generated by *the code's* interaction with the computer hardware and operating

program(s)," *MiTek*, 89 F.3d at 1555 n.15 (emphasis added). SASII's registered

software code defines the scope of its copyright. SASII's failure to introduce that

code into evidence or show it embodies *any* asserted nonliteral elements is fatal.

II.   SASII's Procedural Complaints Are Meritless

SASII's procedural complaints (Br. 43-47) lack substance. "[T]he court"

must decide which elements should be filtered out before trial. *Eng'g Dynamics*,

26 F.3d at 1343; *accord Compulife*, 959 F.3d at 1309 n.12; *Yankee Candle Co. v.*

Bridgewater Candle Co., 259 F.3d 25, 34 n.5 (1st Cir. 2001); *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996). SASII's assertion that the court denied summary judgment because of "genuine issues of material fact" is wrong. Br.45. The court explained that summary judgment was the wrong "framework" for resolving copyright scope because "copyrightability" is "*a question of law*" for the court, not something for a jury. Appx1 (emphasis added). And SASII identifies no factual disputes that supposedly preclude judgment for WPL.

The district court's decision makes clear that there were no such factual disputes. In an opinion rich with record citations, the court ruled that SASII failed to make "*any* filtered showing of protectable material." Appx17 (emphasis added). SASII was "on notice" that it must "come forward with all [its] evidence" or lose its chance for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); *see* Appx2; Appx13660(15:1-16); Appx13661(16:13-17); Appx13663(18:16-21). But SASII did not. That is sufficient reason to enter judgment for WPL. *See General Universal*, 379 F.3d at 143-44. SASII's complaint that the district court failed to make additional "findings of fact" (Br.46) ignores that a plaintiff's failure to carry its burden of defining a copyright's scope is dispositive. Besides, SASII's own concessions and undisputed testimony support the result below. It is "'elementary'" an appellate court may affirm on "'any grounds supported by the record.'"

Chemtech Royalty Assocs., L.P. v. United States, 823 F.3d 282, 288-89 & n.15 (5th Cir. 2016); *see Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

SASII's view that *it* is entitled to judgment (Br. 59) overreaches. If factual disputes preclude judgment or require additional findings, the remedy would be remand for further proceedings—not reversal. *See, e.g.*, *Marshall v. Kimberly-Clark Corp.*, 625 F.2d 1300, 1303 (5th Cir. 1980); C. Wright and A. Miller, 9C *Federal Practice & Procedure* § 2577 (3d ed.). SASII cannot refuse to identify specific asserted elements, sit out a court-ordered filtration analysis, and then claim victory without identifying the extent of any remaining protected material.

III. EXCLUSION OF SASII'S EXPERT INDEPENDENTLY WARRANTS AFFIRMANCE

The district court's judgment rests on a separate rationale, "regardless of the copyrightability determination." Appx18 n.11. The court excluded SASII's "only technical expert" from testifying at trial, both for "egregious" discovery violations and for an "unreliable" methodology. Appx17-18. That had "the practical effect of leaving SAS[II] without any supportable copyright claims." Appx18 n.11. The district court did *not* "exclude[]" Storer from the copyrightability hearing. Br. 61. It heard him out for 100 transcript pages. Appx3385-3485 (82:14-182:4). The

district court exercised permissible discretion in refusing to allow his unreliable and unhelpful opinions to be presented to a jury. Appx17-18.[9]

A. The District Court Did Not Commit Manifest Error by Excluding SASII's Expert Given the "Egregious Conduct"

The district court excluded Storer for "egregious" discovery violations, including (1) submitting reports and exhibits he did not prepare; (2) failing to disclose the basis and reasons for his opinions; and (3) repeatedly refusing to answer deposition questions. Appx18; *see* Appx12921-12935; Appx13626-13637; Appx12671. SASII does not address those violations, much less show the court's ruling "'*manifestly erroneous.*'" *Sandifer v. Hoyt Archery, Inc.*, 907 F.3d 802, 807 (5th Cir. 2018). That waives any argument for reversal. *See Wise v. Wilkie*, 955 F.3d 430, 437-38 (5th Cir. 2020).

The district court's ruling was amply supported. Rule 26 requires a party's expert to "*prepare[]*" a report containing a "complete statement of all opinions . . . and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B) (emphasis added). It "does not contemplate blanket adoption of reports prepared by counsel or others." 6 J. Moore et al., *Moore's Federal Practice* ¶26.23[4] (3d ed. 2000). Storer did not "prepare" his report. Appx12921-Appx12932 (adopted Appx18). He at most ▮description of testimony▮

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[9] The district court did not endorse "Storer's abstraction analysis." Br.61. It excluded Storer's entire "analysis and methodology," Appx17-18, merely finding the parties' competing abstraction schema did not affect the result, Appx12 n.5.

███ . Appx13480-13481(40:1-41:5); Appx13483(43:10-25). His review was ███

███ description of testimony ███ .

Appx13058-13063(524:5-529:7). He had ███ description of testimony ███ .

Appx12973-12976(439:25-442:1); Appx13564-13567(124:9-127:19); Appx12981-12984(447:11-450:18). He guessed that output comparisons—reproduced in SASII's brief (Br.18, 26-27)— ███ description of testimony ███

███ Appx12973-12976(439:25-442:1).

And he denied that a critical exhibit concerning input formats was "prepared at [his] request," Appx3448(145:4-11), repudiating a SASII affidavit averring it was prepared "at [Storer's] behest," Appx13641-13643(¶¶2, 6-7).

Expert reports must also explain "'how' and 'why' the expert reached a particular result." *R.C. Olmstead*, 606 F.3d at 271. But Storer did not disclose the "basis and reasons" for his opinions. Appx13626-13637 (adopted Appx18). He never analyzed SASII's software code, never identified the portions at issue, and never listed the contents of SASII's supposed "collections." *See* pp. 15-17, 46, 56-58, *supra*. His report never distinguished between protected and unprotected materials in SASII's "input formats" and "output designs." *See* pp. 40-43, *supra*. Every one of those failures violates Rule 26. *See R.C. Olmstead*, 606 F.3d at 267, 271; *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 725

F.3d 1377, 1381 (Fed Cir. 2013). Storer's "evasive" and "incomplete" answers at his deposition only exacerbated matters. Fed. R. Civ. P. 37(a)(4); *see* Appx12671.

Absent a compliant report, a party "is not allowed to use" the expert, "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see* *Rembrandt Vision*, 725 F.3d at 1381; *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 642 (7th Cir. 2008) (later testimony cannot "cure deficient expert reports"). Storer's was neither. WPL needed to know where Storer believed "input formats" and "output designs" were expressed in SASII's asserted works; which PROCs, options, and outputs were in the "collections"; and which materials SASII believed protected once unprotected materials were removed. Storer's report provided none of that. It did not even analyze asserted works separately from the hundreds of works SASII no longer asserts. *See* p. 58, *supra*. That impaired WPL's ability to prepare a "proper defense." Appx3316-1317(13:11-14:15); *see* Appx17.

B. Rule 702 Violations Supported Storer's Exclusion

The district court also found Storer's analysis and methodology "unreliable" and "unhelpful" to the jury. Appx17-18. A proffered expert's testimony must be "help[ful] [to] the trier of fact," based on sufficient data, and be the "product of reliable principles and methods" that are "reliably applied." Fed. R. Evid. 702. SASII tries to pass off Storer's failure to filter unprotected elements as going to "weight." Br.61. But a plaintiff's failure to separate protected from unprotected

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elements is dispositive. *See General Universal*, 379 F.3d at 143; *R.C. Olmstead*, 606 F.3d at 275; *Automated Sols.*, 756 F.3d at 520-21. Storer's opinions would have been useless to a jury charged with comparing "*only* … protectable elements" of the asserted works to WPL's accused software. *Paycom*, 758 F.3d at 1204-05 (emphasis added); *see* Appx18.

That failure was only the "minimum" reason for Storer's exclusion. Appx18. "[A]s documented in" papers the court cited, *id.*, Storer's analysis was unreliable and unhelpful because Storer did not provide the "side-by-side comparison" of works required by Fifth Circuit law. *Bridgmon*, 325 F.3d at 576-77; *see* Appx13626-13637. He never provided a "complete listing" of the asserted material, he never looked at the software code defining SASII's copyright, and he lumped together asserted and non-asserted works. Appx3455(152:7-20); *see* pp. 15-17, 46, 56-58, *supra*. Any comparison he offered would have been "built on speculation." *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1374 (Fed. Cir. 2013).

There was no showing that Storer's exhibits were the product of a "reliable" method "reliably applied." Fed. R. Evid. 702(c)-(d). Storer did not disclose—in his testimony or report—who prepared critical exhibits or the choices they made. Appx12973-12976(439:25-442:1); Appx13564-13567(124:9-127:19); Appx12981-12984(447:11-450:18). Unable to "explain[] and justif[y] [others'] discretionary

choices," Storer's testimony "would have rested on air." *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 615 (7th Cir. 2002).

SASII accuses the district court of "frustration" with Storer over "burden-shifting" and of questioning Storer's "credibility." Br. 62-63. But the court found Storer's conduct "egregious" for reasons unrelated to filtration or credibility. Appx18; *see* pp. 61-63, *supra*. Even at the copyrightability hearing Storer was evasive on foundational questions about his knowledge and methods—as the magistrate judge also found during Storer's deposition. *See, e.g.*, Appx3434-3435 (131:4-132:22) ("How many registered works are at issue"?); Appx3442-3443 (139:20-140:15) ("What versions of SAS[II] software did you run"?); Appx3438-3439 (135:3-136:3) ("[D]o you know any versions of the SAS[II] software that are asserted"?); Appx3447-3448 (144:2-145:11) ("Did you ask Dr. Seed to prepare Exhibit 6?"). SASII's characterization (Br. 62-63) rewrites the transcript.

C. Without Storer, SASII Has No Triable Case

The district court ruled that the exclusion of SASII's "only technical expert" had the "practical effect of leaving SAS[II] without any supportable copyright claims." Appx18 n.11; *see General Universal*, 379 F.3d at 143-44; *R.C. Olmstead*, 606 F.3d at 275. SASII admits that Storer's exclusion "devastated" its case. Br. 64. Indeed, SASII's brief relies heavily on Storer's excluded report, exhibits, and testimony. *See, e.g.*, Br. 16, 18, 19, 22, 25, 27. The district court properly dis-

missed SASII's claims rather than hold a trial at which SASII "cannot prevail." *Sandifer*, 907 F.3d at 807; *see Watkins v. Telsmith, Inc.*, 121 F.3d 984, 993 (5th Cir. 1997).

SASII contends the district court should have considered the "possibility of lesser sanctions." Br. 64. But Federal Rule of Evidence 702 forecloses admission of unreliable or unhelpful expert testimony like Storer's. *See Daubert*, 509 U.S. at 591-92. And the exclusion of an expert for failure to make Rule 26(a) disclosures is "a self-executing" consequence: Rule 37(c) itself "prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required." Fed. R. Civ. P. 37 Advisory Committee Notes 1993 amend. SASII's reliance (Br. 64) on *EEOC v. General Dynamics Corp.*, 999 F.2d 113, 115-16 (5th Cir. 1993)—which addresses factors relevant to "contempt"-like sanctions for "violation of a discovery order"—is thus misplaced. There was no manifest error in applying the default consequences of SASII's violations.

IV.   COLLINS'S UNDISCLOSED EXPERT TESTIMONY WAS PROPERLY EXCLUDED

SASII's objections to limits on testimony from SASII's former Chief Technical Officer Keith Collins at the copyrightability hearing (Br. 64-67) lack merit. Before the hearing, SASII "represented to the Court" that Collins would testify only "to the extent that he was disclosed by SAS[II]." Appx4 n.2. That disclosure was "very limited," Appx3382(79:22-23): Collins would offer only fact testimony

about the "history and operations of SAS[II], including the SAS System," Appx3312(9:19-23). The district court did not abuse its discretion by enforcing that limitation.

SASII argues that the district court mistook factual testimony about the SAS System's "technical" operation for "expert opinion," preventing testimony about "'how it works'" or "'how it interacts.'" Br.65-66. But the court permitted Collins to testify about technical matters. Collins testified at length about what the SAS System is, how components "relate to" each other, how "users interface with" it, what PROCs are, and what PROCs do. Appx3353-3356(50:21-53:8). The objectionable questions went further: They asked for testimony about "what are . . . input formats," "[h]ow do the input formats work," and "[w]hat do" slides purporting to show a particular procedure "reflect?" Appx3356-3357(53:9-54:24); Appx3359-3360(56:13-57:21); Appx3375(72:1-2). Although SASII asserts those matters were within Collins's "personal knowledge," Br.65, "input formats" are an "*abstraction layer[]*" that *SASII's expert witness* defined using the Fifth Circuit's abstraction-filtration-comparison test, Appx3356(53:18-54:3) (emphasis added); *see* Appx682(¶11). In asking Collins, a fact witness, to testify about litigation terms SASII's expert defined, SASII sought to have a fact witness provide expert testimony in lieu of testimony from the actual expert. *See United States v. El-Mezain*, 664 F.3d 467, 512 (5th Cir. 2011), *as revised* (Dec. 27, 2011).

The excluded testimony was not only improper expert testimony. It was beyond the topics disclosed. Collins was disclosed as a *fact* witness on the "history and operations of SAS[II], including the SAS System," Appx3312 (9:19-23)—not as a witness who would testify about "input formats," "output designs," or other abstraction layers defined in Storer's report. SASII asserts that Collins was specifically disclosed as someone who would testify about "input formats and output designs." Br. 7. But that is not how the district court described Collins's disclosure at the copyrightability hearing. Appx3312 (9:19-23). SASII never suggested the court had misspoken, as would be required to preserve the argument. *See Chrysler Credit Corp. v. Whitney Nat'l Bank*, 51 F.3d 553, 556 n.1 (5th Cir. 1995).

SASII also fails to explain how the purported errors affected its "'substantial rights.'" *Mays v. Chevron Pipe Line Co.*, 968 F.3d 442, 452 n.17 (5th Cir. 2020). Collins was disclosed as a fact witness. SASII identifies no *facts* that were overlooked or misunderstood. Nor does SASII explain how additional testimony about "input formats," the "operation of Procedures," "'how [the system] works,'" or "'how it interacts'" would have changed the result. Br. 65-66. SASII's claims were dismissed because SASII never identified the protected material in its asserted "collections," never rebutted WPL's showing that elements were unprotected, and never identified the extent of the protected elements that remained. Appx17. None of Collins's factual testimony is relevant to those failures.

CONCLUSION

The district court's judgment should be affirmed.

August 23, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

<u>CERTIFICATE OF CONFIDENTIAL MATERIAL</u>

Case Number: 2021-1542

Short Case Caption: SAS Institute Inc. v. World Programming Limited

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