

No. 17-168

In The
Supreme Court of the United States

ROBIN ANTONICK,

Petitioner,

v.

ELECTRONIC ARTS INC.,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF IN OPPOSITION FOR RESPONDENT
ELECTRONIC ARTS INC.**

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**RESTATEMENT OF THE QUESTIONS
PRESENTED**

1. In a copyright-infringement action, must the works at issue be submitted in evidence so the jury can compare them?

2. In a copyright-infringement action, may an expert's review of a handful of elements from the works at issue substitute for evidence of the works themselves and substitute for the jury's duty to compare the works?

RULE 29.6 STATEMENT

Respondent Electronic Arts Inc. is a publicly-traded corporation and has no parent corporation. No other publicly held corporation owns more than 10% of Electronic Arts Inc.'s stock.

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STATEMENT

This case is about an evidentiary failure of proof. Like any copyright-infringement suit, this one hinged on the jury's comparison of the allegedly infringed work with the allegedly infringing works. But petitioner Robin Antonick did not present those works to the jury or submit them in evidence. The record contains neither the source code nor the contents of any of the games at issue. With no legally sufficient evidence, the district court correctly entered judgment for respondent Electronic Arts Inc. ("EA") as a matter of law, and the Ninth Circuit properly affirmed that judgment.

Having failed to prove his copyright-infringement case in the district court, petitioner asks this Court to rewrite the rules of evidence for copyright cases involving software. There is no reason to do so. First, all circuits uniformly require a copyright-infringement plaintiff to place the allegedly infringed and infringing works in evidence so the jury can compare them, and juries across the country routinely return well-informed verdicts in major software-copying cases after reviewing the software at issue. Second, the expert-testimony rule advanced by petitioner wouldn't have changed the result in this case, because petitioner's expert didn't do what petitioner says an expert should be allowed to do—making this case a poor vehicle to consider new law.

The works in this case were sets of source code. Petitioner alleged that the source code he wrote for

John Madden Football for the Apple II (“*Apple II Madden*”) was infringed by seven different sets of source code for other *John Madden Football* video-games that EA released for the Sega Genesis (collectively, “*Sega Madden*”).

Petitioner acknowledged that the source codes from the *Apple II Madden* and from the seven *Sega Madden* games were 100% different and that there was no literal copying of his source code.¹ Instead, petitioner alleged infringement based on a handful of allegedly similar “elements” within the codes (all but two of which the district court determined were not protected by copyright).² For the jury to evaluate that claim, petitioner had to introduce the source code for these games into evidence so the jury could compare them. He did not.

It is undisputed that petitioner never offered any source code into evidence and never established or presented the contents of any work to the jurors so that they could compare the works. The record contains no evidence that even purports to (1) establish and compare the contents of any of the works as a whole as Ninth Circuit law requires, (2) compare pe-

¹ Supplemental Excerpts of Record (“SER”) 465:20–466:3; SER 783:15–20.

² Excerpts of Record (“ER”) 16; 1234–1235. Petitioner incorrectly claims that “[i]n 1989, he began work on Madden games for the Nintendo *and Sega Genesis* entertainment systems.” Pet. 6. In fact, it is undisputed that he did not work on the Sega Genesis game and expressly declined in writing to do so. SER 608; ER 770:3–4; 774:12–13; 777:17–22; 778:6–9.

petitioner's work to any of respondent's works as whole, or (3) show that petitioner's work is substantially similar (much less virtually identical) to any of respondent's works as a whole.³

This evidentiary failure was petitioner's intentional choice, not "happenstance" or an "evidentiary fortuit[y]." Pet. 27. Petitioner had access to the entire source code for five of the seven allegedly infringing *Sega Madden* games, and even placed those works on his exhibit list before trial—but he never submitted any of it into evidence or displayed any of it to the jury.⁴ Petitioner also failed to introduce into evidence any of his source code for *Apple II Madden*. Petitioner claims that he "proffered clear evidence of [it] in the form of earlier draft programs, design documentation, and other proof." Pet. 26. But that is not true. None of those items was offered into evidence or displayed to the jury.

The only witness who testified for the petitioner about source code was his expert, Michael Barr. But that testimony was carefully limited and did not cure petitioner's failure of proof. Specifically:

Barr conceded that he never reviewed the final version of petitioner's code and did not know its contents.⁵ He only reviewed an earlier, incomplete draft that was missing parts of the code, including the

³ ER 11–12; Pet. App. At 4a–5a; *see also id.* at 8a n.3.

⁴ SER 59–97; ER 59–97

⁵ ER 923; SER 773.

source code that expresses how the football plays were displayed in the game.⁶

Barr never compared the works as a whole. Instead, he testified that he compared only a handful of elements in the *Apple II Madden* game to the corresponding elements in just one of the *Sega Madden* games,⁷ and not the other six.⁸ Barr never ascribed any quantitative or qualitative significance to these elements relative to the works as a whole.

Barr never opined that any of Respondent's works were substantially similar to—or derived from—petitioner's source code. He was asked that very question at trial and did not answer affirmatively.⁹

In the end, Barr's testimony could not aid the jury in its review of the works as a whole, because the works were not in evidence for the jury to review and

⁶ ER 921; SER 772:24–773:5; 775; 782. The source code expressing the football plays was one of only two elements that the district court found protectable under copyright law. On the second element (expression in the source code that shows the field width that was displayed in the game), the jury found that petitioner had not proved substantial similarity. ER 322.

⁷ ER 11; ER 932–934; SER 765:18–766:3; SER 784:22–786:18; Further Excerpts of Record (“FER”) 128:8–17.

⁸ As to the six subsequent *Sega Madden* games, Barr did not review them at all, except for two elements: field width and plays. ER 916:8–21, ER 944:25–947:3, SER 786:19–787:3; SER 788:13–789:1.

⁹ ER 946–947.

compare.¹⁰ Instead, his testimony was offered as a *substitute* for evidence of the works and as a *substitute* for the jury’s obligation to compare the works.

On this record, the Ninth Circuit unanimously affirmed the district court’s finding that “[t]he jury had no evidence of Apple II Madden or Sega Madden [1990] as a whole to enable it to make [a] subjective comparison. By failing to offer any evidence to establish the content of the games in their entirety, Antonick’s proof . . . was insufficient.”¹¹

The Ninth Circuit later denied petitioner’s petition for rehearing en banc. Not a single judge voted to rehear this case.

¹⁰ Petitioner misleadingly states: “Barr explained that memory limitations of the Apple II computer forced Antonick to express the plays in binary code data files, consisting of ones and zeros that could not be decompiled into more readable program language.” Pet. 9. But the binary data files were not “expressed” by petitioner. Those files were generated by a play-editor tool—a program, separate from the game, that generated binary data that the game then used. ER 919, 921. As Barr explained, petitioner could not locate the complete source code for the play editor—all he had was the numbers expressing the initial formations. For the rest of each play, the only thing Barr could look at was the binary data file which, according to him, was “generated by the play editor.” ER 922–923

¹¹ Pet. App. at 30a; ER 11.

REASONS FOR DENYING THE PETITION

- I. **There is no circuit split as to whether the works at issue in a copyright-infringement action must be put in evidence.**¹²
 - A. **Courts uniformly agree that the works must be placed in evidence so the jury can compare them.**

Courts nationwide agree that a copyright-infringement plaintiff must submit the works at issue in evidence, and no court has held otherwise. For example, in *Bridgmon v. Array Systems Corp.*, 325 F.3d 572 (5th Cir. 2003), the Fifth Circuit affirmed a judgment for the defendant because the plaintiff was “unable to produce a copy of [his] software; the only evidence of its content consisted of his oral testimony and a reconstruction” by an expert. *Id.* at 576. The court held that the plaintiff had failed to satisfy his burden of proof, and it reaffirmed the rule that “a side-by-side comparison must be made between the original and the copy to determine whether a layman would view the two works as ‘substantially similar.’” *Id.* (internal quotation marks omitted).

The Ninth Court likewise held in *Seiler v. Lucasfilm Ltd.*, 808 F.2d 1316 (9th Cir. 1986), that “[t]here can be no proof of ‘substantial similarity’ and thus of copyright infringement unless [the plaintiff’s] works are juxtaposed with [the defendant’s] and

¹² This section addresses Question Two as stated in the petition.

their contents compared.” *Id.* at 1319. In *Seiler*, the court upheld the exclusion of “reconstructions” that the plaintiff had proffered in lieu of the lost originals of his allegedly infringed works. *Id.* The court noted that “[t]he dangers of fraud” were “clear” if “reconstructions’ which might have no resemblance to the purported original [c]ould suffice as proof for infringement of the original.” *Id.*¹³

Here, the district court and the court of appeals properly enforced the requirement that petitioner place the works in evidence so the jury could review and compare them. Indeed, from the first paragraph of its opinion, the court of appeals emphasized that “the contents of the copyrighted work and the allegedly infringing works were never introduced into evidence.” Pet. App. at 3a. This fact was dispositive—both to the district court’s grant of judgment as a

¹³ See also *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 146 (5th Cir. 2004) (“Without providing [his] own source code for comparison, [the plaintiff does] not satisfy the requirement that the infringed and infringing work be compared side-by-side.”); *Airframe Sys., Inc. v. L-3 Commc’n Corp.*, 658 F.3d 100, 106 (1st Cir. 2011) (discussed *infra*) (“[T]he plaintiff must necessarily establish the content of the copyrighted work.”); *InDyne, Inc. v. Abacus Tech. Corp.*, 876 F. Supp. 2d 1278, 1291 (M.D. Fla. 2012), *aff’d*, 513 F. App’x 858 (11th Cir. 2013); *Granger v. Acme Abstract Co.*, 900 F. Supp. 2d 419, 422–26 (D.N.J. 2012); *cf. Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 841 (10th Cir. 1993); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994) (jury must “determine whether, as a whole, [works] are sufficiently similar to support a finding of illicit copying”).

matter of law and to the court of appeals' affirmance of that judgment.

As the court of appeals further explained: “[N]either the source code for Apple II Madden—the ‘Work’—nor the source code of any allegedly infringing works were introduced into evidence. Nor were images of the games at issue introduced.” Pet. App. at 5a. Petitioner’s expert “was only able to examine a partial draft version of the Apple II Madden source code, because the complete final version could not be found.” *Id.* at 5a n.1. Moreover, even “[t]he draft version [that his expert] examined was not introduced into evidence.” *Id.* “EA showed the jury a video of Sega Madden, but the jury did not view a video of Apple II Madden.” *Id.* at n.2.

The court of appeals’ opinion focused on this evidentiary void. The court quoted the district court’s conclusion that JMOL must be granted to EA “under the ‘intrinsic test’ because ‘the jury had no evidence of Apple II Madden or Sega Madden as a whole to enable it to make this subjective comparison.’” Pet. App. at 7a. The court concluded that, “absent evidence of the copyrighted work and the allegedly infringing works, the record is insufficient to allow appellate review of the jury’s verdict.” *Id.*

Petitioner broadly argues that copyright infringement plaintiffs should be excused from placing their works in evidence because the “fixation” requirement for copyrightability¹⁴ requires only that

¹⁴ Under 17 U.S.C. § 102(a), “[c]opyright protection subsists . . . 1194795

the copyrighted work exist in perceptible form¹⁵ “for a period of more than transitory duration”¹⁶—but not, petitioner argues, all the way up to the time of an infringement trial. Pet. 3, 25–26. This “duration” argument conflates a *copyrightability* requirement (fixation in perceptible form for “a period of more than transitory duration”) with the requirements for *proving copyright infringement*. That a work passes the low bar of fixation and therefore is *copyrightable* does not excuse the plaintiff from carrying his burden of proving that the work has been *infringed*.¹⁷

in original works of authorship *fixed* in any tangible medium of expression” Emphasis added. Section 101 states that “[a] work is ‘*fixed*’ in a tangible medium of expression when its embodiment in a copy . . . , by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration*.” Emphases added. In a linguistic oddity of copyright law, “[t]he term ‘copies’ includes the material object . . . in which the work is *first* fixed”—i.e., the original. *Id.* (emphasis added).

¹⁵ We use the phrase “perceptible form” as shorthand for the statutory phrase that the original embodiment was “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated” 17 U.S.C. § 101.

¹⁶ 17 U.S.C. § 101.

¹⁷ Petitioner also cites authority that a copy does not infringe unless it exists for more than a transitory period. *See Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127–30 (2d Cir. 2008). Again, that a copy passes the low bar of fixation and therefore is *capable of infringing* does not excuse a plaintiff from proving that it *does infringe*.

Petitioner tries to gin up a Circuit split where none exists. He claims that, while his infringement claim failed as a matter of law under “the Ninth Circuit’s rigid rule,” it “would have encountered no proof problem in the First Circuit.” Pet. 28. But the case he cites for the First Circuit’s liberality creates no circuit split. If anything, it buttresses the court of appeals’ ruling below.

In *Airframe Systems, Inc. v. L-3 Communications Corp.*, 658 F.3d 100 (1st Cir. 2011), plaintiff Airframe’s expert provided a declaration concerning infringement of an unregistered version of Airframe’s software that, by law, could not be the subject of an infringement suit.¹⁸ The district court granted summary judgment for defendant L-3, concluding that Airframe “‘had not produced the relevant source code’” and that “it was Airframe’s ‘burden to prove the allegedly infringed source code in its original form.’” *Id.* at 104 (citation and internal brackets omitted). The First Circuit panel affirmed, explaining: “Having presented no evidence sufficient to prove the content of its registered source code versions, [plaintiff] Airframe cannot show that any of its registered works is substantially similar to the allegedly infringing . . . program, and Airframe has failed to create a genuine issue of material fact as to

¹⁸ 17 U.S.C. § 411(a) states, in part, that “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”

its claim of copyright infringement.” *Id.* at 107. The appeals court had no occasion to—and didn’t—opine on whether the testimony of Airframe’s expert would have been sufficient to prove substantial similarity at trial had he analyzed one of the registered (and therefore actionable) versions of the software without submitting the source code for that version into evidence. Accordingly, *Airframe Systems* creates no circuit split on the question that petitioner presents here.¹⁹

B. The rule that petitioner urges would usurp the jury’s role and invite spurious infringement suits.

The petition’s underlying premise is that “lay juries” are cast adrift at sea when asked to review software through the eyes of “the ordinary, reasonable audience.”²⁰ But the truth is that jurors in the

¹⁹ The First Circuit noted in dicta that, “if the Best Evidence Rule applies [in a case], evidence other than the original may be sufficient to establish the content of a copyrighted work.” *Id.* at 107 n.9 (emphasis added). But the Best Evidence Rule did *not* apply in *Airframe Systems* because Airframe had made “no effort” to satisfy its requirements—e.g., by demonstrating that “all originals have been lost or destroyed” or that “the original cannot be obtained.” *Id.* (citing FED. R. EVID. 1001–1004). Here, likewise, the Best Evidence Rule didn’t apply because in this case all the originals *weren’t* lost. Instead, petitioner simply chose not to place in evidence the source code for five allegedly infringing *Sega Madden* games or the “earlier draft” versions of the allegedly infringed *Apple II Madden*.

²⁰ *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).

Ninth Circuit successfully adjudicate major software-copying cases all the time without notable difficulty.²¹

The rule that petitioner proposes would make for terrible public policy. Where a copyright-infringement claim focuses on source code, placing the actual code in evidence is of heightened im-

²¹ See, e.g., *Johnson v. Storix, Inc.*, No. 3:14-CV-1873-H-BLM, 2017 WL 2779265 (S.D. Cal. June 27, 2017) (jury returned verdict of software copyright infringement); *Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10-cv-0106-LRH-VCF, 2016 WL 6650835 (D. Nev. Nov. 9, 2016) (same); *Synopsys, Inc. v. ATop-Tech, Inc.*, 13-cv-02965-MMC, 2016 WL 6158216 (N.D. Cal. Oct. 24, 2016) (same); *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2016 WL 3181206 (N.D. Cal. June 8, 2016) (jury found that re-implementation of 37 Java APIs was fair use); see also Kyle Orland, *Oculus, execs liable for \$500 million in ZeniMax VR trial*, Ars Technica, <https://arstechnica.com/gaming/2017/02/oculus-execs-liable-for-500-million-in-zenimax-vr-trial/> (Feb. 1, 2017) (jury found Oculus liable for copyright infringement for misuse of certain ZeniMax code); Joe Mullin, *Arista beats Cisco's \$335M copyright claim with an unusual defense*, Ars Technica, <https://arstechnica.com/tech-policy/2016/12/jury-clears-arista-of-ciscos-335m-copyright-claim/> (Dec. 14, 2016) (San Jose, California jury found allegedly infringed software was *scènes à faire*); Jan Wolfe, *VMware prevails in \$110 million software licensing dispute*, Westlaw News, <https://www.reuters.com/article/ip-copyright-vmware/vmware-prevails-in-110-million-software-licensing-dispute-idUSL1N1JA1SA> (June 13, 2016) (Oakland, California jury found VMware did not engage in copyright infringement by incorporating Phoenix's BIOS program into its software products).

portance because expert and lay witnesses otherwise might conflate a program’s copyrightable expression with its uncopyrightable “ideas” or with audiovisual outputs that are not the subject of the infringement claim. *See* Pet. App. at 10a. In addition, creating a special evidentiary rule for software copyright cases that was different from the rule for other copyright cases and other software cases (involving trade secrets, for example) would be arbitrary and unmanageable. Moreover, “[t]he dangers of fraud” are “clear” if “reconstructions’ which might have no resemblance to the purported original [c]ould suffice as proof for infringement of the original.” *Seiler*, 808 F.2d at 1319.

As the court of appeals’ opinion correctly explains, without the source code in evidence, the jury “could not compare the works to determine substantial similarity” and “the record [was] insufficient to allow appellate review of the jury’s verdict.” Pet. App. at 7a. A rule excusing the plaintiff from submitting source code and allowing him to rely on the fragmentary testimony of an expert would usurp the jury’s role by performing one of its most vital tasks. “The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes” and is “a tangible implementation of the principle that the law comes from the people.” *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017). By undermining the jury’s role, the rule proposed by the petitioner would invite frivolous and even fraudulent copyright-infringement claims against successful software companies.

II. This case is not an appropriate vehicle for deciding whether to change the role of experts in software-copying cases.²²

This Court can and does deny certiorari where the “the decision below is correct regardless of how the Court resolves the question presented, such that the Court would not likely reach the question and the decision would be robbed of any practical significance.” STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 506 (10th ed. 2013). An opinion issued under those circumstances would be advisory. “Federal courts may not ‘decide questions that cannot affect the rights of litigants in the case before them’ or give ‘opinion[s] advising what the law would be upon a hypothetical state of facts.’” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted). Ultimately, a case is not a good vehicle to consider a legal rule if the petitioner himself would not benefit from the change he proposes. *See, e.g., Tigor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (dismissing writ where resolving issue would not “make any difference even to these litigants”).²³

That is the case here. Eliminating the expert rule challenged by petitioner would not change the

²² This section addresses Question One as stated in the Petition.

²³ *See also DeBacker v. Brainard*, 396 U.S. 28, 31 (1969) (holding that case was “not an appropriate vehicle for consideration of the standard of proof in juvenile proceedings” where counsel admitted that evidence was sufficient “[n]o matter what the standard was”).

outcome of the case. Petitioner did not lose because of the expert rule. He lost because he failed to submit the works in evidence so the jury could compare them and failed to submit any evidence comparing the works and their contents as a whole.

Even giving full weight to the trial testimony of petitioner's expert would not change the outcome, because his expert—whose testimony was not constrained by the expert rule—did not compare the works as a whole and never testified about the works and their contents as a whole.²⁴

²⁴ See Appellant's Petition for Rehearing En Banc at 7–8 (acknowledging that Barr only compared similarities in a handful of elements). Barr testified that he compared only a handful of elements in the *Apple II Madden* game to the corresponding elements in just *one* of the *Sega Madden* games and *not* the other six. See ER 11; ER 932-934; SER 765:18–766:3; SER 784:22–786:18; FER 128:8–17. As to the six subsequent Sega games, the only elements Barr compared were field width and plays. ER 916:8–21; ER 944:25–947:3, SER 786:19–787:3; SER 788:13–789:1. Barr never ascribed any quantitative or qualitative significance to these elements relative to the works as a whole. In fact, he never opined that any of Respondent's works were substantially similar to—or were derived from—petitioner's source code. He was asked that very question at trial, and did not answer affirmatively. SER 765:18-766:3. Barr also conceded that he never reviewed the final version of petitioner's code. ER 923; SER 773–774. He only reviewed an earlier, incomplete draft that was missing parts of the code, including most notably the source code that expresses the football plays—one of only two elements that the district court found protectable under copyright law. ER 921; SER 772:24–773:5; 775; 782:2–13. (As for the second protectable element—source-code expression of field width—the jury found that petitioner

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In essence, petitioner really asks the Court to grant review and then hold that a plaintiff claiming infringement of a copyright on source code may deliberately withhold the allegedly infringed and infringing source code from evidence at trial and instead carry his burden by presenting the testimony of an expert who never compares the works as a whole but instead compares only a handful of elements, the vast majority of which are not protected by copyright law. That position contradicts settled law and sound policy.

CONCLUSION

For all the reasons stated above, the Court should deny the Petition.

had not proved substantial similarity. ER 322.) And Barr admitted he was not an expert in football or videogame development and that he had never played petitioner's game. SER 769:2–16.

Respectfully submitted,

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