

Exhibit A

Corynne McSherry (SBN 221504)
corynne@eff.org
Mitchell L. Stoltz (SBN 291302)
mitch@eff.org
Victoria Noble (SBN 337290)
tori@eff.org
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Attorneys for *Amicus Curiae* ELECTRONIC
FRONTIER FOUNDATION

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CONCORD MUSIC GROUP, INC. ET AL,	)	No. 5:24-cv-03811-EKL-SVK
	)	
Plaintiffs,	)	<i>AMICUS CURIAE</i> BRIEF OF THE
	)	ELECTRONIC FRONTIER
v.	)	FOUNDATION IN SUPPORT OF
	)	DEFENDANT ANTHROPIC PBC'S
ANTHROPIC PBC,	)	MOTION FOR SUMMARY
	)	JUDGMENT
Defendant.	)	
	)	Judge Eumi K. Lee
	)	Magistrate Judge Susan van Keulen
	)	

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE	1
INTRODUCTION	1
ARGUMENT	2
I. GENERATIVE AI TRAINING AND USE SERVES THE PURPOSES OF COPYRIGHT. 2	
A. The Purpose of Copyright Law, Including Section 107, Is Not Confined to Fostering the Creation of Copyrightable “Products of Human Authorship.”	3
B. Generative AI Tools <i>Are</i> Powerful Engines for Human Creative Expression.	4
II. “MARKET DILUTION” IS NOT A COGNIZABLE COPYRIGHT HARM.	8
CONCLUSION.....	14

TABLE OF AUTHORITIES**Cases**

<i>A.V. ex rel. Vanderhye v. iParadigms, LLC</i> , 562 F.3d 630 (4th Cir. 2009)	3
<i>Aalmuhammed v. Lee</i> , 202 F.3d 1227 (9th Cir. 2000)	6
<i>Andy Warhol Found.</i> , 598 U.S. 508 (2023).....	9
<i>Authors Guild v. Google, Inc.</i> , 804 F.3d 202 (2d Cir. 2015)	3, 10
<i>Bartz v. Anthropic</i> 787 F.3d 1007 (N.D. Cal 2025)	4, 11
<i>Burrow-Giles Lithographic Co. v. Sarony</i> , 111 U.S. 53 (1884).....	5
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	3, 4, 8, 9
<i>Feist Publications, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991).....	8
<i>Google LLC v. Oracle</i> , 593 U.S. 1 (2021).....	4, 11
<i>Kadrey v. Meta Platforms, Inc.</i> , 788 F. Supp. 3d 1026 (N.D. Cal. 2025)	2, 11
<i>Kelly v. Arriba Soft Corp.</i> , 336 F.3d 811 (9th Cir. 2003)	3
<i>Los Angeles News Serv. v. CBS Broad., Inc.</i> , 305 F.3d 924 (9th Cir.)	9
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	3
<i>Silvers v. Sony Pictures Ent., Inc.</i> , 402 F.3d 881 (9th Cir. 2005)	10
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	3, 7, 8, 10
<i>Yonay v. Paramount Pictures Corp.</i> , 163 F.4th 685 (9th Cir. 2026)	8, 9

Statutes

17 U.S.C. § 102..... 8

Other Authorities

4 NIMMER ON COPYRIGHT § 13.05[A][4]..... 11

4 PATRY ON COPYRIGHT § 10:152..... 11

4 PATRY ON COPYRIGHT § 10:155.40..... 8

Abrar Al-Heeti, *From Novelty to Necessity: How AI Could Open Up a World of Accessibility for Everyone*, CNET, (Sept. 12, 2024) 8

Amineh Ahmadi Nejad, et al., *Art, Activism, and AI: Generating Visual Narratives of Injustice through Research-Creation with a Feminist Lens* 6

Andrew Chow, *How AI is Transforming Music*, Time (December 4, 2023)..... 6

Ashim Mahara, *Cybersecurity Data Extraction from Common Crawl* (March 2025) 13

Christoph Schuhmann, et al., “LAION-5B: An Open Large-Scale Dataset for Training Generation Image-Text Models,” (Oct. 16, 2022)..... 12

Generative AI Raises Competition Concerns, Federal Trade Commission (June 29, 2023)..... 12

Gloria Lu, *The World’s Smartest Artificial Intelligence Just Made Its First Magazine Cover*, Cosmopolitan, (June 21, 2022). 6

James Love, *We Need Smart Intellectual Property Laws for Artificial Intelligence*, SCIENTIFIC AMERICAN (August 7, 2023)..... 14

Jordan G. Teicher, *When Photography Wasn’t Art*, JSTOR DAILY, Feb. 6, 2016) 11

Katrina Geddes, *Engineering Semiotic Democracy* FIU L. R. (Forthcoming)..... 5, 7

Ken Shulman, *The Creative Future of Generative AI*, MASSACHUSETTS INSTITUTE OF TECHNOLOGY CENTER FOR ART, SCIENCE, AND TECHNOLOGY (Nov. 16, 2023). 6

Lea Bishop, *Digital Dialectic: Why Every “AI-Generated” Work Has a Human Author*, 20 FIU L. Rev. 861 (2026)..... 7

Livia Gershon, *Did Photography Really Kill Portrait Painting?* JSTOR DAILY (Sept. 13, 2022)..... 11

Michael D. Murray, *Tools Do Not Create: Human Authorship in the Use of Generative Artificial Intelligence*, 15 J.L. TECH. & INTERNET 76 (2024)..... 7

Nate Anderson, *100 years of Big Content Fearing Technology*, Ars Technica, Oct 9, 2011 4

1	PUBLICATIONS OFFICE OF THE EUROPEAN UNION, <i>The Synergy Between Open Data And AI: A</i>	
2	<i>Two-Way Relationship</i> (Oct. 21, 2024)	12
3	Sean Flynn, <i>Examples of Text and Data Mining Research Using Copyrighted Materials</i> , Kluwer	
4	Copyright Blog, Mar. 6, 2023	4
5	Stefan Baack, <i>A Critical Analysis of the Largest Source for Generative AI Training Data:</i>	
6	<i>Common Crawl</i> , ASSN. FOR COMPUTING MACHINERY (Feb. 6, 2024)	12, 13
7	Stefan Baack, <i>Training Data for the Price of a Sandwich</i> , Mozilla / (Feb. 6, 2024)	13
8	U.S. Copyright Office Registers Thousands of Human-AI Collaborative Works Amid Legal	
9	Challenges	7
10	Will Crowe, <i>Artistic Expression for People with Disability: AI to Foster Creativity</i> ,	
11	OCCUPATIONAL THERAPY AUSTRALIA, https://otaus.com.au/news/artistic-expression-for-	
12	people-with-disability-ai-to-foster-creativity (June 6, 2025)	7
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

INTEREST OF AMICUS CURIAE¹

EFF is a member-supported, nonprofit civil liberties organization that has worked for more than 30 years to protect free expression, access to knowledge, and innovation. EFF, its more than 30,000 members, and the community of technology users they represent have a strong interest in a copyright system that promotes the progress of science by balancing copyright incentives with countervailing constitutional interests. Consistent with this mission, EFF has participated, as counsel or amicus curiae, in multiple copyright cases pertaining to new technologies; provides free legal counseling on copyright issues; and advocates for balanced copyright policy in legislative and regulatory arenas. EFF brings a critical and underrepresented perspective to its amicus advocacy work by keeping the public interest at the forefront and highlighting how judicial decisions may impact people other than commercial stakeholders or the immediate parties to a dispute.

INTRODUCTION

It's 1975. Earth, Wind, and Fire rule the airwaves, *Jaws* is on every theater screen, *All In the Family* is must-see TV, and Sony starts selling the first videotape recorder, or VTR. Finally, as one ad puts it, "you don't have to miss Kojak because you're watching Columbo (or vice versa)." Major rightsholders run to Congress and the courts, claiming that this new technology is "to the American film producer and the American public as the Boston strangler is to the woman home alone." After years of litigation, the Supreme Court ultimately rules in Sony's favor, noting that where copyright law has not kept up with technological developments, courts should be careful not to expand copyright protections on their own. That ruling unleashes decades of technological

¹ No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person other than amicus or their counsel contributed money that was intended to fund preparing or submitting this brief.

1 innovation, including unexpected effects like the emergence of a vibrant video rental market. What
2 doesn't it do? Destroy the movie and television industry.

3 Plaintiffs' approach to the fair use analysis asks this Court to do precisely what *Sony*
4 counsels against: embrace a brand-new theory of copyright, based in substantial part on hyperbole
5 and speculation about the displacement of "human artistic creativity." This Court should decline.
6 Like the VTR, large language models like Claude are general purpose tools, used by humans to do
7 a broad variety of things far beyond generating lyrics. The effects of this particular technological
8 innovation will doubtless be far-reaching, disruptive, and potentially harmful for some—but
9 copyright law is not the way to address those harms. Indeed, accepting Plaintiffs' approach,
10 particularly the licensing model they and their amici insist is the path forward, risks cutting off
11 many of the real benefits AI models offer by ensuring that technological development stays in the
12 hands of the very few companies that can afford to make those deals, subject to veto by the
13 relatively few copyright-holders with the practical means to offer them.
14
15

16 ARGUMENT

17 **I. GENERATIVE AI TRAINING AND USE SERVES THE PURPOSES OF** 18 **COPYRIGHT.**

19 By facilitating users' creation of expressive works, generative AI aligns with copyright
20 law's constitutional purpose: to serve as an engine for new creativity. Plaintiffs fundamentally
21 misconstrue both copyright law and empirical reality to pretend otherwise. Copyright law as a
22 whole—including the fair use doctrine—exists to promote the development and availability of
23 both expressive and non-expressive innovation, not a particular kind of "human creation" done
24 "the old-fashioned way." Plfs' Br., 31 (quoting *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d
25 1026, 1035 (N.D. Cal. 2025)). And Plaintiffs' fundamental premise—that AI models merely
26 generate "digital facsimiles of human authorship...at the push of a button"—ignores the millions
27
28

1 of users choosing and pushing those buttons. *Cf.* Plfs’ Br., 20.

2 **A. The Purpose of Copyright Law, Including Section 107, Is Not Confined to**
 3 **Fostering the Creation of Copyrightable “Products of Human Authorship.”**

4 Plaintiffs’ claim, Plfs’ Br., 19, that the purpose of copyright is solely to protect “human
 5 creation” offers an improperly cramped view of copyright law. To be sure, the purpose of copyright
 6 may be to stimulate “artistic creativity for the public good.” *Sony Corp. of Am. v. Universal City*
 7 *Studios, Inc.*, 464 U.S. 417 (1984). But that is not the same as “to stimulate the creation of
 8 particular kinds of new copyrightable works,” particularly given decades of case law, particularly
 9 in the Ninth Circuit, applying fair use protections to a broad swath of non-expressive uses. *Perfect*
 10 *10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165-66 (9th Cir. 2007) (incorporating images into
 11 electronic reference tool had immense public benefits); *see also Kelly v. Arriba Soft Corp.*, 336
 12 F.3d 811, 818-19 (9th Cir. 2003) (improving access to information on the internet); *Authors Guild*
 13 *v. Google, Inc.*, 804 F.3d 202, 209, 216-18 (2d Cir. 2015) (identifying books of interest). *A.V. ex*
 14 *rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009) (plagiarism detection
 15 software).
 16

17 These holdings reflect, as they must, a determination that those uses also served the
 18 purposes of copyright, whether or not they were tied to the creation of new copyrightable works.
 19 *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (fair use requires courts to
 20 examine four statutory factors and weigh them together “in light of the purposes of copyright.”)
 21 The decisions also recognize that in the face of “technological change,” courts “must be
 22 circumspect in construing the scope of rights created by” the Copyright Act. *Sony*, 464 U.S. at
 23 431-32.
 24

25 Further, *Warhol* did not signal a “sea change” in the fair use analysis. *Cf.* Plfs’ Br., 21. To
 26 the contrary, the Court expressly reaffirmed landmark fair use cases like *Campbell* and *Google v.*
 27
 28

1 *Oracle*. In 2026, as in 1996, a transformative use is simply one that that “adds something new and
 2 important.” *Google LLC v. Oracle*, 593 U.S. 1, 29 (2021), citing *Campbell* at 579; *see also Bartz*
 3 *v. Anthropic* 787 F.3d 1007, 1021 (N.D. Cal 2025) (“using copyrighted works to train LLMs to
 4 generate new text was quintessentially transformative . . . Anthropic's LLMs trained upon works
 5 not to race ahead and replicate or supplant them — but to turn a hard corner and create something
 6 different.”) Accordingly, there is no need to “closely scrutinize” pre-*Warhol* decisions and
 7 undermine the legal certainty that has supported technological innovation for decades, including
 8 socially beneficial uses of machine learning, such as facilitating academic literature reviews,
 9 enabling medical discovery, identifying and tracking misinformation, reducing bias in language
 10 translation tools.²

12 **B. Generative AI Tools *Are* Powerful Engines for Human Creative Expression.**

13 Plaintiffs and amici also misconstrue users’ role in the creation of new works with the
 14 assistance of AI, denigrating those works as mere “imitations of human expression” that will
 15 “smother the human creativity” of others. Plfs’ Br., 20.

17 AI is hardly the first technology to engender claims like these. The camera is a paradigmatic
 18 example. *See generally* Nate Anderson, *100 years of Big Content Fearing Technology*, *Ars*
 19 *Technica*, Oct 9, 2011 (describing 1906 essay from composer John Philip Sousa “decrying the
 20 latest piratical threat to his livelihood, to the entire body politic, and to “musical taste” itself”: the
 21 player piano and the gramophone) Before 1909, the U.S. Copyright Office wouldn’t register
 22

24 ² Sean Flynn, *Examples of Text and Data Mining Research Using Copyrighted Materials*,
 25 Kluwer Copyright Blog, Mar. 6, 2023, *available at*
 26 [https://legalblogs.wolterskluwer.com/copyright-blog/examples-of-text-and-data-mining-research-](https://legalblogs.wolterskluwer.com/copyright-blog/examples-of-text-and-data-mining-research-using-copyrighted-materials/#:~:text=One%20of%20the%20most%20common,academic%20journals%20and%20other%20sources.)
 27 [using-copyrighted-](https://legalblogs.wolterskluwer.com/copyright-blog/examples-of-text-and-data-mining-research-using-copyrighted-materials/#:~:text=One%20of%20the%20most%20common,academic%20journals%20and%20other%20sources.)
 28 [materials/#:~:text=One%20of%20the%20most%20common,academic%20journals%20and%20other%20sources.](https://legalblogs.wolterskluwer.com/copyright-blog/examples-of-text-and-data-mining-research-using-copyrighted-materials/#:~:text=One%20of%20the%20most%20common,academic%20journals%20and%20other%20sources.)

1 copyrights in photographs, on the theory that cameras “created” them, not humans. Over time, of
 2 course, lawmakers realized that photography could be deeply creative. *See Burrow-Giles*
 3 *Lithographic Co. v. Sarony*, 111 U.S. 53, 58–60 (1884) (photograph was “an original work of art”
 4 authored by human plaintiff, not a “mere mechanical reproduction”). Indeed, the advent of instant
 5 cameras and eventually the smartphone democratized human creativity by making it possible for
 6 more people to create images. In addition, photography led to unexpected developments, like
 7 photojournalism that documented real life conditions, political and social movements, and so on.
 8 *See Katrina Geddes, Engineering Semiotic Democracy* FIU L. R. (Forthcoming).³

10 The same dynamic is already underway with AI. Plaintiffs portray AI-generated works as
 11 orthogonal to “**human** authorship,” Plfs’ Br., 19. But “AI-generated works” are more commonly
 12 “AI-assisted works”:

14 AI-generated works do not spontaneously spring into existence. A human user must
 15 possess an idea, express that idea in one or more prompts, and continue prompting
 16 the AI system until it produces the desired result. There is still a discursive,
 17 relational, dialogic exchange taking place between creator and audience, just with
 the assistance of a machinic intermediary. In this sense, AI-generated expression is
 still a dialogue between humans, just through the medium of AI.

18 Geddes at 31-32. And that expression can be highly creative. To take a just a few examples:

- 19 • Boston-based artist Nettrice Gaskins uses AI to create Afro-futurist art, including a
 20 portrait of Octavia Butler now on display at the San Francisco Airport as part of the
 21 “Women of Afro-futurism” exhibition.⁴
- 22 • Indian artists Prateek Arora and Varun Gupta use generative AI to reimagine
 23 Western science fiction. *See* Geddes at 31-32.

25 ³ Available at SSRN: <https://ssrn.com/abstract=4865510> or
 26 <http://dx.doi.org/10.2139/ssrn.4865510>

27 ⁴ [https://www.sfromuseum.org/sites/default/files/2025-12/Extended-Labels-Women-of-](https://www.sfromuseum.org/sites/default/files/2025-12/Extended-Labels-Women-of-Afrofuturism-251219.pdf)
 28 [Afrofuturism-251219.pdf](https://www.sfromuseum.org/sites/default/files/2025-12/Extended-Labels-Women-of-Afrofuturism-251219.pdf)

- 1 Philadelphia-based artist Alex Smith uses generative AI to reimagine Afrofuturism
2 with queer, plus-sized Black superheroes. Id.
- 3 Ana Miljački, a professor of architecture at MIT, used generative AI to create a
4 “non-liner documentary” film on Yugoslav World War II memorials and the values
5 they embodied.⁵
- 6 A team of editors, AI researchers, and a digital artist created used an AI image
7 generator to design a cover of *Cosmopolitan* magazine.⁶
- 8 A research-creation project used AI generated visual art to both amplify the voices
9 of activists in the Iran Woman Life Freedom Movement and evaluate AI’s role in
10 sociopolitical advocacy through art.⁷
- 11 AI company Bronze works with musicians like Disclosure and Jai Paul to create
12 songs that never sound the same when played back twice, with the goal of
13 challenging audience conceptions of what music could be.⁸

14 These creators are all “authors,” as surely as Dorothea Lange, Marcel Duchamp, or Georgia
15 O’Keefe. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (defining an “author” as the
16 person “who superintended the whole work, the ‘master mind’”). The Copyright Office recognizes

17
18
19
20
21 ⁵ Ken Shulman, *The Creative Future of Generative AI*, MASSACHUSETTS INSTITUTE OF
22 TECHNOLOGY CENTER FOR ART, SCIENCE, AND TECHNOLOGY, <https://arts.mit.edu/mit-generative-ai-art/> (Nov. 16, 2023).

23 ⁶ Gloria Lu, *The World’s Smartest Artificial Intelligence Just Made Its First Magazine Cover*,
24 *Cosmopolitan*, <https://www.cosmopolitan.com/lifestyle/a40314356/dall-e-2-artificial-intelligence-cover/> (June 21, 2022).

25 ⁷ Amineh Ahmadi Nejad, et al., *Art, Activism, and AI: Generating Visual Narratives of Injustice
26 through Research-Creation with a Feminist Lens*,
27 https://computationalcreativity.net/iccc23/papers/ICCC-2023_paper_115.pdf.

28 ⁸ Andrew Chow, *How AI is Transforming Music*, Time,; <https://time.com/6340294/ai-transform-music-2023/> (December 4, 2023)

1 as much, having registered more than 6000 works like these.⁹

2 Given this range of experimentation, courts should be reluctant to decide in advance what
3 tools do and do not foster “human creativity.” *See generally* Lea Bishop, *Digital Dialectic: Why*
4 *Every “AI-Generated” Work Has a Human Author*, 20 FIU L. Rev. 861 (2026); Michael D.
5 Murray, *Tools Do Not Create: Human Authorship in the Use of Generative Artificial Intelligence*,
6 15 J.L. TECH. & INTERNET 76, 76 (2024) (“An artist working with a generative AI tool is no
7 different from an artist working with a digital or analog camera or with Photoshop or another image
8 editing and image rendering tool.”)¹⁰

10 What is more, AI tools can support artistic creation and information access by people with
11 disabilities, for whom traditional artistic forms and sources of information are often inaccessible.
12 These important tools are not “plainly infringing” as amici contend. Br. of Amici Assn. of Am.
13 Publishers, et al., 11 (hereinafter “AAP Br.”).. To the contrary, these accessibility uses are
14 paradigmatic fair use. *Sony Corp. of Am.*, 464 U.S. at 455. For example, AI image generators allow
15 people with motor impairments to create images by describing their creative ideas through prompts
16 entered using voice-to-text software, rather than using traditional tools like pens or paintbrushes,
17 which may be difficult to grasp or manipulate.¹¹ And the AI-generated summaries that some amici
18 seek to prevent from “competing” with their content, AAP Br., 11, are an important source of
19 information for blind and low vision users, because they are often more accessible than many
20
21

22 ⁹ U.S. Copyright Office Registers Thousands of Human-AI Collaborative Works Amid Legal
23 Challenges [https://legalnewsfeed.com/2026/04/21/u-s-copyright-office-adapts-rules-for-ai-](https://legalnewsfeed.com/2026/04/21/u-s-copyright-office-adapts-rules-for-ai-generated-works-registering-over-6000-new-pieces/)
24 [generated-works-registering-over-6000-new-pieces/](https://legalnewsfeed.com/2026/04/21/u-s-copyright-office-adapts-rules-for-ai-generated-works-registering-over-6000-new-pieces/)

25 ¹⁰ Indeed, some of the so-called “guardrails” AI companies have adopted precisely to fend off
26 lawsuits like this one may be actually impeding the purposes of copyright by inhibiting fair uses
27 and misleading the public as to the proper boundaries of fair use. *See* Geddes at 6-8.

28 ¹¹ Will Crowe, *Artistic Expression for People with Disability: AI to Foster Creativity*,
OCCUPATIONAL THERAPY AUSTRALIA, [https://otaus.com.au/news/artistic-expression-for-people-](https://otaus.com.au/news/artistic-expression-for-people-with-disability-ai-to-foster-creativity)
[with-disability-ai-to-foster-creativity](https://otaus.com.au/news/artistic-expression-for-people-with-disability-ai-to-foster-creativity) (June 6, 2025).

websites and traditional web search tools.¹²

II. “MARKET DILUTION” IS NOT A COGNIZABLE COPYRIGHT HARM.

Plaintiffs and their amici ask this Court to depart from well-established fair use principles and adopt a novel “market dilution” theory, which would insulate copyright holders from hypothetical competition from non-infringing works created with the help of AI tools like Claude. Plfs’ Br., 31–34; AAP Br., 12; RIAA Br., 4–5. This theory contravenes 300-year-old copyright principles and would impede future creative expression. *See* 4 PATRY ON COPYRIGHT § 10:155.40.

The fourth fair use factor considers the “extent” of any harm to the markets for the original or derivative works caused by the “particular actions of the alleged infringer,” or that would result if the conduct at issue became “unrestricted and widespread.” *Id.* In assessing those effects, it looks only at harms that are “cognizable under the Copyright Act,” *i.e.*, uses of a work that “usurp a market that properly belongs to the copyright holder” and flow from protectible elements of a work. *Infinity Broad. Corp.*, 150 F.3d at 110; *Campbell*, 510 U.S. at 592–93, 593 n.24.

Other forms of harm, no matter how significant, like competition from AI-generated works that allegedly “dilute” broadly defined markets for entire classes of works, play no role in the analysis because copyright protects only an author’s original expression. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991); *see also Sony Corp. of Am.*, 464 U.S. at 432. (Copyright protection “has never accorded the copyright owner complete control over all possible uses of his work.”). No author may copyright ideas, facts, concepts, styles, or tropes reflected in their work. 17 U.S.C. § 102(b); *Yonay v. Paramount Pictures Corp.*, 163 F.4th 685, 692 (9th Cir. 2026). With this fundamental limitation, copyright law not only allows “but *encourages* others to

¹² Abrar Al-Heeti, *From Novelty to Necessity: How AI Could Open Up a World of Accessibility for Everyone*, CNET, <https://www.cnet.com/tech/mobile/ai-is-turning-phones-into-smarter-accessibility-tools-and-its-just-getting-started/> (Sept. 12, 2024).

1 build freely” on existing works. In addition, as a matter of law, a use is only considered harmful
2 under the Copyright Act if it shares “substantial amounts of the original expression.” *Yonay*, 163
3 F.4th at 690.

4 Moreover, factor four excludes transformative uses of that original expression. *Campbell*,
5 510 U.S. at 593–94. Thus, while harm to markets for derivative uses of original song lyrics—like
6 making a “rap version” of the same lyrics—may be considered, any market harm caused by a
7 secondary use of its unprotectible elements—such as a new song inspired by the love story
8 underpinning the original or imitating its musical style—must be excluded. *Campbell*, 510 U.S. at
9 593–94. And if the secondary work uses only a small portion of the original—such as a few lines
10 of its lyrics—only the harm attributable to the “uncompensated use” of the short fragment of the
11 original may be considered—not any and all harm caused by “merely an additional use in an
12 already saturated market” for licenses to use the work in its entirety. *Los Angeles News Serv. v.*
13 *CBS Broad., Inc.*, 305 F.3d 924, 942 (9th Cir.), *opinion amended on denial of reh’g*, 313 F.3d 1093
14 (9th Cir. 2002) (use of three-second video clip would not harm market for licenses to rebroadcast
15 the original footage in its entirety).

16
17
18 Plaintiffs also postulate that every “AI-generated” song uploaded to streaming services like
19 Spotify diverts would-be listeners from “human-written” songs, reducing Plaintiffs’ proportional
20 share of the royalties that Spotify pays to rightsholders each year. Plfs’ Mot., 33. Setting aside the
21 incorrect assumption that such music cannot be “human written” *supra* at I.B, there are several
22 problems with this argument.

23
24 First, it confuses the statutory focus of the fair use inquiry: “the specific use alleged to be
25 infringing.” *Andy Warhol Found.*, 598 U.S. at 549. Here, that use is *Anthropic’s* copying of
26 Plaintiffs’ song lyrics to build Claude, a general-purpose AI text-generator. Instead of focusing on
27
28

1 the market effects of *Anthropic*’s use of song lyrics to build an AI model—a use that certainly
2 serves a different purpose than Plaintiffs’ songs originally did—Plaintiffs jump ahead to *third*
3 *parties*’ potential uses of Claude to create new songs. Uses of the defendant’s secondary work by
4 third parties have no part in the fair use analysis. *See Sony Corp. of Am.*, 464 U.S. at 434.

5
6 Second, dissimilar works are not “substitutes,” for purposes of fair use, because the
7 analysis excludes harms that “occur in relation to interests that are not protected by copyright.”
8 *Authors Guild v. Google, Inc.*, 804 F.3d 202, 224 (2d Cir. 2015). For example, the court in *Authors*
9 *Guild* explained that a tool built by Google could provide facts communicated in “snippets” of a
10 book displayed to a user, even though this could potentially eliminate the need to obtain the book.
11 *Authors Guild*, 804 F.3d at 224. The potential for lost sales does not “change the taking of an
12 unprotected fact into a copyright infringement.” *Id.* at 224. And because the “snippets” provided
13 by Google were deemed unlikely to satisfy the user’s “interest in the *protected aspect* of the
14 author’s work,” the snippets did not “provide a significant substitute for the purchase of the
15 author’s book.” *Id.* at 224–25. So too with AI-generated songs that do not contain protected
16 expression from an original song. Drawing upon unprotected stylistic elements in original works
17 may satisfy a user’s interest in listening to a similar-sounding original, but that does not mean the
18 new songs usurp the market for the original.
19

20
21 Third, copyright law is a creature of statute. *Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d
22 881, 883 (9th Cir. 2005). The Constitution gives Congress the role of fashioning new rules to
23 address new technologies, including deciding whether new rules are needed at all. *Sony Corp. of*
24 *Am.*, 464 U.S. at 431. Consider again the advent of photography. Portrait artists feared the camera
25 would replace the paintbrush, particularly since as cameras could produce thousands of images in
26
27
28

1 the time it would take a human to paint just one.¹³ In practice, portraiture painting actually
 2 experienced a resurgence and provided artists with a new revenue source, by allowing them to
 3 capture and sell reproductions of their own artworks.¹⁴ It is for Congress, not the courts, to
 4 determine whether generative AI will follow the same dynamic.

5 Nor does the existence of a limited licensing market for training data tilt Factor Four
 6 against fair use. The Supreme Court has cautioned against “the ‘danger of circularity posed’ by
 7 considering new licensing opportunities because ‘it is a given in every fair use case that plaintiff
 8 suffers a loss of a potential market if that potential is defined as the theoretical market for licensing
 9 the very use at bar.’” *Google*, 593 U.S. at 38 (quoting 4 NIMMER ON COPYRIGHT § 13.05[A][4]).
 10

11 Not surprisingly, Plaintiffs’ circular argument has already been rejected by two federal
 12 courts. *See Kadrey*, 788 F. Supp. 3d at 1052 (finding that the existence of an AI training license
 13 market is “irrelevant,” because “this market is not one that the plaintiffs are legally entitled to
 14 monopolize,” and is thus “is not cognizable” under the fourth factor); *Bartz v. Anthropic PBC*, 787
 15 F. Supp. 3d 1007, 1032 (N.D. Cal. 2025) (market for AI training data licenses “is not one the
 16 Copyright Act entitles Authors to exploit”). Nor can the circularity problem be avoided by
 17 characterizing some copyright holders’ recent self-declared right to cash in on the “AI arms race”
 18 as “traditionally” licensed uses central to the core of plaintiff’s copyright interests. 4 PATRY ON
 19 COPYRIGHT § 10:152; *contra* RIAA Br., 12.
 20
 21

22 Further, contrary to amici’s claims, licensing agreements with “trillion-dollar companies”
 23 to train AI models will not promote the development of better technology or competition by small
 24

25 ¹³ See Jordan G. Teicher, *When Photography Wasn’t Art*, JSTOR DAILY,
 26 <https://daily.jstor.org/when-photography-was-not-art/> (Feb. 6, 2016); Livia Gershon, *Did*
 27 *Photography Really Kill Portrait Painting?* JSTOR DAILY, [https://daily.jstor.org/did-](https://daily.jstor.org/did-photography-really-kill-portrait-painting/)
 28 [photography-really-kill-portrait-painting/](https://daily.jstor.org/did-photography-really-kill-portrait-painting/) (Sept. 13, 2022).

¹⁴ *Id.*

1 developers. RIAA Br., 12; AAP Br., 14–15. It’s true that licenses may “promote...legal certainty”
 2 to the extent they allow incumbent AI companies to avoid Plaintiffs’ and amici’s own “threat[s]
 3 of litigation.” But a requirement to license millions of works for training purposes would raise
 4 massive barriers to entry for smaller competitors.

5 This isn’t a hypothetical concern. As the Federal Trade Commission recently explained,
 6 the “volume and quality of data required to pre-train a generative AI model from scratch may
 7 impact the ability of new players to enter the market,” especially if rightsholders “leverage their
 8 control to dampen or distort competition in generative AI markets.”¹⁵ Indeed, until recently a lack
 9 of access to adequate training data was a major impediment to participation in many areas of
 10 generative AI research, limiting research progress.¹⁶ To address this problem, nonprofits,
 11 researchers, and others constructed large datasets using data scraped from the open web—
 12 inevitably including copyrighted information—and made it available to the public.¹⁷ These open
 13 datasets, like LAION and Common Crawl, allowed more researchers and startups to develop
 14 generative AI tools.
 15
 16

17 Democratizing participation in the field led to rapid technological progress.¹⁸ A majority
 18

19
 20 ¹⁵ *Generative AI Raises Competition Concerns*, Federal Trade Commission,
[https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-](https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns)
 21 [competition-concerns](https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns) (June 29, 2023).

22 ¹⁶ Christoph Schuhmann, et al., “LAION-5B: An Open Large-Scale Dataset for Training
 23 Generation Image-Text Models,” <https://arxiv.org/abs/2210.08402> (Oct. 16, 2022).

24 ¹⁷ *Id.*; Stefan Baack, *A Critical Analysis of the Largest Source for Generative AI Training Data: Common Crawl*, ASSN. FOR COMPUTING MACHINERY,
[https://www.mozillafoundation.org/en/research/library/generative-ai-training-data/common-](https://www.mozillafoundation.org/en/research/library/generative-ai-training-data/common-crawl/)
 25 [crawl/](https://www.mozillafoundation.org/en/research/library/generative-ai-training-data/common-crawl/) (Feb. 6, 2024).

26 ¹⁸ *Id.* See also, e.g., PUBLICATIONS OFFICE OF THE EUROPEAN UNION, *The Synergy Between Open*
 27 *Data And AI: A Two-Way Relationship*, [https://data.europa.eu/en/news-events/news/synergy-](https://data.europa.eu/en/news-events/news/synergy-between-open-data-and-ai-two-way-relationship#:~:text=How%20open%20data%20increases%20accuracy,community%20to%20obtain%20new%20insight)
 28 [between-open-data-and-ai-two-way-](https://data.europa.eu/en/news-events/news/synergy-between-open-data-and-ai-two-way-relationship#:~:text=How%20open%20data%20increases%20accuracy,community%20to%20obtain%20new%20insight)
[relationship#:~:text=How%20open%20data%20increases%20accuracy,community%20to%20obtain%20new%20insight](https://data.europa.eu/en/news-events/news/synergy-between-open-data-and-ai-two-way-relationship#:~:text=How%20open%20data%20increases%20accuracy,community%20to%20obtain%20new%20insight) (Oct. 21, 2024).

1 of large language models, including GPT-3, the model that ChatGPT was originally built on, were
 2 trained on data from an large repository assembled by Common Crawl, a small nonprofit.¹⁹ One
 3 study found that at least 64 percent of large language models (“LLMs”) published between 2019
 4 and 2023 were built using Common Crawl data, and that the availability of that data led to
 5 improved competition and transparency in LLM development.²⁰ Researchers have built on
 6 Common Crawl’s work, creating specialized, high quality datasets that provided the foundation
 7 for important cybersecurity research²¹ and scientific advancements.²²

9 Shrinking the scope of fair use could derail this important progress. Licensing the immense
 10 quantity of works in databases like Common Crawl—which contains more than 9.5 petabytes of
 11 data from every corner of the internet—would be virtually impossible. It would require identifying
 12 and negotiating licenses with copyright owners for web pages of all kinds, many of which were
 13 scraped over a decade ago—and that’s to say nothing of the cost of paying licensing fees for all of
 14 these works. The result would be a far less competitive, dynamic generative AI market.

16 Finally, a licensing requirement would also reduce the quality and usefulness of AI tools
 17 that do eventually make it to market. For example, excluding relevant scientific materials from
 18 training datasets over licensing disputes could compromise the quality of models used in hospitals
 19 and doctors’ offices. *See* James Love, *We Need Smart Intellectual Property Laws for Artificial*
 20 *Intelligence*, SCIENTIFIC AMERICAN, <https://www.scientificamerican.com/article/we-need-smart->
 21

23 ¹⁹ Baack, *supra* Note 17.

24 ²⁰ Stefan Baack, *Training Data for the Price of a Sandwich*, Mozilla,
[https://www.mozillafoundation.org/en/research/library/generative-ai-training-data/common-](https://www.mozillafoundation.org/en/research/library/generative-ai-training-data/common-crawl/)
 25 [crawl/](https://www.mozillafoundation.org/en/research/library/generative-ai-training-data/common-crawl/) (Feb. 6, 2024).

26 ²¹ Ashim Mahara, *Cybersecurity Data Extraction from Common Crawl*,
<https://arxiv.org/html/2602.22218v1> (March 2025).

27 ²² [https://www.semanticscholar.org/paper/The-BigScience-ROOTS-Corpus:-A-1.6TB-](https://www.semanticscholar.org/paper/The-BigScience-ROOTS-Corpus:-A-1.6TB-Composite-Laurenccon-Saulnier/16c64f74ce0e6a59b0709c0d8e66596a5bc08ed6)
 28 [Composite-Laurenccon-Saulnier/16c64f74ce0e6a59b0709c0d8e66596a5bc08ed6](https://www.semanticscholar.org/paper/The-BigScience-ROOTS-Corpus:-A-1.6TB-Composite-Laurenccon-Saulnier/16c64f74ce0e6a59b0709c0d8e66596a5bc08ed6)

1 intellectual-property-laws-for-artificial-intelligence/ (August 7, 2023) ("When AI is used in
2 hospitals and in gene therapy, do you really want to exclude relevant information from the training
3 database?")
4

5 **CONCLUSION**

6 For the above reasons, amicus urges the Court to grant Anthropic's Motion for Summary
7 Judgment.
8

9 DATED: April 27, 2026

Respectfully submitted,

10 By: /s/ Corynne McSherry
11 Corynne McSherry

12 Victoria Noble
13 Mitchell L. Stoltz
14 ELECTRONIC FRONTIER FOUNDATION
15 815 Eddy Street
16 San Francisco, CA 94109
17 Telephone: (415) 436-9333
18 Facsimile: (415) 436-9993

19 *Attorneys for Amicus Curiae Electronic Frontier*
20 *Foundation*
21
22
23
24
25
26
27
28