

No. 17-168

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IN THE  
**Supreme Court of the United States**

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ROBIN ANTONICK,  
*Petitioner,*

v.

ELECTRONIC ARTS INC.,  
*Respondent.*

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

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**REPLY BRIEF FOR PETITIONER**

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## REPLY BRIEF

The opposition of Electronic Arts Inc. (“EA”) is stunning in its failure to respond to the conspicuous circuit split on a critical issue of copyright jurisprudence raised in the certiorari petition and reinforced in the amicus brief. EA makes no effort to defend the Ninth Circuit’s entrenched “nutty” rule that here required a lay jury to interpret binary code—essentially a series of zeros and ones—and compare different versions of assembly code language, all without the aid of expert testimony. A lay jury cannot decipher material such as binary code without expert assistance in understanding computer code. Yet, under currently divergent circuit law, a New York jury may hear expert testimony to help decide copyright infringement but a San Francisco jury cannot.

Whether experts may testify to substantial similarity in copyright actions is squarely presented and, given the Ninth Circuit’s resistance to a modernized rule for the digital age, this Court’s intervention is essential.

Rather than addressing the line of decisions beginning with *Computer Associates Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992), which have made the Ninth Circuit an outlier on expert testimony, EA floats meritless vehicle arguments. These are smokescreens to obscure the sharp *Altai/Antonick* split. The Court should grant certiorari to resolve it.

**I. THE ROLE OF EXPERT TESTIMONY IS  
PROPERLY PRESENTED BECAUSE THE  
ISSUE WAS PRESSED AND PASSED  
UPON BELOW**

In its “restatement” of the questions presented, EA rewrites beyond recognition the issues presented to this Court. To start with, EA ignores the foundational principle that the respondent cannot “expand the questions presented.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 279 n.11 (1993). Contrary to EA’s mutation of Antonick’s petition, the court of appeals opinion presents no question of an “expert’s review” being a “substitute for the jury’s duty to compare the works.” Brief in Opposition for Respondent Electronic Arts Inc. (“Opp. Br.”) at i.

Rather, the panel was bound by the “nutty rule” (to quote the Ninth Circuit authoring judge) that, to understand source code and binary code, the jury could not receive expert evidence based on a 40-year-old decision involving costumed cartoonish characters. Petition for Writ of Certiorari (“Pet.”) at 14; App. 8a-9a (following *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)). Although ignored by EA, the Second Circuit wisely departed from this approach in recognizing that in “the context of computer programs, many of the familiar tests of similarity prove to be inadequate, for they were developed historically in the context of artistic and literary, rather than utilitarian, works.” *Altai*, 982 F.2d at 713-14. Agreeing, the Tenth Circuit reasoned: “The ‘total concept and feel’ test was developed in different contexts and it is not very helpful in comparing similarities among protected components of computer codes.” *Gates Rubber Co. v.*

*Bando Chem. Indus., Ltd.*, 9 F.3d 823, 839 n.15 (10th Cir. 1993).

Yet, in “determining whether one work is substantially similar to another” in this case involving computer programs, the Ninth Circuit woodenly applied this anachronistic standard. App. 6a. The court of appeals made plain that, until this Court holds otherwise, the Ninth Circuit will continue to focus, even in copyright disputes involving computer code and other complex, specialized subject matters, on “whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works”—without expert assistance. *Id.* One circuit marching out of step should not be allowed to distort copyright law in this way, much less in the most important geographic region for the computer software industry.

Instead of addressing the glaring discord in the circuits, EA argues that this case is “not a good vehicle” for resolving the *Altai/Antonick* split because “petitioner himself would not benefit from the change he proposes.” Opp. Br. at 14.

As discussed in the next section, EA’s factual premise is wrong but, more fundamentally, EA misapprehends when an issue qualifies for certiorari. Much as Antonick was master of his complaint, he is the master of the questions presented so long as they satisfy the criteria for granting certiorari. They unquestionably do.

The Court’s “traditional rule . . . precludes a grant of certiorari only when ‘the question presented was not pressed or passed upon below.’” *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted and emphasis added). This guideline “operates (as it is

phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon” and vice versa. *Id.* Conversely: “Where issues are neither *raised before nor considered* by the Court of Appeals, this Court will not ordinarily consider them.” *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (emphasis added and citation omitted).

The correct focus thus is not what might happen later, as EA speculates, but what occurred in the appellate proceedings below. Only major lapses preclude certiorari jurisdiction. *See, e.g., State of Cal. v. Taylor*, 353 U.S. 553, 556 n.2 (1957) (petitioner could not raise at merits stage issues that were “expressly excluded” in certiorari petition).

Assessed under these standards, this petition is not a close call. Antonick challenged the Ninth Circuit’s divergence from *Altai*, and other decisions permitting expert testimony, in both his opening and reply briefs.<sup>1</sup> After the panel suggested an en banc petition on the issue, App. 9a n.4, Antonick filed a petition urging that *Krofft* be revisited in computer software cases.<sup>2</sup> The Ninth Circuit balked, leaving no recourse except to seek this writ of certiorari. App. 14a.

It is hard to imagine what more Antonick could have done to press the first question he presents to this Court. An issue is preserved for certiorari where, as here, “a few pages” in the appellate briefing argue the point and the “panel below had no authority to

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<sup>1</sup> Dkt. 14 at 39-42; Dkt. 47-2 at 20-25. “Dkt.” refers to the record in Ninth Circuit No. 14-15298.

<sup>2</sup> Dkt. 77-1 at 9-17.



overrule” circuit precedent. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007).

Unable to thwart certiorari under the settled “pressed or passed upon” threshold, *Duignan v. United States*, 274 U.S. 195, 200 (1927), EA frames a wholly different issue that EA would *prefer* to oppose. According to EA, the copyrighted and infringing works “must be put in evidence” and Antonick did not satisfy this standard as judicially applied. Opp. Br. at 6. EA’s reading of the record is off base.

## **II. THE OBJECTIONS TO CERTIORARI ARE NOTHING MORE THAN SPECULATION AND IMMATERIAL DISAGREEMENTS ABOUT THE RECORD**

EA’s bad-vehicle argument centers on the notion that “[t]his case is about an evidentiary failure of proof,” one so incontestable that it should be dispositive. Opp. Br. at 1. But, for multiple reasons, this theory is no basis for denying certiorari on the questions presented.

First, EA speculates that the judgment as a matter of law for EA, despite the jury verdict for Antonick, would survive after a Supreme Court opinion. But the nature of a certiorari grant renders the ultimate fate of the judgment unknowable. As four Justices put the matter: “[W]hen certiorari is granted, *by definition* the Court’s resolution of the issues presented in that case might affect the judgment rendered below.” *Straight v. Wainwright*, 476 U.S. 1132, 1133 n.2 (1986) (Powell, J., concurring, joined by Burger, C.J., Rehnquist, J., and O’Connor, J.) (emphasis in original).

Second, EA’s assertion that Antonick could not prevail under *any* standard for admitting expert testimony is at odds with the Ninth Circuit’s view of

what is at issue on appeal. The opinion stated: “Antonick is not alone in contending that experts should be allowed to help juries assess the holistic similarity of technical works such as computer programs.” App. 9a n.4. His argument, the panel advised, was for “an en banc court.” *Id.*

Why encourage an en banc petition if, as EA contends, it would be pointless on this record? As discussed, Antonick repeatedly challenged the *Krofft* rule as a misguided prohibition in computer software cases. Antonick therefore agrees with EA that “[t]he jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes,” Opp. Br. at 13, but the jury should receive all relevant evidence, enabling it to resolve fact disputes in an informed manner. Due process demands that fact-finders understand the evidence presented. See *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972).

Third, EA sets forth an inflexible standard for evidentiary proof that is simply not the law. EA boldly proclaims on the first page of its Opposition that “all circuits uniformly require a copyright-infringement plaintiff to place the allegedly infringed and infringing works in evidence,” Opp. Br. at 1, only to pull back from that statement on page 11, at note 19.

EA does so with good reason. An illustrative circuit precedent recognizes that “if the Best Evidence Rule is satisfied, evidence other than the original may be sufficient to establish the content of a copyrighted work.” *Airframe Sys., Inc. v. L-3 Commc’s. Corp.*, 658 F.3d 100, 107 n.9 (1st Cir. 2011) (citing two Ninth Circuit decisions). This is such a case.

Here, Antonick’s expert, Michael Barr, provided the jury with straightforward testimony and demonstrative exhibits derived directly from the binary and

source code available as well as other forensic tests based on that code. Even EA does not suggest that the jury would have grasped the meaning of this code—just a sequence of numbers, Pet. at 10—without an expert translator to explain why the number sequences generated suspiciously similar plays. Consuming over 200 pages of transcript, Barr’s testimony was extensive and the jury chose to credit him.<sup>3</sup>

As decisions such as *Altai* recognize, Barr’s testimony is exactly the expert guidance that copyright law contemplates for comparing computer programs, except in the Ninth Circuit. Likewise, the evidence on which Antonick relied is fully consistent with the legal criteria for a protected right under the Copyright Act—the second question presented to which EA offers no coherent or cogent response. See Pet. at 25-29.

Fourth, EA tries to make the petition fact-intensive but its arguments are immaterial to a grant of certiorari. The questions presented—whether experts may testify in this type of case and whether the Ninth Circuit’s strict evidentiary requirement runs afoul of the Copyright Act—are pure issues of law. See Pet. at i. Upon their resolution, the lower courts will reexamine the record in light of this Court’s legal guidance. Antonick responds to some of EA’s points out of caution.

EA contradicts itself on the evidence that was before the jury. At times EA says there was no code evidence. At other times EA acknowledges that Antonick’s expert compared a “handful” of game elements in *Apple II Madden* with those in the allegedly infringing program, *Sega Madden*. Opp. Br. at 4.

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<sup>3</sup> Dkt. 47-2 at 28 (collecting record citations).

Here, that conceded handful was enough. Barr’s extensive testimony squarely addressed the *only* elements (field width and plays/formations) that required a jury trial to determine substantial similarity. App. 16a-17a. EA asserts that Barr did not compare the works as a whole but the record is to the contrary.<sup>4</sup> Although the Ninth Circuit opinion gives the verdict short shrift, App. 5a-6a, the jury unanimously found that EA’s *Sega Madden* unlawfully copied plays and formations from its predecessor *Apple II Madden*, for which Antonick had written the computer code.<sup>5</sup>

By the Ninth Circuit’s own description, Barr relied on code evidence. App. 5a & n.1. But under the Ninth Circuit’s *Krofft* prohibition, the jury was not allowed to rely on his testimony to find in Antonick’s favor. App. 8a-9a. If this Court disapproves the Ninth Circuit’s outdated rule, Barr’s testimony will “by definition” be viewed in a different light in a retrial or other proceedings. *Straight*, 476 U.S. at 1133 n.2 (Powell, J., concurring) (emphasis deleted). Barr’s testimony along with other evidence could easily warrant a renewed verdict in Antonick’s favor. Among the circumstantial evidence, EA had access to Antonick’s *Apple II Madden* code during the few months that EA scrambled to get the first *Sega Madden* to market for the 1990 holiday season. Pet. at 12.

Finally, EA seeks to turn the tables as to who is at fault for the original code not being before the jury. EA contends that Antonick “deliberately” withheld code

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<sup>4</sup> See, e.g., Dkt. 47-3 at FER 128 (Barr testifying that EA’s player ratings, part of both games as a whole, “represent a subset of the ratings” in “Mr. Antonick’s game”).

<sup>5</sup> Dkt. 11-3 at ER 321-23.

he could have submitted and “failed to introduce into evidence any of his source code for *Apple II Madden*.” Opp. Br. at 3, 16. This is an absurd argument. Antonick wrote the *Apple II Madden* code under a contract that required Antonick to turn the code over to EA as custodian of that proprietary material.<sup>6</sup> Of tremendous economic value, Antonick’s code launched the most successful sports videogame franchise in history—although he has yet to receive royalties for his Derivative Works per the verdict.

If anyone is at fault for the full original code being absent, then, it is EA for its failure to retain (or produce) the code of which it was the lawful custodian. EA should not be permitted to evade its responsibility to pay royalties owed to Antonick on the ground that EA shirked its contractual responsibility to retain the source code that the Ninth Circuit, at least in the current posture, has held was necessary. The Ninth Circuit’s holding is all the more galling given the jury’s conclusion, App. 16a, that Antonick filed suit within the statute of limitations. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, --- U.S. ---, 134 S. Ct. 1962, 1967 (2014).

### **III. UNLESS THIS COURT INTERVENES, THE NINTH CIRCUIT’S STANDARDS FOR ADJUDICATING SOFTWARE COPYRIGHT CASES WILL RESULT IN ABSURD TRIAL PROCEDURES IN THE MOST SIGNIFICANT GEOGRAPHIC REGION FOR SOFTWARE LITIGATION**

As EA highlights, Opp. Br. at 12 n.21, software copyright cases are on the rise, especially in the Ninth Circuit. Although EA cites jury trials that are

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<sup>6</sup> Dkt. 11-4 at ER 555-58, 562-63.

currently subject to appeal, EA neglects to mention that those very jury trials *admitted* expert testimony on the functioning and interpretation of software code to help lay jurors evaluate the similarities between the works at issue. *Id.* Just as EA presented expert testimony on these questions in the trial below (in opposition to Antonick’s expert), the same occurred in the two recent trials (*Oracle Am., Inc. v. Google Inc.* and *Cisco v. Arista Networks*) that EA cites for the proposition that juries are deciding copyright infringement competently.<sup>7</sup>

Only in the *Antonick* case, which EA lost before the jury, did the same counsel in all three cases assert that the use of experts to explain the functioning and interpretation of computer software was in error. As this pattern reveals, the Ninth Circuit’s rule creates a “heads I win, tails you lose” mockery of justice that only this Court can correct. The very trials that EA references to support its assertion that “jurors in the

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<sup>7</sup> EA’s reliance on these recent cases is surprising because they directly contradict its core position. Expert software-coding testimony was central to both of these trials. In *Oracle v. Google*, Google called a Professor of Computer Science at Duke University to educate the jury about software code and testify regarding the similarity of computer programs. See Transcript of Jury Trial Proceedings, *Oracle America, Inc., v. Google, Inc.*, Doc. No. 1064 at 2078-2119 (N.D. Cal. No. C 10-3561 WHA, Apr. 26, 2012); Transcript of Jury Trial Proceedings, *Oracle America, Inc., v. Google, Inc.*, Doc. No. 1065 at 2150-2224 (N.D. Cal. No. C 10-3561 WHA, Apr. 27, 2012). Likewise, expert testimony was not merely permitted but critical to the outcome in *Cisco v. Arista Networks*. See, e.g., Arista’s Opposition to Cisco’s Motion for Judgment As a Matter of Law Under Rule 50(B), *Cisco Systems, Inc. v. Arista Networks, Inc.*, No. 5:14-cv-05344-BLF, 2017 WL 3131277 (N.D. Cal. Jan. 31, 2017) (citing expert testimony as substantial evidence supporting defense verdict).

Ninth Circuit successfully adjudicate major software-copying cases all the time without notable difficulty,” Opp. Br. at 11-12, unequivocally violate the Ninth Circuit standard set forth in the *Antonick* case, which EA here champions.

Furthermore, as the *Oracle v. Google* and *Cisco v. Arista Networks* litigations demonstrate, intellectual property disputes relating to computer software often involve both patent and copyright infringement claims. Therefore, the Ninth Circuit’s *Antonick* ruling creates a case management nightmare. Patent case management appropriately allows jurors to learn the technology with the aid of expert witnesses. But under the Ninth Circuit’s *Antonick* holding, the district judge will need to empanel separate juries to hear the copyright issues lest they learn about the computer code from qualified experts.

Software intellectual property litigation will only increase as the digital revolution unfolds. The time is ripe for this Court to correct the Ninth Circuit’s “nutty,” anachronistic, and truly absurd interpretation of copyright law.

**CONCLUSION**

The petition should be granted.

Respectfully submitted,

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