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SAS v. WPL: A Longstanding Transatlantic Dispute with an East Texas Flavor

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SAS Institute and World Programming Limited have sparred against each other in courtrooms on both sides of the Atlantic for 11 years.

The storied litigation between the two software programming competitors essentially tells the same tale each time: SAS accuses World Programming of copyright infringement. SAS doesn't prevail. SAS sues WPL somewhere else but includes additional allegations. WPL counterclaims. And the case has also caused a trans-Atlantic tiff between judges in the U.S. and the United Kingdom.

This plot has played out on the home turfs of both companies with mixed results. The High Court of Justice in London – previously known as “Her Majesty’s High Court of Justice” – ruled against SAS. WPL is based in Hampshire, England.

A couple years later, SAS sued WPL in federal court in North Carolina, where SAS is based. In this lawsuit, SAS added breach of contract and fraud allegations. The North Carolina judge rejected the copyright infringement claims but found for SAS on the other counts and awarded \$79 million.

For the past two years, the battle repeated itself in the Eastern District of Texas, where U.S. District Judge Rodney Gilstrap last month dismissed SAS’ copyright infringement claims (with prejudice).

In a telephone conference call Tuesday, lawyers for the parties said they plan to file motions in the next few days that will tie up the Eastern District litigation so WPL can move forward with an appeal and SAS to seek legal fees.

SAS’ failure to prove copyright infringement has now happened thrice, but WPL lead attorney Brad Caldwell says there is nothing ordinary or simple about this litigation. For example:

- While Gilstrap has unrivaled experience overseeing U.S. patent infringement litigation, it is historically more rare for a copyright infringement case to appear in his court — or frankly, anywhere outside of New York or California;
- Software copyright infringement cases are even more uncommon in Texas;

- The case involved claims of infringement of “non-literal” elements of a software work, a less-frequented claim in intellectual property law that is as nuanced as it is hard to prove; and
- Just as the case was heading to a jury trial in September, the complexity of the issues prompted Judge Gilstrap to delay the trial and set a special hearing to determine the extent to which the non-literal elements of SAS’ software were copyrightable. “A hearing like that in itself is a rare event, due to the unusual allegations here, but Judge Gilstrap embraced the need to dig in and make sure the scope of SAS’ IP rights were properly framed to a jury,” Caldwell said.

With SAS’ copyright infringement claims out the door, WPL recently agreed to dismiss its counterclaims against SAS, leaving no remaining issues for the courtroom opponents to take to trial, which had been rescheduled for next year.

This new development paves the way for WPL to seek its attorneys’ fees and for SAS to appeal Judge Gilstrap’s copyrightability ruling, which it said in court documents it plans to do once there is a final judgment.

Although they already informed the court of their change of plans in a recent filing, the parties conferred with Judge Gilstrap Tuesday over phone and agreed to re-submit their withdrawal of other claims through a different type of filing to make the case bulletproof from getting bounced back from the appeals court on a minor procedural issue.

WPL hopes the recent developments signify an end in sight to the decade-plus litigation, which has been described by WPL’s lawyers as primarily an effort to put WPL out of business through the cloud and cost of litigation.

“SAS has been suing WPL for many years to ultimately put it out of business because they want to be the only ones who can sell software that execute customer programs written in the SAS Programming Language,” Caldwell, a name principal at Caldwell Cassidy & Curry, told *The Texas Lawbook*. “I hope for WPL’s sake that it is [the last chapter]. WPL is made up of really good, brilliant people who are trying hard to run a business. The most important thing for

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WPL is to focus on running their business and serving customers instead of paying lawyers.”

SAS’ lead lawyer, Press Millen of Womble Bond Dickinson, did not respond to requests for comment.

A Transatlantic Tug-of-War

WPL and SAS both develop and sell software products geared toward data analytics for their corporation-focused customer base. SAS sued WPL and six other companies in 2018, alleging copyright infringement and patent infringement. The other companies SAS sued were WPL’s customers — among them, Yum! Brands, Pizza Hut and Shaw Industries.

SAS claims WPL designed its system, called the World Programming System, specifically to clone SAS’ software.

The customer defendants gradually got dismissed from the litigation before the Oct. 26 copyrightability ruling. SAS also abandoned its patent infringement claims before the copyrightability issue was decided, leaving SAS with nothing to claim against WPL after Judge Gilstrap ruled.

In his 16-page memorandum and order, Judge Gilstrap found SAS had failed to prove its copyrightability claims. Moreover, he struck SAS’ expert witness, Dr. James Storer, who the judge said demonstrated “egregious conduct” during the special hearing and who Caldwell said was “ducking and dodging questions.”

To be sure, SAS hasn’t lost every time. While its copyright infringement claims did not stick in the North Carolina case, SAS did successfully obtain a \$79 million judgment in 2016 after the court ruled WPL had committed fraud and breached license agreements, although that judgment was inconsistent with a prior English Court judgment. The North Carolina court also issued an injunction that prohibits WPL from licensing its software to any new customer within the U.S. until it pays the judgment in full. That ruling was recently affirmed by the U.S. Court of Appeals for the Fourth Circuit.

But as is par for this litigation, the enforcement of the North Carolina order rumbled across the Atlantic Ocean. A UK judge issued an order prohibiting SAS from enforcing the debt collection from the North Carolina judge in England. A U.S. judge on the Fourth Circuit responded in writing that the UK order was an “affront” and said “comity is not advanced when a foreign country condones an action brought solely to interfere with a final U.S. judgment.

In response, three Lord Justices from the Court of Appeal in London accused the U.S. court

of “infringing the sovereignty of the United Kingdom” and issued an injunction in May prohibiting SAS from enforcing the debt orders in the UK.

From Plaintiff to Defense

There’s one more unusual thing about this case. It forced Caldwell to “figure out how to sit on the defense side of the courtroom.”

You see, Caldwell Cassady’s clients are almost always plaintiffs. Until recently, Caldwell said he hasn’t done defense work for several years.

Caldwell Cassady’s most well-known plaintiff client is VirnetX, which over the past decade has obtained several half-billion-dollar jury verdicts against Apple.

VirnetX won its mSost recent verdict against Apple on Oct. 30 for \$502 million.

Although VirnetX and WPL are on different sides of the “v,” their worlds collided Oct. 26. Caldwell and his colleagues were in the middle of jury selection for the VirnetX trial when they received word that Judge Gilstrap had dismissed SAS’ copyright claims.

“A lot of times as the plaintiff, you’re representing a small company and you realize you’re their only hope for survival,” Caldwell said. “What’s weird is this is a defense case in which we still represent the small company and are critical to their survival. It’s not a case where we’re the small guy plaintiff going after the big guy. In WPL’s case, we are defending the small guy who is being sued by its much, much larger competitor.”

Others on the Caldwell Cassady team representing WPL are principals Austin Curry, Hamad Hamad and John Summers as well as associates Warren McCarty, Seth Reich and Bailey Blaies.

The case is 2:18-cv-00295-JRG in the U.S. District Court for the Eastern District of Texas.