

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. ____

SAS INSTITUTE INC.,

Applicant,

v.

WORLD PROGRAMMING LIMITED,

Respondent.

**APPLICATION TO THE HON. JOHN G. ROBERTS, JR.
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT**

Pursuant to Supreme Court Rule 13(5), SAS Institute Inc., hereby moves for an extension of time of 60 days, to and including September 3, 2023, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be July 5, 2023.

In support of this request, Applicant states as follows:

1. The decision below is *SAS Institute Inc. v. World Programming Ltd.*, 64 F.4th 1319 (Fed. Cir. 2023). The Federal Circuit issued judgment on April 6, 2023. (Exhibit 1). Unless extended, SAS's time to seek certiorari with this Court expires on July 5, 2023. SAS is filing this application more than ten days before that date. See S. Ct. R. 13.5. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). Respondents have no objection to this extension request.

2. This case concerns the burden of proving protectability during the “filtration” step of the “abstraction/filtration/comparison” test for substantial similarity under the Copyright Act. SAS sells a suite of software for data access, management, analysis, and presentation called the SAS System. SAS has copyright registrations for the SAS System, for which it receives a presumption of validity under 17 U.S.C. § 410(c). WPL, a competitor, acquired copies of the SAS System and used it to create a “clone” called the World Programming System, the purpose of which was to compete with and replace the SAS System. After discovering WPL’s copying of the SAS System, SAS filed suit in the United States District Court for the Eastern District of Texas alleging copyright and patent claims.

3. Both parties filed cross-motions for summary judgment, which the district court denied. The district court then held a novel “copyrightability hearing” to decide which portions of the SAS System that WPL copied were protectable, a step in the substantial similarity analysis referred to as “filtration.” At the copyrightability hearing, the district court applied a never-before-seen burden-shifting scheme to the filtration step: even where SAS had a presumptively valid copyright, the district court found that once WPL had produced evidence that some part of the SAS System was unprotectable, the burden shifted back to SAS to disprove all of WPL’s theories of unprotectability. Following the hearing, the district court dismissed the claim without specifying the procedural basis for doing so, finding that SAS had not met its burden of showing that each of the specific elements WPL had copied were protectable. The Federal Circuit affirmed the district court’s dismissal

of SAS's copyright claim and endorsed its burden-shifting approach. In particular, the Federal Circuit found that once the defendant came forward with sufficient evidence that the allegedly copied material was unprotectable due to a limiting doctrine such as the idea/expression distinction, merger doctrine, or *scenes-a-faire*, the burden shifted back to the copyright holder to establish precisely what parts of its asserted work were in fact protectable.

4. Good cause exists for a 60-day extension within which to file a certiorari petition. This case presents a fundamental and complicated question of copyright law on which the federal courts of appeals are now divided. Congress ordered the burden of proof by creating a presumption of validity where the plaintiff has a timely registration, so that the plaintiff is not “forced in the first instance to prove all of the multitude of facts that underline the validity of the copyright unless the defendant, effectively challenging them, shifts the burden of doing so to the plaintiff.” H.R. Rep. No. 94-1476, at 157 (1976); 17 U.S.C. § 410(c). As a result, all other circuits place the burden of proving unprotectability of all of the copied elements of a work on the defendant. For example, the Eleventh Circuit in *Compulife Software Incorporated v. Newman*, found that the magistrate judge had improperly placed the burden on the plaintiff to prove, as part of the filtration analysis, that the elements that the defendants copied were protectable, and that “it should have required the defendants to prove that those elements were *not* protectable.” 959 F.3d 1288, 1303 (11th Cir. 2020). The Federal Circuit’s decision is inconsistent with other approaches because

it merely places the burden of production on the defendant, and then shifts the burden of proof back to the plaintiff.

5. Moreover, the Federal Circuit's decision effectively eliminates the presumption of validity afforded by Congress to timely registered works. The presumption is vitally important to copyright owners and serves as an inducement to register works. U.S. Copyright Office, *Circular 1: Copyright Basics* at 5 (Mar. 2021). Limiting doctrines always apply to at least some elements of a copyrighted work; every work, for example, is an expression of at least one uncopyrightable idea. Thus, a defendant can always say that a work involves an unprotectable idea and, under the Federal Circuit's new burden-shifting approach, the burden would always shift back to the plaintiff to prove that all of the copied elements of its work were protectable.

An extension of time will help ensure that the petition thoroughly presents the important and novel issues raised by the Federal Circuit's decision and the widespread and complex ramifications of that decision. An extension will also help accommodate applicants' counsel's other professional obligations during the time allotted to prepare a petition, which for Dale Cendali include preparing motions for summary judgment in *Teradyne, Inc. v. Astronics Test Systems, Inc.* CASE NO. 2:20-cv-02713 GW (SHK), which is due in the Central District of California on June 30, 2023. The requested 60-day extension would cause no prejudice to Respondents, who have advised that they have no objection to the extension.

WHEREFORE, for the foregoing reasons, Applicants requests an extension of time within which they may file a petition for a writ of certiorari to and including July 5, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dale M. Cendali, a member of the Supreme Court Bar, hereby certify that three copies of the attached Application to Honorable John G. Roberts, Jr. for an Extension of Time to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit were served on:

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