

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 BUNGIE, INC.,

9 Plaintiff,

10 v.

11 PHOENIX DIGITAL GROUP LLC;
12 DAVID SCHAEFER; JORDAN
13 GREEN; JEFFREY CONWAY; and
14 JAMES MAY,

15 Defendants.

C21-0811 TSZ

ORDER

16 THIS MATTER comes before the Court on Defendants' motion for judgment as a
17 matter of law ("JMOL") and for a new trial, docket no. 310. This case proceeded to trial
18 on a claim of copyright infringement brought by Plaintiff Bungie, Inc. ("Bungie") against
19 all Defendants, and a counterclaim for circumvention of technological measures in
20 violation of the Digital Millenium Copyright Act ("DMCA") brought by Defendant
21 James May against Bungie. After a four-day trial, the jury rendered a verdict for Bungie
22 on its copyright claim and against May on his DMCA counterclaim. *See* Verdict (docket
23 no. 299). The jury found that all Defendants had engaged in direct, vicarious, and
contributory copyright infringement and that May had not proven his DMCA

1 counterclaim. *See id.* at 1–3. In the pending motion, Defendants renew their half-time
2 motion for JMOL, contending that Bungie did not introduce sufficient evidence at trial to
3 sustain the jury’s copyright infringement verdict. Additionally, May moves for a new
4 trial on his DMCA counterclaim, arguing that the Court erred in instructing the jury on
5 his spoliation of evidence.

6 **Discussion**

7 **A. Judgment as a Matter of Law on Bungie’s Copyright Claim**

8 A jury’s verdict must be upheld if it is supported by substantial evidence. *See*
9 *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2006). Evidence is substantial
10 if it is adequate to support the jury’s conclusions, even if drawing a contrary conclusion
11 from the evidence is possible. *Id.* In ruling on a motion for JMOL, the Court may not
12 make credibility determinations or weigh the evidence. *EEOC v. Go Daddy Software,*
13 *Inc.*, 581 F.3d 951, 961 (9th Cir. 2009). Rather, the Court must draw all inferences from
14 the evidence in the light most favorable to the nonmoving party, and it must disregard all
15 evidence favorable to the moving party that the jury was not required to believe. *Winarto*
16 *v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001). The Court
17 must accept the jury’s credibility findings consistent with the verdict, and it may not
18 substitute its view of the evidence for that of the jury. *Id.* Judgment as a matter of law
19 may be granted only when the evidence, as appropriately viewed, permits only one
20 reasonable conclusion and such conclusion runs contrary to the jury’s verdict. *A.D. v.*
21 *Cal. Highway Patrol*, 712 F.3d 446, 453 (9th Cir. 2013).

1 To prove a claim for copyright infringement, a plaintiff must establish both
2 (1) ownership of a valid copyright, and (2) copying of protected aspects of the
3 copyrighted work. *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d
4 1051, 1064 (9th Cir. 2020). Bungie and Defendants stipulated that Bungie owns valid
5 copyrights in the computer software and audiovisual works of *Destiny 2* and *Destiny 2:
6 Beyond Light* (collectively, “*Destiny 2*”), the video games that underlie this suit.
7 Admitted Fact 3, Pretrial Ord. at 5 (docket no. 245). Thus, at trial Bungie needed only to
8 establish that the “Cheat Software” distributed by Defendants had copied protected
9 aspects of *Destiny 2*. Bungie could show that Defendants copied protected aspects of
10 *Destiny 2* with either direct or circumstantial evidence of copying. *See Range Road
11 Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1154 (9th Cir. 2012). Both types of
12 evidence were presented at trial.

13 **1. Direct Evidence**

14 Direct evidence of copying can include party admissions. *See Tolkien Tr. v.
15 Polychron*, No. 23-cv-4300, 2023 WL 9471264, at *6 (C.D. Cal. Dec. 14, 2023). At trial,
16 May admitted that, in developing a cheat for *Destiny 2*, he attached reverse engineering
17 tools to the game. *See* Tr. (May 21, 2024) at 214:6–22 (docket no. 306); Tr. (May 22,
18 2024) at 243:25–244:21 (docket no. 307); *see* Trial Ex. 56 (log of times May was banned
19 from *Destiny 2* for connecting reverse engineering tools or other prohibited programs to
20 the game). Those reverse engineering tools were designed to access *Destiny 2*’s code so
21 that May could copy the code structure and put it into the cheat he was developing. *See*
22 Tr. (May 22, 2024) at 240:3–11, 241:5–21 (docket no. 307). Defendants’ argument that
23

1 the cheat May was working to develop was not the Cheat Software at issue in this case,
2 and that the Cheat Software was actually developed by non-party Andreas Banek, was
3 necessarily rejected by the jury.

4 Bungie also presented direct evidence that the use of the Cheat Software caused
5 unauthorized copying to occur. Defendants conceded that, in order for the Cheat
6 Software to function, it had to be “injected” into the *Destiny 2* process. *See* Tr. (May 22,
7 2024) at 232:7–233:11, 417:6–15 (docket no. 307). As Bungie’s expert witness, Dr.
8 Edward Kaiser, explained, when a cheat is “injected” into *Destiny 2*, a copy of the
9 *Destiny 2* code with the Cheat Software code inside of it runs on the customer’s
10 computer, creating a modified version of the game. *See* Tr. (May 21, 2024) at 77:18–
11 78:3, 89:20–90:5 (docket no. 306).

12 Copyright protection also extends beyond *Destiny 2*’s code to the game’s
13 audiovisual works. The parties stipulated to how the Cheat Software affected the
14 audiovisual output of *Destiny 2*: the “ESP feature allows users to see other *Destiny 2*
15 players and non-player characters through solid walls by displaying a distinct box around
16 the other players, displaying the players’ names, and [disclosing] the distance between
17 the cheating and non-cheating players.” Admitted Fact 11, Pretrial Ord. at 6 (docket
18 no. 245). This stipulation, and Defendants other admissions, are direct evidence that the
19 Cheat Software infringed *Destiny 2*’s audiovisual works. Substantial direct evidence
20 supports the jury’s verdict that Defendants engaged in copyright infringement.

1 **2. Circumstantial Evidence**

2 Bungie also presented circumstantial evidence that is substantial enough to sustain
3 the jury’s verdict. To prove copying via circumstantial evidence, Bungie was required to
4 show that (i) Defendants had access to *Destiny 2*, and (ii) *Destiny 2* and the Cheat
5 Software are substantially similar. *See Skidmore*, 952 F.3d at 1064.

6 Proof of access can be shown via either direct evidence of access or, alternatively,
7 “circumstantial evidence can be used to prove access either by (1) establishing a chain of
8 events linking the plaintiff’s work and the defendant’s access, or (2) showing that the
9 plaintiff’s work has been widely disseminated.” *Art Attacks Ink, LLC v. MGA Ent. Inc.*,
10 581 F.3d 1138, 1143 (9th Cir. 2009) (citation omitted). The parties stipulated that
11 *Destiny 2* has a player base of over 30 million players and was widely disseminated, *see*
12 Admitted Fact 2, Pretrial Ord. at 5 (docket no. 245), and May admitted that he accessed
13 *Destiny 2* and its object code, Tr. (May 22, 2024) at 243:25–244:4, 259:2–7 (docket
14 no. 307).

15 Substantial similarity is evaluated using a two-part test. “The first part, the
16 extrinsic test, compares the objective similarities of specific expressive elements in the
17 two works.” *Skidmore*, 952 F.3d at 1064 (citing *Cavalier v. Random House, Inc.*, 297
18 F.3d 815, 822 (9th Cir. 2002)). “The second part, the intrinsic test, ‘test[s] for similarity
19 of expression from the standpoint of the ordinary reasonable observer, with no expert
20 assistance.’” *Id.* (alteration in original, quoting *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d
21 628, 637 (9th Cir. 2008)). Bungie satisfied both the extrinsic and intrinsic tests for
22 substantial similarity.

1 Defendants rely heavily on the case *Antonick v. Electronic Arts, Inc.*, 841 F.3d
2 1062 (9th Cir. 2016), to support their argument that Bungie failed to prove substantial
3 similarity at trial. *Antonick* is distinguishable from this case in two ways. First, in
4 *Antonick* the plaintiff failed to admit the alleged infringing computer code into evidence.
5 *Id.* at 1065. Although Bungie likewise did not admit the source code of the Cheat
6 Software into evidence, in this matter, the Court gave a spoliation of evidence instruction
7 to the jury. *See* Jury Instruction No. 9 (docket no. 293 at 13–14) That instruction
8 informed the jury that they “may presume” any spoliated evidence, including records
9 relating to the Cheat Software and the Cheat Software itself, were adverse to Defendants.
10 *See id.* This permissive presumption gave the jury a basis to find that the Cheat Software
11 was substantially similar to *Destiny 2*.

12 Second, *Antonick* involved only infringing computer code and not audiovisual
13 works. 841 F.3d at 1067. Audiovisual works are, however, one of the *Destiny 2*
14 components that Bungie has copyrighted. Admitted Fact 3, Pretrial Ord. at 5 (docket
15 no. 245); Trial Ex. 1 (*Destiny 2* Audiovisual Copyright Registration and Deposit
16 Materials); Trial Ex. 3 (*Destiny 2: Beyond Light* Audiovisual Copyright Registration and
17 Deposit Materials). At trial, the jury was able to compare both the original audiovisual
18 elements of *Destiny 2* and the modified audiovisual elements created by the Cheat
19 Software. *See* Trial Ex. 1 (*Destiny 2* Audiovisual Copyright Registration and Deposit
20 Materials); Trial Ex. 3 (*Destiny 2: Beyond Light* Audiovisual Copyright Registration and
21 Deposit Materials); Trial Ex. 29 (screenshots from Aimjunkies.com showing the Cheat
22
23

1 Software in use). Thus, substantial circumstantial evidence also supports the jury's
2 verdict.

3 **3. Derivative Works**

4 Defendants' final argument for why they are entitled to JMOL on Bungie's
5 copyright claim is that, as a matter of law, the Cheat Software does not create derivative
6 works. The case Defendants rely on to support this contention, *Lewis Galoob Toys, Inc.*
7 *v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992), is distinguishable from the instant
8 case. *Galoob* involved a device known as the "Game Genie," which was inserted
9 between a game cartridge and the game console and through which the cartridge's code
10 would have to pass to get to the console. *See id.* at 967. The Game Genie blocked a
11 single byte of data from being transmitted from the cartridge to the console and allowed
12 the user to insert new data in place of the blocked byte. *See id.* In essence, "[t]he Game
13 Genie was dumb; it functioned only as a window into the computer program, allowing
14 players to temporarily modify individual aspects of the game." *Micro Star v. Formgen*
15 *Inc.*, 154 F.3d 1107, 1111 (9th Cir. 1998) (distinguishing *Galoob* from a case involving
16 alleged infringement of copyrighted audiovisual works and finding infringement in the
17 latter case where "the audiovisual displays generated by the [video game] from the
18 [infringing products] are in the [infringing products] themselves").

19 In the present case, the Cheat Software was not dumb and functioned as more than
20 a window into *Destiny 2*'s programming. Beyond just allowing the end user to edit a
21 value in computer code generated from a valid source without modifying the underlying
22 source, the Cheat Software's computer code is "injected" into the *Destiny 2* code,

1 creating an essentially new and altered copy of the game. *See* Tr. (May 21, 2024) at
2 77:18–78:3, 89:20–90:5 (docket no. 306). Additionally, the Cheat Software added red
3 boxes around certain characters, creating a modified audiovisual display of *Destiny 2*, *i.e.*
4 a derivative work. *See id.* at 77:18–78:3, 89:20–90:5; Trial Ex. 29 (screenshots from
5 Aimjunkies.com showing Cheat Software in use). Defendants’ argument that the Cheat
6 Software does not create derivative works fails, and substantial evidence supports the
7 jury’s verdict that Defendants infringed Bungie’s copyrights in *Destiny 2*.

8 **Jury Instruction on May’s Spoliation of Evidence**

9 May contends that he is entitled to a new trial on his DMCA counterclaim because
10 the Court erred in giving Jury Instruction No. 9, docket no. 293 at 13–14, which
11 instructed the jury regarding May’s spoliation of evidence. “On a motion for a new trial,
12 the Court’s inquiry is whether, giving full respect to the jury’s findings and considering
13 all of the evidence, the Court is left with ‘the definite and firm conviction that a mistake
14 has been committed.’” *IDS Prop. & Cas. Ins. Co. v. Fellows*, No. C15-2031, 2017 WL
15 2600186, at *3 (W.D. Wash. June 15, 2017) (quoting *Landes Constr. Co. v. Royal Bank*
16 *of Canada*, 833 F.2d 1365, 1371-72 (9th Cir. 1987), and citing 11 Charles Alan Wright,
17 et al., *Fed. Prac. & Proc.* § 2806 & n.26 (3d ed. 2012)).

18 On November 1, 2023, the Court issued an Order finding that Defendants,
19 including May, had spoliated evidence and that a spoliation instruction should be given at
20 trial. *See* docket no. 216. May’s arguments that Instruction No. 9 was not supported by
21 the facts or the law ignore entirely the Court’s prior Order and findings therein. May has
22 not raised any doubt about the appropriateness of Instruction No. 9.

1 **Conclusion**

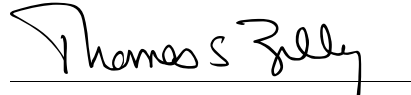
2 For the foregoing reasons, the Court ORDERS:

3 (1) Defendants’ motion for judgment as a matter of law and for a new trial,
4 docket no. 310, is DENIED.

5 (2) The Clerk is directed to send a copy of this Order to all counsel of record.

6 IT IS SO ORDERED.

7 Dated this 30th day of August, 2024.

8
9 
10 Thomas S. Zilly
11 United States District Judge
12
13
14
15
16
17
18
19
20
21
22
23