IN THE SUPREME COURT OF THE UNITED STATES

17A ____

WORLD PROGRAMMING LTD.,

Petitioner,

v.

SAS INSTITUTE, INC.,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME
IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

World Programming Ltd. ("WPL") respectfully requests a 59-day extension of time, to and including April 20, 2018, within which to file a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in *SAS Institute, Inc.* v. *World Programming Ltd.*, Nos. 16-1808 & 16-1857 (4th Cir.). The court of appeals entered judgment on October 24, 2017, and denied rehearing and rehearing en banc on November 21, 2017. Unless extended, the time for filing a petition for a writ of certiorari will expire on Tuesday, February 20, 2018 (February 19 being a federal holiday). Pursuant to this Court's Rule 13.5, this

application is being filed at least 10 days before that date. This Court has jurisdiction under 28 U.S.C. §1254(1). A copy of the court of appeals' opinion is attached as Exhibit 1, and a copy of its order denying rehearing and rehearing en banc is attached as Exhibit 2.

As explained below, the extension is necessary to permit counsel of record—who was not retained until well after rehearing was denied in the Fourth Circuit—to fully familiarize himself with the record and relevant legal principles, and because he has been heavily engaged with the press of other matters.

1. This case arises out of competition in the market for statistical analysis software. Petitioner WPL is a United Kingdom company formed to develop statistical analysis and reporting software. Ex. 1, Op. at 5. Respondent SAS Institute, Inc. ("SAS Institute") is a North Carolina company that offers an integrated suite of software known as the "SAS System." *Id.* at 4-5. The SAS System allows users to perform statistical analysis by writing instructions in the computer programming language of SAS. *Ibid.* WPL sought to compete with SAS Institute by developing its own software, the "World Programming System" ("WPS"), which could run programs written in the language of SAS. *Id.* at 5.

While developing its WPS software, WPL bought copies of a version of the SAS System (called the "Learning Edition") and observed, tested, and studied the functionality of that software. Ex. 1, Op. at 5. WPL's purchase, observation, testing, and studying of the Learning Edition all took place in the United Kingdom,

where, as with other European Union member states, such acts are lawful. See, *e.g.*, Council Directive 2001/29/EC, art. 50, 2001 O.J. (L 167/10) (EC); Council Directive 91/250/EEC, art. 5(3), 1991 O.J. (L 122/42) (EC); Copyright, Designs and Patents Act 1988, c. 48, § 50B(1) (U.K.). SAS Institute's software did require WPL to agree to a "shrinkwrap" license agreement prohibiting "'reverse engineering'" before the software could be fully installed. Ex. 1, Op. at 4-5. However, contractual bans on observing, testing, and studying the functionality of a software program are against public policy and thus null and void under U.K. law. *Id.* at 6-7.

2. SAS Institute twice filed suit against WPL for reverse engineering its software—first in the United Kingdom, and later in the U.S. District Court for the Eastern District of North Carolina. Ex. 1, Op. at 5. In the U.K. case, SAS Institute alleged that WPL breached the Learning Edition license agreement (thereby infringing copyright in the SAS Learning Edition) and infringed SAS Institute's copyrights in the SAS System and in the SAS System's instruction manuals. *Ibid.* SAS Institute brought those claims in the U.S. lawsuit as well, along with claims for fraudulent inducement, tortious interference with contract, tortious interference with prospective business advantage, and violation of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. § 75-1.1 *et seq.* Ex. 1, Op. at 5.

The U.K. litigation reached final judgment first. In January 2013, the U.K. High Court entered a final ruling for WPL on all claims except for copyright

infringement of the SAS System manuals. Ex. 1, Op. at 6. The High Court rejected SAS Institute's copyright claim over the SAS System: While WPL may have replicated some of the SAS System's functionality, WPL had not reproduced the SAS System's design or any of its source code. *Ibid.* The court also denied SAS Institute's claim for breach of contract because, under U.K. law, those terms of the SAS Learning Edition shrinkwrap license were not enforceable. *Id.* at 6-7. The Court of Appeal of England and Wales affirmed the High Court's ruling, and the judgment in WPL's favor became final when the Supreme Court of the United Kingdom denied discretionary review in 2014. *Id.* at 7.

In the U.S. action, the district court granted summary judgment to SAS Institute and found WPL liable for breaching the license agreement. Ex. 1, Op. at 7. The court, however, granted summary judgment to WPL on SAS Institute's claims for copyright infringement of the SAS System, tortious interference with contract, and tortious interference with prospective economic advantage. *Ibid.* The court denied WPL's motion for summary judgment on SAS Institute's claims of breach of contract, fraudulent inducement, and violation of the UDTPA. *Id.* at 7 & n.1.[1]

The case proceeded to a jury trial on liability for the fraudulent inducement and UDTPA claims, as well as on damages for SAS Institute's contract claim. Ex.

[1] The district court also denied summary judgment on a copyright claim alleging infringement of the copyright on the SAS manuals, but the parties later stipulated to the dismissal of that claim. Ex. 1, Op. at 7 n.1.

1, Op. at 8. The jury found WPL liable for fraudulent inducement and violation of the UDTPA, awarding $26,376,635 in damages. *Ibid.* Under the UDTPA, the compensatory damages award was trebled to $79,129,905. *Ibid.* However, the court denied SAS Institute's request for an injunction against WPL. *Ibid.*

3. The Fourth Circuit affirmed in part and vacated the judgment below in part. Ex. 1, Op. at 4.

The court of appeals first rejected WPL's argument that the U.K. judgment was res judicata as to SAS Institute's claims. Ex. 1, Op. at 10-13. The court concluded that res judicata did not apply because it "would have the practical effect of preventing SAS from having its claims heard in any adequate forum." *Id.* at 10-11. The U.K. judgment, the court held, was contrary to North Carolina public policy. *Id.* at 12. In particular, the court cited North Carolina's preference for enforcing contractual agreements. Giving the U.K. judgment preclusive effect, the court stated, would "bar[] a North Carolina company from vindicating its rights under North Carolina law on the basis of the E.U.'s contrary policies." *Ibid.* (citing *Bueltel* v. *Lumber Mut. Ins. Co.*, 518 S.E.2d 205, 209 (N.C. Ct. App. 1999)).

The court of appeals also affirmed the district court's grant of summary judgment on SAS Institute's breach of contract claims, Ex. 1, Op. at 13-20, invoking North Carolina contract-interpretation principles, see, *e.g.*, *id.* at 14-15. It rejected WPL's challenge to certain evidentiary rulings. *Id.* at 21-22. For example, the district court had excluded evidence about the U.K. litigation and

E.U. law. *Id.* at 21. WPL had sought to introduce evidence that its reliance on E.U. law and U.K. law—which permit observing, testing, and studying the functionality of software programs notwithstanding contrary agreements—undermined the claim of willfulness. The court of appeals rejected that argument because WPL's alleged reverse engineering had pre-dated the U.K. suit. *Ibid.*

The court of appeals next upheld the district court's denial of SAS Institute's request for injunctive relief on its breach of contract and fraud claims. See Ex. 1, Op. at 22-29. It concluded that SAS Institute failed to demonstrate an irreparable injury. *Id.* at 26-28. The court also found that the balance of the hardships and the public interest weighed against issuing an injunction. *Id.* at 28-29.

The court of appeals likewise held that SAS Institute was not entitled to an injunction on its copyright claims. Given the nature of the dispute, the court explained, injunctive relief did not appear to be appropriate relief. Ex. 1, Op. at 30-31. SAS Institute had also failed to meet its burden under the traditional, four-factor test. *Id.* at 31. "Given how strongly the traditional equitable factors weigh against the issuance of injunctive relief in this case, it is hard to conceive how the outcome of what is a close copyright claim would lead to SAS receiving such relief." *Ibid.*

Having ruled that SAS Institute was not entitled to equitable relief on its copyright claim, the court of appeals then held that the district court's ruling on the copyright claim—against SAS Institute—should be vacated as moot. Ex. 1, Op.

at 32-33. "SAS ha[d] made clear," the court stated, "that the only relief it seeks from the copyright claim that it has not already received from its other claims is an injunction," a remedy to which SAS Institute was not entitled. *Id.* at 32. Without "a practical effect on the outcome of this case," the court concluded, "the copyright claim is moot." *Id.* at 33.

4. On November 21, 2017, the court of appeals denied WPL's petition for rehearing and rehearing en banc. Ex. 2.

5. WPL respectfully requests that an extension of time be granted. Undersigned counsel of record was only recently retained to represent WPL in this matter. Accordingly, additional time is necessary for counsel to familiarize himself with both the case's extensive record and the relevant legal principles. Counsel of record also has been heavily engaged with the press of other matters.[2] WPL thus respectfully requests a 59-day extension of time within which to file a petition for a writ of certiorari, to and including April 20, 2018.

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[2] These include a response to a petition for a writ of mandamus in *In re Apple Inc.*, No. 18-123 (Fed. Cir.), filed on January 16, 2018; a response to a motion to stay in *VirnetX Inc.* v. *Cisco Systems, Inc.*, No. 18-1197 (Fed. Cir.), filed on January 16, 2018; an amicus brief in *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466 (U.S.), filed on January 19, 2018; an oral argument in *United Parcel Service, Inc.* v. *Postal Regulatory Commission*, Nos. 16-1354 & 16-1419 (D.C. Cir.), held on January 22, 2018; an opening brief in *Continental Circuits LLC* v. *Intel Corp.*, No. 18-1076 (Fed. Cir), filed on January 31, 2018; and an oral argument in *Gilead Sciences, Inc.* v. *Merck & Co.*, Nos. 16-2302 & 16-2615 (Fed. Cir.), held on February 5, 2018.

Respectfully submitted.

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February 6, 2018