

No. 21-01542

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

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SAS INSTITUTE INC.,

*Plaintiff-Appellant,*

v.

WORLD PROGRAMMING LIMITED,

*Defendant-Appellee.*

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

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**BRIEF OF CREATORS' RIGHTS GROUPS AS *AMICI CURIAE* IN  
SUPPORT OF APPELLANT AND REVERSAL**

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## CERTIFICATE OF INTEREST

Counsel for *amici curiae* certify the following:

1. **Represented Entities:** American Photographic Artists, American Society of Media Photographers, The Authors Guild, Inc., Digital Media Licensing Association, Dramatists Guild of America, Romance Writers of America, Songwriters Guild of America, and Textbook & Academic Authors Association.
2. **Real Party in Interest:** See paragraph 1.
3. **Parent Corporations and Stockholders:** None.
4. **Legal Representatives:** No others.
5. **Related Cases:** None.
6. **Organizational Victims and Bankruptcy Cases:** None.

Date: May 21, 2021

/s/ Nancy E. Wolff

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 Joint Comments on Copyright Alternative in Small-Claims  
 Enforcement (“CASE”) Act Regulations (Apr. 26, 2021),  
[https://thescl.com/wp-content/uploads/2021/04/  
 SCL\\_SGAJointComments\\_2021-April26.pdf](https://thescl.com/wp-content/uploads/2021/04/SCL_SGAJointComments_2021-April26.pdf)..... 21

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

*Amici curiae* comprise eight leading industry associations in the areas of academia, authorship, music, photography, publishing, and theatre. Together, the *amici* represent the interests of hundreds of thousands of creators nationwide. Members of the *amici* rely heavily on copyright law to protect their work and provide them with the financial ability to be able to continue to create for the public good. As such, the *amici* and their members have a strong interest in the proper application of copyright law, including courts' application of the proper burdens of proof in copyright infringement actions. The eight industry associations submit this brief to help the Court understand the substantial adverse impact that the district court's erroneous burden-shifting framework could have on creators, if it were affirmed and extended beyond the scope of a software case.

**American Photographic Artists** (“APA”) is a leading non-profit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA champions the rights of photographers and image-makers worldwide.

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* states that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici curiae*, their members, or counsel contributed money intended to fund preparation or submission of this brief.

**American Society of Media Photographers** (“ASMP”) represents thousands of members who create and own substantial numbers of copyrighted photographs and other visual content, used by entities of all sizes. In its seventy-six-year history, ASMP has been committed to protecting the rights of photographers and visual creators and promoting the craft of image making.

**The Authors Guild, Inc.** (the “Guild”) is the nation’s oldest and largest professional organization for all writers. It is a national non-profit association and its more than 10,000 members include historians, biographers, academicians, journalists, and other writers of nonfiction and fiction. The Guild works to promote the rights of authors and freelance writers to freedom of expression, copyright, and fair contracts.

**Digital Media Licensing Association** (“DMLA”) represents the interests of digital licensing entities that offer, for license, millions of images, illustrations, film clips, and other content on behalf of thousands of individuals to editorial and commercial users. DMLA advocates for copyright protection for content to ensure a fair licensing economy.

**Dramatists Guild of America** (“DGA”) is a national, professional membership trade association of over 8,000 theatre writers including playwrights, composers, lyricists, and librettists. DGA was established in 1919 for the purpose

of aiding dramatists in protecting both the artistic and economic integrity of their work.

**Romance Writers of America** (“RWA”) is a non-profit trade association whose mission is to advance the professional and common business interests of career-focused romance writers through networking and advocacy and by increasing public awareness of the romance genre. RWA works to support the efforts of its members to earn a living, to make a full-time career out of writing romance—or a part-time one that generously supplements their main income.

**Songwriters Guild of America** (“SGA”) is the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Established in 1931, SGA has for 90 years successfully operated with a two-word mission statement: “Protect Songwriters,” and continues to do so throughout the United States and the world.

**Textbook & Academic Authors Association** (“TAA”) represents over 2,000 authors or aspiring authors of scholarly books, textbooks, and academic articles. TAA supports authors in the creation of works that stimulate the love of learning and foster the pursuit of knowledge. TAA also promotes greater public appreciation of the importance of scholarly authors to expanding knowledge.

*Amici curiae* submit this brief, on the consent of all parties,<sup>2</sup> in support of Appellant and reversal of the district court’s decision on copyrightability, pursuant to Fed. R. App. P. 29(a).

## **INTRODUCTION**

As a practical matter, a party generally cannot prove a negative. Courts have recognized this logical principle in copyright cases, most often in discussions of the burdens of proof allocated to plaintiffs and defendants. *See, e.g., Compulife Software Inc. v. Newman*, 959 F.3d 1288, 1305 (11th Cir. 2020) (“[P]lacing the burden to prove protectability on the infringement plaintiff would unfairly require him to prove a negative.”); *Muhammad-Ali v. Final Call, Inc.*, 832 F.3d 755, 761 (7th Cir. 2016) (discussing burdens in copyright cases and noting that the allocation to the alleged infringer makes sense because “proving a negative is a challenge in any context” (internal quotations omitted)); *Greenbie v. Noble*, 151 F. Supp. 45, 68 (S.D.N.Y. 1957) (finding that a plaintiff need not prove that copied matter was not derived from the public domain because it would place the plaintiff “in the position of proving a negative, which would be quite an impossible burden, and one which is not imposed upon a plaintiff in a copyright case” (internal quotations omitted)). Yet, the court below adopted a burden-shifting framework that required Plaintiff-

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<sup>2</sup> Counsel for both parties consented via email to the filing of this brief.

Appellant SAS Institute Inc. (“Appellant” or “SAS”) to prove a negative by demonstrating that the copied portions of a copyrighted work are not unprotected.

The district court’s decision was erroneous because the court misapplied the burden-shifting framework. While the district court acknowledged the Eleventh Circuit’s reasoning for its conclusion that “the *defendant* bears the burden of proving . . . that the elements he copied from a copyrighted work are unprotectable,” *Compulife Software Inc.*, 959 F.3d at 1305, the court ultimately placed the onus on SAS to “combat” Defendant-Appellee World Programming Limited’s (“Appellee” or “WPL”) generalized allegations that SAS’s work contained unprotectable material by showing “what WPL pointed to as unprotectable is indeed entitled to protection.” Appx17. This unwarranted shifting of defendant’s burden to plaintiff undermines the purpose of copyright: to enable authors to exploit their creative expression for a limited time in order to incentivize creation for the public good. Copyright owners already shoulder a heavy burden in proving their *prima facie* case. If defendants could merely point to a certain “species” of unprotectability to avoid liability and shift the burden back to the copyright owner, copyright owner-plaintiffs would be severely disadvantaged in their ability to successfully litigate copyright infringement cases.

Members of the *amici* are very concerned about this dangerous aberration of copyright law, which is unmoored from case law or the constitutional requirements

for copyright protection. If this misinterpretation of the law is affirmed, there is a significant risk that any subsequent court employing filtration or dissection in its substantial similarity analysis might follow this framework in allocating burdens in a copyright case. Under the district court’s reasoning, a creator suing for copyright infringement would not be able to reach a jury unless he demonstrated that all of the elements copied by the defendant are not basic ideas, facts, scènes à faire, public domain, or other unprotected material. This additional requirement could entail costly expert witnesses or canvassing of an entire genus of photography, literature, or music to prove the negative of the defendant’s assertion. Further, it is often difficult, if not impossible, to divide a creative work into separable elements. Such a scenario is untenable for creators, who already shoulder increased costs to enforce their rights against online piracy, while seeing their incomes decline.

## **ARGUMENT**

### **I. COPYRIGHT OWNERS WHO CHOOSE TO ENFORCE THEIR RIGHTS SHOULD NOT NEED TO PROVE A NEGATIVE**

#### **A. Upsetting the Allocation of Burdens in Copyright Cases Undermines the Purpose of Copyright**

Plaintiffs in copyright infringement actions carry substantial burdens. Put succinctly, “[t]o establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)

(citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)). However, in practice, a plaintiff must prove several additional sub-elements as part of its *prima facie* case for copyright infringement, including “(1a) that the person asserting the claim is the owner of the copyright” (and has a certificate of registration or refusal from the U.S. Copyright Office),<sup>3</sup> “(1b) that the copyright is valid,” “(2a) that the defendant, as a factual matter, copied from the plaintiff’s copyrighted work (rather than, for example, merely independently creating a similar work),” “(2b) that the defendant copied some elements from the plaintiff’s copyrighted work that are protected by the work’s copyright (rather than, for example, merely copying unprotected ideas) and (2c) that the defendant’s actual copying of protected elements from the plaintiff’s copyrighted work produced substantial similarity between the copied elements in the defendant’s work and the protected expression in the plaintiff’s work.” Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 Lewis & Clark L. Rev. 621, 633 (2019). The defendant must then rebut elements of plaintiff’s *prima facie* infringement claim or present affirmative defenses. *See generally id.* at 638–69.

This allocation of burdens between plaintiffs and defendants promotes the adversarial nature of the U.S. legal system and permits plaintiffs to enforce their

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<sup>3</sup> *See Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

copyrights by carrying a manageable load. Upsetting the balance of burdens, by tipping the scales and shifting defendants' burden to plaintiffs, would not only erode this system but would undermine copyright's purpose by allowing defendant-infringers to shirk their defenses or rebuttals to a plaintiffs' *prima facie* case and making it exceedingly more difficult for plaintiffs to enforce their copyrights for a limited time. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[T]he limited grant . . . is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“[T]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . . .”). Copyright owners are already battling increasing appropriation of their creative works through online piracy and would be further discouraged from even bringing a copyright case if they faced increased burdens, as the associated financial toll may be just too high.

## **B. The District Court Misapplied the Burden-Shifting Framework**

The district court committed legal error in its misapplication of the burden-shifting framework set out in *Compulife Software Inc. v. Newman*, 959 F.3d 1288

(11th Cir. 2020). There, the court explained that the plaintiff must prove ownership of a valid copyright, as well as copying in fact. *Id.* at 1305. At that point, the defendant must filter out any copied elements that it contends are unprotectable. *Id.* The burden then shifts back to the plaintiff to compare the remaining material—i.e., the copied material that the defendant did not address, as well as the copied material for which the plaintiff may rebut defendant’s filtration—and establish substantial similarity. *Id.* However, the district court misinterpreted and misapplied this framework.

After finding that SAS satisfied its initial burden, the court shifted the burden to WPL. *See* Appx15–16. At this point, the district court should have required WPL to show that “the elements [it] copied . . . are *unprotectable*.” *Compulife*, 959 F.3d at 1305. Instead, the court erroneously allowed WPL to present generalized references to SAS’s work, independent of the elements that WPL copied, finding that WPL “established that at least some of the asserted works were unprotectable . . . .” Appx16. Next, the district court should have filtered the unprotected portions out of the analysis, and then shifted the burden to SAS “to prove substantial similarity between any remaining (*i.e.*, unfiltered) protectable material and the allegedly infringing work.” *Compulife*, 959 F.3d at 1306. However, the district court erroneously shifted the burden to SAS—*during* the filtration stage, not “[a]fter filtration is complete”—to “combat” WPL’s allegations of unprotectability,

requiring SAS to show “what WPL pointed to as unprotectable is indeed entitled to protection.” Appx16–17; *Compulife*, 959 F.3d at 1306. In doing so, the district court imposed an additional burden on SAS, unmoored from case law or the constitutional requirements,<sup>4</sup> before it could even compare the works.

Curiously, the district court’s conception of the burden-shifting framework was contrary to its own analysis of the reasoning underlying the framework. As the Eleventh Circuit recognized, a plaintiff cannot prove a negative and there are some types of unprotectability that “can be negated only by presenting practically infinite evidence.” *Compulife*, 959 F.3d at 1305–06. For this reason, placing the burden of proving protectability on plaintiff would require impossibilities. *Id.* at 1306. The district court quoted and relied upon this specific reasoning (Appx14), but nonetheless proceeded to apply a framework that included shifting the burden of proving protectability back to SAS, which is exactly what the Eleventh Circuit was trying to avoid. *See Compulife*, 959 F.3d at 1305 (describing the magistrate judge’s error in “implicitly plac[ing] on *Compulife* the burden of proving that the elements of its HTML code that the defendants copied were protectable”).

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<sup>4</sup> Indeed, increasing the plaintiff’s burden in this instance does not square with the constitutional requirement for originality, which remains low. *See Feist*, 499 U.S. at 345 (holding that “the requisite level of creativity is extremely low; even a slight amount will suffice”); *see also Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (noting that the “the quantity of originality that need be shown is modest—only a dash of it will do”).

### **C. Extension of the District Court’s Burden-Shifting Framework Could Be Disastrous for Creators**

The district court’s aberration in copyright law holds dangerous implications far beyond software cases. Under the district court’s reasoning, a defendant could cite a species of unprotectability (such as facts or scènes à faire) and then wait for the plaintiff-copyright owner to handle the lion’s share of the evidentiary work, shifting the onus of litigating a copyright case onto the plaintiff. This would impose upon creators the burden of proving that specific elements copied by a defendant are *not* unprotectable, which would require the plaintiff to prove a negative.

Creators have no assurance that other courts would not adopt a similar standard in substantial similarity analyses that involve some form of filtration or dissection. Indeed, filtration and dissection are widely applied in substantial similarity analyses across the circuits. *See, e.g., Corbello v. Valli*, 974 F.3d 965, 974 (9th Cir. 2020) (employing analytic dissection as part of the extrinsic test); *Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 186 (1st Cir. 2013) (describing and applying the dissection analysis that separates original expressive elements from unprotected content); *Lil’ Joe Wein Music, Inc. v. Jackson*, 245 F. App’x 873, 877 (11th Cir. 2007) (applying extrinsic-intrinsic test and comparing protectible and unprotectable elements); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 271–73 (2d Cir. 2001) (applying the “more discerning observer” test that filters out unprotectable elements). Courts in these circuits, as well as courts looking for clarity regarding

the burdens of proof in copyright infringement cases, may follow the district court's lead and unfairly place the burden of disproving unprotectability on the plaintiff-copyright owner. Such an extension could prove disastrous for creators, including many members of the *amici*.

### **1. Photography**

Courts have recognized that there is “no uniform test to determine the copyrightability of photographs.” *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000) (collecting cases). Photographs may be “original” in numerous respects, including rendition, timing, and creation of the subject. *See Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 452–54 (S.D.N.Y. 2005); *see also Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (finding originality of portrait based upon overall composition, including pose, clothing, background, light, and shade, “suggesting and evoking the desired expression”); *Rogers*, 960 F.2d at 307 (“Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.”). However, basic ideas or concepts of subject matter, common poses, typical wardrobes, scènes à faire, and public domain material are not protected. *See e.g., Harney*, 704 F.3d at 186 (“Harney may not claim exclusive rights to the piggyback pose of Gerhartsreiter and Reigh, their clothing, the items they carried, or the Church of the Advent shown with

bright blue sky behind it.”); *Bryant v. Gordon*, 483 F. Supp. 2d 605, 615 (N.D. Ill. 2007) (“Bryant cannot claim copyright protection in the idea or concept of his subject matter, a two-person sniper team in Ghillie suits, in the prone position, sighting a target.”); *Psihoyos v. Nat’l Geographic Soc’y*, 409 F. Supp. 2d 268, 275 (S.D.N.Y. 2005) (finding that sand is a “*scene a faire* because it is the obvious choice of background for the Fossil”).

As it stands, the “creative spark” needed to meet the originality test for a photograph is low. *See Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076–77 (9th Cir. 2000) (discussing how the majority of the circuits have adopted the “prevailing view” that “almost any[] photograph may claim the necessary originality to support a copyright” (quoting 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 2.08[E][1], at 2–130 (1999))); *Jewelers’ Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (S.D.N.Y. 1921) (“[N]o photograph, however simple, can be unaffected by the personal influence of the author”). But if the district court’s reasoning was extended, photographers would need to provide proof far beyond the constitutional requirement. Once defendants raise a garden-variety rebuttal or defense (like uncopyrightability or public domain), to move forward in their case—and to even reach a jury—photographers would need to affirmatively show, for example, that poses are not common, wardrobes are not typical, or elements do not qualify as *scènes à faire*.

Unlike many other forms of creative works, photographs do not readily lend themselves to this analysis. In part, this is due to the combination of elements that form the heart of a photograph. *See Rentmeester v. Nike*, 883 F.3d 1111, 1119 (9th Cir. 2018) (“Photographs cannot be dissected into protected and unprotected elements in the same way [as other types of work].”). This difficulty is precisely the burden that the district court would shift to the photographer. The photographer’s final image is an amalgam of both protectable and unprotectable elements, and untangling the two, then defining why those deemed “unprotectable” were in fact protectable, would require photographers to engage costly expert witnesses or canvas an entire array of a certain type of photograph to distinguish elements that make the photograph at issue protectable.

Either option is untenable for photographers, who may not be able to financially afford to carry this burden and litigate their case to completion. *Cf. Occupational Outlook Handbook: Photographers*, U.S. Bureau of Labor Statistics, <https://www.bls.gov/ooh/media-and-communication/photographers.htm> (last modified Apr. 9, 2021) (reporting the 2020 median pay to be \$41,280 per year for photographers and estimating a four percent decline in employment from 2019 to 2029). Copyright litigation is already prohibitively expensive. *Am. Intell. Prop. L. Ass’n, Report of the Economic Survey 2019*, at I-208 (estimating that the mean cost of litigating a copyright infringement lawsuit, inclusive of all pre- and post-trial

costs, including an appeal when applicable, is \$397,000). If the district court’s reasoning is extended, many photographers, including members of the *amici*, may consider the additional burden they would face and decide that they cannot afford to use their limited resources to protect their photography, further raising the barriers to simply exercising their statutory rights and protecting their livelihoods. The nature of photography as a medium, and the ease with which copyrighted works can be shared and distributed via the Internet, has led to an explosion of infringement in the past decade. Already, infringers feel the freedom to take and disseminate copyrighted photographs. To shift the burden in the way the district court has done here would only add to the financial and practical onus on photographers simply seeking redress for these violations.

## **2. Writing**

Similarly, for writers, the expression in their writings—whether it is in a novel, textbook, screenplay, drama, article, or short story—is protected, but ideas, historical facts, common phrases, *scènes à faire*, and stock scenes and themes are not. *See, e.g., Corbello*, 974 F.3d at 975–78 (finding historical facts and events in a stage musical, including a “character based on a historical figure,” are not protected); *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996) (“[The] setting of a dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur nurseries, and uniformed workers . . . are classic *scenes a faire* that flow from the

uncopyrightable concept of a dinosaur zoo”); *Feldman v. Twentieth Century Fox Film Corp.*, 723 F. Supp. 2d 357, 367 (D. Mass. 2010) (“[C]opyright protection does not extend to stock characters, such as a blond, blue-eyed hero or doctors in ‘hot and cold’ romances.”). Much like photographs, copyright protection in literary works varies on a case-by-case basis and certain classes of works may be subject to thicker or thinner protection. *See, e.g., Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir. 1980) (“In works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another.”). As one judge put it, “[n]obody writes books of purely original content.” *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978).

In evaluating which elements of a literary work may be protected, courts consider various elements including the theme, plot, scenes, mood, characters, pace, setting, time sequence, and characterizations. *See, e.g., Williams*, 84 F.3d at 589 (comparing theme, setting, characters, time sequence, plot, and pace); *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460–64 (11th Cir. 1994) (analyzing plot, mood, characterization, pace, setting, and sequence of events); *O’Neill v. Dell Publishing Co.*, 630 F.2d 685, 687 (1st Cir. 1980) (considering specific treatment, details, scenes, events, and characterization). The analysis often requires a comparison of the similarities between specific elements in the two works, with the

plaintiff offering a detailed list of similarities. If the district court's reasoning were extended to copyright infringement cases involving other literary works, a defendant, in response, could merely assert that elements on plaintiff's list qualify as "stock" or scènes à faire, and leave it to the plaintiff to prove what specific parts of her work are and are not protectable. This is problematic for writers because many genres of novels (romance, science fiction, mysteries, etc.) have certain standardized story expectations, tropes, common elements, and other scènes à faire, and there are numerous subgenres (and sub-subgenres) that are defined by their adherence to very specific elements.

For instance, in the "omegaverse" subgenre, there are three types of people: alphas, betas, and omegas, each with very defined characteristics. In that subgenre, which arose out of fan fiction, there are certain plot elements that are essential to the subgenre. Generally, there is often an alpha male leader who is wildly attracted to an omega female and takes her as his prisoner in his domicile, but there are countless forms of expression within the subgenre that distinguish each novel. Moreover, many authors in these subgenres have huge reader fan bases (think of the *Bridgerton* series of historical romance novels by popular author Julia Quinn) and readers can readily distinguish the expression of one author from another. Copyright infringement disputes have arisen frequently out of fan fiction works, where some authors borrow heavily from others, sometimes going far beyond adopting the

particular elements that define the subgenre; however, requiring a copyright owner to read all the books in a specific subgenre to show that no one else has employed the same expression would be contrary to the fundamental principle that copyright protects works of authorship that are original to the author, regardless of whether they are novel. *See Feist*, 499 U.S. at 345–46 (“Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”).

Authors have already seen their incomes decline in recent years, even as they seek out different ways to receive a return for their creations. *See, e.g., Six Takeaways from the Authors Guild 2018 Author Income Survey*, AuthorsGuild.org (Jan. 5, 2019), [https://www.authorsguild.org/industry-advocacy/six-takeaways-from-the-authors-guild-2018-authors-income-survey/#\\_ftnref1](https://www.authorsguild.org/industry-advocacy/six-takeaways-from-the-authors-guild-2018-authors-income-survey/#_ftnref1). Imposing further requirements on writers’ ability to enforce their rights and prevail in copyright infringement cases against infringers will disincentivize writers from bringing cases in the first place. A decline in cases may very well embolden infringers who will infer that authors are not able to expend the resources to build a successful copyright infringement case, resulting in an increased likelihood that infringers will get away unscathed.

### 3. Music

Copyright protection in musical works extends to both the musical composition and sound recording, but like other creative works, not every element is protectible *per se*. Generic phrases, common chants, and clichés in lyrics, such as “Despacito” or “Go \_\_\_\_\_, it’s your birthday,” as well as “basic harmonic and rhythmic building blocks of music,” have been held to fall below the threshold for copyright protection. *See, e.g., Lil’ Joe Wein Music, Inc.*, 245 F. App’x at 878–79; *Cortes v. Universal Music Latino*, 477 F. Supp. 3d 1290, 1297 (S.D. Fla. 2020); *Batiste v. Najm*, 28 F. Supp. 3d 595, 615 (E.D. La. 2014). However, as may often be the case in musical works, a particular combination of unprotectable elements—or protected and unprotectable elements—may support a finding of substantial similarity. *See Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (noting that “music is comprised of a large array of elements, some combination of which is protectable by copyright”); *see also Pyatt v. Jean*, No. CV-04-3908 (TCP) (AKT), 2006 WL 8440910, at \*4 (E.D.N.Y. Aug. 29, 2006) (“The major flaw in Defendants [sic] argument is that while the lyrics and melody taken separately may each be unoriginal, the combination of the two is not.”).

While there is no uniform set of factors, courts analyzing musical works may consider “melody, harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, and lyrics.” *Swirsky*, 376 F.3d at 849; *see Griffin v. Sheeran*, 351 F.

Supp. 3d 492, 499–500 (S.D.N.Y. 2019). Expert testimony is particularly important in music copyright cases, as parties frequently engage experts to opine on various parts of the substantial similarity analysis, including—for defendants—what may be considered unoriginal or qualify as *scènes à faire*. See *Johnson v. Gordon*, 409 F.3d 12, 19 (1st Cir. 2005) (“As is often true in musical copyright actions, each side relied heavily on its own expert.”); *Positive Black Talk, Inc. v. Cash Money Recs., Inc.*, No. CIV.A. 02-0425, 2003 WL 1921999, at \*3–5 (E.D. La. Apr. 21, 2003) (considering defendants’ expert testimony regarding common phrases in “hip-hop vernacular” and “bootycall music” but denying motion for legal determination of copyrightability and allowing the case to proceed to trial).

If courts were to extend the district court’s shifting of the burden of proof to copyright cases involving musical works, copyright owners would undoubtedly suffer the consequences. Both plaintiffs and defendants carry heavy burdens in music copyright cases, with some commentators characterizing such cases as a “battle of the experts.” See, e.g., J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 Mich. Telecomm. & Tech. L. Rev. 407, 431 (2004); Christine Lepera & Michael Manuelian, *Music Plagiarism: A Framework for Litigation*, 15 Ent. & Sports L. 3, 3, 5 (1997). Permitting defendants to merely identify some unprotectable elements or cite certain doctrines, such as *scènes à faire*, to shift the burden back to plaintiffs would magnify plaintiffs’

economic burden to an unsustainable level. Music copyright infringement cases are already so costly to mount that many songwriters and composers regard them as a “right without a remedy.”<sup>5</sup> Foisting an additional set of obligations on plaintiffs to refute every thin suggestion by defendants of non-protectability would go even further toward rendering copyrights in musical works financially impossible to enforce, thereby effectively depriving music creators of their statutory rights rooted in the U.S. Constitution.

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<sup>5</sup> See Songwriters Guild of America, Inc., Joint Comments on Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations (Apr. 26, 2021), [https://thescl.com/wp-content/uploads/2021/04/SCL\\_SGAJointComments\\_2021-April26.pdf](https://thescl.com/wp-content/uploads/2021/04/SCL_SGAJointComments_2021-April26.pdf).

As SGA president Rick Carnes stated in a December 8, 2020 letter to U.S. congressional leaders:

In the digital age, copyright protection for US songwriters and composers has degenerated into a right without a remedy. It now requires an expenditure by a creator of well over a quarter million dollars at minimum to bring a copyright infringement action in federal court, at a time when music and other creators are being forced to leave their professions in droves to escape the poverty brought on by the violation of their rights with near-total impunity. It is not hyperbole to state that the very future of American culture is being put at risk, along with the livelihoods of hundreds of thousands of individual authors and creators who form the bedrock of a significant segment of the US economy, by failing to address this very solvable problem.

*Id.*

## **CONCLUSION**

For the reasons set forth above, the creators' rights groups, as *amici curiae*, respectfully request that the Court reverse the district court's dismissal of the copyright claims against Appellee and remand to the district court.

Dated: May 21, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 21, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Nancy E. Wolff  
Nancy E. Wolff

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(3) because this brief contains 4,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2020, the word processing software used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2020, Times New Roman, 14 point.

/s/ Nancy E. Wolff  
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Dated: May 21, 2021