

Exhibit A

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re Mosaic LLM Litigation

Master File Case No. 3:24-cv-01451-CRB
Consolidated with Case No. 3:24-cv-02653-CRB

**BRIEF OF THE COMPUTER AND
COMMUNICATIONS INDUSTRY
ASSOCIATION, A.I. PROGRESS, INC.,
AND NETCHOICE, LLC AS *AMICI
CURIAE* IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Before: Hon. Charles R. Breyer

Date: October 30, 2026

Time: 10:00 a.m.

Location: Courtroom 6, 17th Floor

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INTRODUCTION AND SUMMARY OF ARGUMENT

The fair use doctrine exists to ensure that copyright’s limited monopoly does not “stifle the very creativity which that law is designed to foster.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Training a generative AI model is a paradigmatic application of that principle—and one already being deployed in a wide range of innovative contexts and applications. Developers engage in intermediate, non-expressive copying of works—not to enjoy, display, or distribute them, but to build a fundamentally new kind of tool: one that analyzes statistical relationships among words and word fragments to enable human users not only to create *new* expression, but also to answer factual research questions, detect fraud, classify and organize information, assist people with disabilities, and achieve many other goals.

Courts have consistently held that such transformative uses further the constitutional objective of promoting the “Progress of Science and useful Arts,” even when the development process involves large-scale reproduction of copyrighted material. *See Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 30 (2021); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015). The Ninth Circuit has long recognized that fair use protects copying of copyrighted content undertaken to create new tools and information-access technologies, even where the tools are ultimately used to create new works that represent competition for the rightsholder. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527-28 (9th Cir. 1992); *Sony Computer Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 603 (9th Cir. 2000). Two federal courts have now squarely addressed the question presented here—whether use of copyrighted material in the process of training a generative AI model is a fair use—and reached the same conclusion: It is. *See Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007 (N.D. Cal. 2025); *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026 (N.D. Cal. 2025). This Court should join them.

Amici curiae submit this brief to address three points. First, the purpose of the Copyright Act in general, and the fair use doctrine in particular, is to promote “Progress.” U.S. Const. art. I, § 8, cl. 8. Thus, copyright grants no exclusive right over all “uses” of a work, but instead grants limited exclusive rights to “serve the cause of promoting broad public availability of literature, music, and the other arts.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

1 Affording fair use protection to generative AI training is fully consistent with that purpose.
 2 Plaintiffs’ contrary argument—that AI training is antithetical to the purposes underlying fair use
 3 because it lacks human authorship at the output stage—misreads the doctrine’s foundation, is
 4 inconsistent with settled law, and ignores how AI models actually work and how people use them.

5 Second, training a generative AI model is among the most clearly transformative uses a
 6 court has been asked to evaluate. The copyrighted works are not copied to be consumed or
 7 distributed; they are analyzed to extract statistical patterns that enable a tool to generate new text
 8 or other output at the direction of a human user. Both the purpose and the character of this use are
 9 categorically different from the original purpose and character of the underlying works.

10 Third, Plaintiffs’ market-dilution theory of harm misconstrues the fourth fair use factor and
 11 is contrary to the purposes of copyright. Neither the Supreme Court nor the Ninth Circuit has ever
 12 adopted a theory under which the creation of new, non-infringing expression constitutes
 13 cognizable market harm. To the contrary, both courts have recognized that copyright does not
 14 confer a monopoly against competition; fair use exists to prevent incumbent rightsholders from
 15 strangling the technologies that others will use to add to the store of human creativity and
 16 expression. *E.g.*, *Google*, 593 U.S. at 35; *Connectix Corp.*, 203 F.3d at 603.

17 ARGUMENT

18 **I. The Purpose of the Copyright Act, and of Fair Use in Particular, Is to Promote** 19 **Progress—Not Protectionism.**

20 Plaintiffs contend that using copyrighted works to train generative AI is inherently contrary
 21 to the purpose of fair use because “the fundamental purpose of the Copyright Act” is “the incentive
 22 for human creation,” which the outputs of generative AI tools lack. ECF No. 403 (“Pls. Opp’n”)
 23 at 22. Plaintiffs’ argument misapprehends the purpose of copyright and fair use, as well as
 24 generative AI’s function as a tool in assisting with, rather than replacing, human creativity.

25 The Constitution makes clear that copyright’s exclusive rights are a means to serve the
 26 public end of “promot[ing] the Progress of Science and useful Arts.” U.S. Const. art. I, § 8, cl. 8.
 27 As the Supreme Court explained in *Aiken*, “[c]reative work is to be encouraged and rewarded, but
 28 private motivation must ultimately serve the cause of promoting broad public availability of

1 literature, music, and the other arts.” 422 U.S. at 156. The “immediate effect” of copyright is to
 2 secure “a fair return for an ‘author’s’ creative labor,” but its “ultimate aim is, by this incentive, to
 3 stimulate artistic creativity for the general public good.” *Id.* And the Court has emphasized that
 4 this purpose has particular force in the face of new technology: When “technological change has
 5 rendered [the Act’s] literal terms ambiguous, the Copyright Act must be construed in light of this
 6 basic purpose.” *Id.* The Court has reaffirmed that principle for nearly a century. *See, e.g., Sony*
 7 *Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Feist Publ’ns, Inc. v. Rural*
 8 *Tel. Serv. Co.*, 499 U.S. 340, 352-354, 364 (1991) (rejecting the so-called “sweat of the brow”
 9 doctrine that provided copyright protection solely as a “reward for the hard work” of authorship);
 10 *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“The copyright law, like the
 11 patent statutes, makes reward to the owner a secondary consideration.”); *Fox Film Corp. v. Doyal*,
 12 286 U.S. 123, 127 (1932) (the “primary object” in conferring copyright monopoly is the public
 13 benefit). Consistent with this settled understanding of copyright’s constitutional purposes,
 14 Congress codified fair use in the 1976 Copyright Act. *See* H.R. Rep. No. 94-1476 at 66 (1976)
 15 (“Section 107 is intended to restate the present judicial doctrine of fair use”).

16 That is why the Copyright Act carefully balances incentives to authors—as one mechanism
 17 to promote publication—against other interests, including the public’s access to information and
 18 the ability of others to build upon earlier work. The Act “has never accorded the copyright owner
 19 complete control over all possible uses of his work.” *Sony Corp. of Am. v. Universal City Studios,*
 20 *Inc.*, 464 U.S. at 432. Rather, the Act grants only certain enumerated rights, 17 U.S.C. § 106, and
 21 creates a limitation for fair uses, 17 U.S.C. § 107—even where those uses might diminish the
 22 incentives otherwise granted to authors. This design reflects a normative judgment: Copyright
 23 exists to serve the public’s interest in access to a growing universe of useful information, and the
 24 exclusive rights the Act confers on authors are calibrated to that purpose.

25 Against this backdrop, fair use “permits courts to avoid rigid application of the copyright
 26 statute” when it would suppress innovation and creativity. *Google*, 593 U.S. at 18 (quoting *Stewart*
 27 *v. Abend*, 495 U.S. 207, 236 (1990)). The Supreme Court has accordingly recognized that
 28 copyright does not grant incumbents a veto over new technologies merely because they introduce

1 competitive efficiencies or alter established markets. *See Sony Corp. of Am. v. Universal City*
2 *Studios, Inc.*, 464 U.S. at 429.

3 History confirms the point. Nearly every major technological disruption in the production
4 or distribution of creative works was met by predictions from incumbent rightsholders that the new
5 technology would destroy creativity. The educational publishing industry worried that
6 photocopiers and their widespread use by librarians and educators would eviscerate the market for
7 their works, but the industry grew alongside photocopying and attendant benefits to science and
8 scientific progress. *See Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353 (Ct. Cl.
9 1973). The movie and television industry predicted that home video recording would be its
10 undoing; the Supreme Court held otherwise, *see Sony Corp. of Am. v. Universal City Studios, Inc.*,
11 464 U.S. at 456 (holding that time-shifting via VCR was fair use), home video became one of
12 Hollywood’s most lucrative revenue streams, and the industry thrived. Today, Plaintiffs claim that
13 generative AI models trained on their books will somehow replace human writers. Pls. Opp’n 13-
14 14, 22. In each prior instance, the technology that incumbents opposed resulted not in less
15 creativity, but in more—more creators, more works, more competition, and broader public access
16 to new knowledge and information. Plaintiffs’ arguments in this case are the latest iteration of a
17 familiar and wrongheaded refrain.

18 The Supreme Court’s decision in *Google LLC v. Oracle Am., Inc.* illustrates the point.
19 Google duplicated thousands of lines of code from Oracle’s Java SE application programming
20 interface in the process of creating Android—a new platform for software developers building new
21 applications in an entirely new computing environment: mobile devices. 593 U.S. at 11, 27-28.
22 The Court found this use of code from the copyrighted API transformative because Google’s
23 purpose—creating a “distinct and different computing environment” for software development—
24 was fundamentally different from Oracle’s purpose in creating Java for desktops and laptops. *Id.*
25 at 29-33. And the Court warned that allowing Oracle to “hold the key” to controlling all such
26 developmental use risked harm to the public and could hinder “creative improvements” such as
27 “new applications” and “new uses”—a result that “would interfere with, not further, copyright’s
28 basic creativity objectives.” *Id.* at 35, 39. Just as allowing Oracle to lock up the Java API code

1 would have stifled the very creativity copyright is meant to foster, allowing copyright holders to
2 lock up copyrighted works and prevent their use as training data would stifle the vast downstream
3 creativity that generative AI enables.

4 Plaintiffs resist this conclusion by arguing that copyright fosters exclusively human
5 authorship and that its fundamental purpose is to “presev[e] the incentive for human creation.” Pls.
6 Opp’n 22; *see also id.* at 13 (arguing that ““training generative AI models”” will ““undermine the
7 incentive for human beings to create things the old-fashioned way”” (quoting *Kadrey*, 788 F. Supp.
8 3d at 1034-1035)). This argument mistakes one mechanism for incentivizing new works (granting
9 limited rights to authors) with the purpose of the Copyright Act more generally—and, critically,
10 with the purpose of the fair use doctrine, which limits those rights. Fair use is no mere carve-out;
11 it is a mechanism affirmatively designed to serve copyright’s broader constitutional purposes of
12 promoting public access, downstream creativity, and progress. *Fogerty v. Fantasy, Inc.*, 510 U.S.
13 517, 527 (1994). Incentivizing human authorship—really, a *particular method* of human
14 authorship—is not the test for fair use.

15 Plaintiffs’ argument that a finding of fair use here would not promote human authorship
16 also fails on its own terms. Plaintiffs ignore how people use AI models. Generative AI models are
17 mere tools—built by human developers and deployed by human users who supply the initiative,
18 intent, judgment, and editorial selection that drive the creative process. Researchers use large
19 language models to synthesize scientific literature across disciplines. Lawyers and clinicians use
20 long-context models to review voluminous case files and medical records—a capability Mosaic
21 itself pioneered. *See* ECF No. 321 (“Defs.’ Mot.”) at 6. Educators use them to develop tailored
22 instructional materials. Independent creators—authors, musicians, designers—use them to draft,
23 revise, and polish their work. In each case, the human user remains the locus of creative decision-
24 making; the model is the instrument.

25 This is nothing new. The history of creative expression is the history of humans using ever-
26 more-sophisticated tools to produce works of authorship. The photographer’s camera, the writer’s
27 typewriter and word processor, the filmmaker’s editing software, the musician’s digital audio
28 workstation, the graphic designer’s software suite—each of these tools performs significant work

1 in service of the human creator’s expressive vision. Generative AI is the latest iteration of this long
2 tradition. Generative AI, like many tools before it, is a tool for computer-assisted human
3 expression, not the computer’s own expression.

4 The Supreme Court settled more than a century ago that creative works produced using
5 new technologies remain the work of human authors. In *Burrow-Giles Lithographic Co. v. Sarony*,
6 the Court upheld copyright in a photograph, rejecting the argument that photography involved a
7 “merely mechanical” process incapable of supporting authorship. 111 U.S. 53, 59 (1884). The
8 photographer’s “selecti[on] and arrang[ement]” of the subject—positioning, lighting, costume—
9 constituted the requisite “original intellectual conceptions.” *Id.* at 58, 60. For the same reasons,
10 works created by humans using generative AI tools remain eligible for copyright protection.

11 Plaintiffs invoke *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025), Pls. Opp’n 22, for
12 the proposition that “human authorship is [a] prerequisite for protection under the Copyright Act.”
13 Pls. Opp’n 22. But *Thaler* addressed only whether a machine itself could be listed as the sole author
14 of a copyrighted work on a registration, and it expressly recognized that “[a]dhering to the human-
15 authorship requirement does not impede the protection of works made with artificial intelligence.”
16 130 F.4th at 1049. Authorship turns on the human contribution to a work, not on whether a
17 machine was used in making it. *Thaler*’s narrow ruling in this rapidly evolving area of law
18 provides no support for shutting down a revolutionary new outlet for human expression; it does
19 not even purport to address fair use for training, which involves the use of inputs rather than
20 authorship of outputs.

21 Moreover, the humans who build, deploy, and use these models do respond to economic
22 incentives—and they are the very actors whose creative activity the Copyright Act is designed to
23 promote. Developers invest substantial resources in training models. Researchers use them to
24 accelerate scientific discovery and promote knowledge. Users employ them for a wide range of
25 purposes, including to help them create works of authorship that they can publish, distribute, and
26 commercialize. To restrict the ability of these actors to develop and use AI tools for public benefit
27 would subordinate the constitutional purpose of copyright to the protection of incumbent business
28 models. Fair use exists precisely to prevent that result. *See Google*, 593 U.S. at 34.

1 II. Training Generative AI Models Is a Transformative Use.

2 Training a generative AI model is among the most clearly transformative uses courts have
3 ever been asked to evaluate. *Bartz*, 787 F. Supp. 3d at 1033. The training process does not
4 reproduce copyrighted works to perform, display, or distribute them to a new audience; instead, it
5 analyzes these works to extract statistical patterns that enable generative AI models to perform a
6 variety of novel tasks. Both the purpose and the character of this use are categorically different
7 from the expressive purpose and character of the original works. Indeed, the Copyright Act and
8 Supreme Court precedent compel the conclusion that training is transformative.

9 The first factor in the statutory fair use analysis—“the purpose and character of the use,”
10 17 U.S.C. § 107(1)—turns primarily on whether the challenged use “adds something new, with a
11 further purpose or different character, altering the first with new expression, meaning, or message.”
12 *Campbell*, 510 U.S. at 579. “[I]t asks, in other words, whether and to what extent the new work is
13 ‘transformative.’” *Id.* In *Campbell*, the Supreme Court held that a rap artist’s use of a country
14 musician’s song was transformative because it used the original work for a fundamentally different
15 purpose: to comment on and criticize the original work. *Id.* at 580-81. The Court emphasized that
16 the “more transformative the new work, the less will be the significance of other factors, like
17 commercialism, that may weigh against a finding of fair use.” *Id.* at 579.

18 In *Google*, the Court confirmed that this transformative-use analysis is not limited to the
19 context of creative commentary or traditional expressive arts. 593 U.S. at 11. There, Google’s
20 copying of code from Oracle’s Java software to build the Android smartphone platform was highly
21 transformative because Google’s purpose—creating a new platform for software development on
22 mobile devices—fundamentally differed from Oracle’s purpose in creating Java for computers. *Id.*
23 at 27-28. The Court reached this conclusion “even though Google’s use was a commercial
24 endeavor.” *Id.* at 32. Crucially, the Court recognized that Google’s copying to build a new tool
25 served “the basic constitutional objective of copyright itself” (*id.* at 30): “to promote the Progress
26 of Science and useful Arts.” *Feist*, 499 U.S. at 349 (quoting U.S. Const. art. I, § 8, cl. 8).

27 Most recently, the Court reaffirmed that the “‘central’ question” for the first factor is
28 whether the use “adds something new, with a further purpose or different character.” *Andy Warhol*

1 *Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 528 (2023) (quoting *Campbell*, 510
 2 U.S. at 579). Cautioning that transformativeness requires more than the mere addition of “new
 3 expression” or a new aesthetic, *id.* at 525, the Court held that licensing a downscaled print of an
 4 Andy Warhol silkscreen of another artist’s photograph of the musician Prince to serve as a
 5 magazine illustration depicting the musician was not transformative because in that instance the
 6 print was licensed for the exact same purpose as the original photograph. *Id.* at 529-33. Unlike
 7 Google’s use of Oracle’s code in “a new system created for new products,” which was in a “distinct
 8 and different computing environment,” *id.* at 533 n.8, the at-issue “environment” for the Warhol
 9 print and the original artist’s photo were not in this case “distinct and different,” *id.* at 536. *Warhol*
 10 therefore reemphasizes that the transformative-use inquiry is purpose-driven: Where the secondary
 11 use is for “substantially the same purpose” as the original, the use is not transformative. *Id.* at 526.

12 Plaintiffs read *Warhol* to mean that a use is non-transformative whenever the resulting
 13 technology could be used to produce works in the same general category as the originals, absent
 14 “independent justification.” Pls. Opp’n 14-15. That inverts the inquiry. *Warhol* turned on the fact
 15 that the Warhol print and the original photograph were licensed for the identical use—magazine
 16 illustration of the same musician. 598 U.S. at 529-33. Here the original works are novels to be
 17 read; the challenged use is the derivation of statistical parameters that no author owns and no
 18 human can even read. Defs.’ Mot. 11-13.

19 Taken together, these decisions establish that the transformative-use inquiry asks whether
 20 the secondary use serves a genuinely different purpose than the original did. Under this framework,
 21 the use of copyrighted works to train a generative AI model serves a different purpose than the
 22 original purpose of the works on which the model is trained.

23 A novel exists to entertain, to provoke thought, and to immerse a reader in a narrative—as
 24 Plaintiffs themselves testified. *See* Defs.’ Mot. 12. A work of history or reportage exists to inform.
 25 A commentary exists to convey specific opinions and expressions to an audience. When
 26 developers train a generative AI model on these works, however, the purpose is not to read, enjoy,
 27 or convey the expression contained within them. Nor is the purpose of training to provide users
 28 with the very same novels, histories, or commentaries on demand; if that were the case, the goal

1 could be achieved through traditional databases and search algorithms, systems that are vastly
2 simpler and require significantly less capital investment than the neural networks that underlie
3 generative AI. Instead, the purpose is computational: to analyze statistical relationships among
4 oceans of text fragments in order to create *new* products—generative AI models—that can offer
5 the public creative and innovative uses not achievable by the copyrighted materials in the training
6 data. *See Google*, 593 U.S. at 30.

7 This distinction mirrors a long line of cases establishing that non-expressive uses of
8 expressive works are fair use. For example, in *Authors Guild, Inc. v. HathiTrust*, the Second Circuit
9 ruled that creating a digital database of books to allow users to search for specific terms, and to
10 facilitate access for print-impaired readers, was a transformative use because that use of the books
11 served a different function from the original. 755 F.3d 87, 97-98 (2d Cir. 2014). Similarly, the
12 Second Circuit evaluated Google’s copying of tens of millions of books to enable “text mining”
13 and “data mining” tools that track the statistical frequency of words over time, and found the use
14 highly transformative because Google did not copy the books for consumption of their expressive
15 content. *Authors Guild v. Google, Inc.*, 804 F.3d at 209, 217. The Ninth Circuit reached analogous
16 conclusions regarding image search engines, holding that the reproduction of copyrighted images
17 as thumbnails to facilitate a new method of finding information on the internet is a transformative
18 purpose. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Kelly v. Arriba*
19 *Soft Corp.*, 336 F.3d 811, 818-19 (9th Cir. 2003). Training a generative AI model is the natural
20 technological evolution of these judicially-endorsed, non-expressive uses of whole-work copies.

21 Recognizing that using copyrighted materials to train generative AI models involves
22 fundamentally different purposes than those for which the original materials were created, courts
23 in this district have correctly applied the Supreme Court’s transformativeness framework to find
24 that training is transformative. Judge Alsup recognized this distinction in *Bartz*, finding that
25 Anthropic’s use of copyrighted books to train its models was “quintessentially transformative” and
26 “among the most transformative many of us will see in our lifetimes.” 787 F. Supp. 3d at 1022,
27 1033. The purpose of using books to train models was not to “replicate or supplant them—but to
28 turn a hard corner and create something different.” *Id.* at 1022. Judge Chhabria reached the same

1 conclusion on the first factor in *Kadrey*, concluding there was “no serious question that Meta’s use
2 of the plaintiffs’ books had a ‘further purpose’ and ‘different character’ than the books—that it
3 was highly transformative.” 788 F. Supp. 3d at 1044. “The purpose of Meta’s copying was to train
4 its LLMs, which are innovative tools that can be used to generate diverse text and perform a wide
5 range of functions,” Judge Chhabria reasoned, while “[t]he purpose of the plaintiffs’ books, by
6 contrast, is to be read for entertainment or education.” *Id.*

7 The transformative use inquiry exists to ensure that the limited monopoly of copyright does
8 not “stifle the very creativity which that law is designed to foster.” *Campbell*, 510 U.S. at 577. The
9 real-world applications of generative AI models powerfully illustrate the transformativeness of the
10 use. Mosaic was founded to reduce the cost and computing power required to train AI models, and
11 it released the MPT models free of charge as open-source tools for the research community,
12 publishing their code and weights for an audience of developers and researchers rather than
13 consumers. Defs.’ Mot. 3, 6. That practice is the foundation of an entire scientific ecosystem: open-
14 weight model releases and openly documented training corpora are what allow university labs,
15 non-profit research institutes, and resource-constrained organizations to reproduce results, audit
16 model behavior, study bias and safety, and build on one another’s work. Open models are in turn
17 adapted to purposes no novel or other literary work could serve: analyzing genomic and clinical-
18 trial data, translating low-resource languages, powering assistive technologies for people with
19 disabilities, detecting fraud in financial data, furthering AI research, and reviewing the voluminous
20 legal and medical records that long-context models—a capability in which Mosaic was among the
21 industry leaders—were built to process. Defs.’ Mot. 6. Enterprises, hospital systems, and public
22 agencies use platforms like Defendants’ to train and deploy models on their own proprietary data,
23 without ever exposing that data to a third party. Defs.’ Mot. 3. None of these applications share
24 any connection or purpose with the original expressive use of the copyrighted works in the training
25 data, and exemplify the very definition of adding “a further purpose or different character” to
26 existing copyrighted works. *Campbell*, 510 U.S. at 579.

27 This Court should reject Plaintiffs’ incorrect analysis of the transformativeness inquiry and
28 join *Bartz* and *Kadrey* in finding that training generative AI models is a transformative use.

1 **III. Plaintiffs’ Market Dilution Theory Misconstrues the Fair Use Inquiry and Is**
 2 **Antithetical to the Purposes of Copyright.**

3 Plaintiffs miss the mark in arguing that the fourth fair use factor cuts against AI training
 4 because generative AI models might create “AI-generated competing works” that dilute the market
 5 and indirectly substitute for their works. Pls. Opp’n 20-24. Recognizing “market dilution” as a
 6 form of market harm under factor four would undermine the fundamental purpose of copyright
 7 law to promote progress and run headfirst into decades of Supreme Court and Ninth Circuit
 8 authority recognizing that copyright owners do *not* enjoy the right to exclude competition beyond
 9 a work’s specific, copyrightable expression. The fourth fair use factor—harm to the market for the
 10 copyrighted work—has never been understood to reach competitive pressure from works that are
 11 not substantially similar to the copyrighted work and therefore do not substitute for it. And there
 12 is good reason to proceed cautiously through this uncharted territory, as stretching the market harm
 13 inquiry beyond its traditional contours threatens the First Amendment and the Progress Clause.

14 Plaintiffs argue that Defendants’ “models could replace Plaintiffs as writers” and that there
 15 could be “an unmitigated flood of AI-generated books that compete with Plaintiffs’ works.” Pls.
 16 Opp’n 20-22. In support, Plaintiffs point to Judge Chhabria’s decision in *Kadrey* where he opined
 17 in dicta that “using copyrighted books to train an [AI model] might harm the market for those
 18 works [] by helping to enable the rapid generation of countless works that compete with the
 19 originals, even if those works aren’t themselves infringing.” *Kadrey*, 788 F. Supp. 3d at 1052. He
 20 deemed “[h]arm from this form of competition” as “the harm of market dilution,” and became the
 21 only court to propose such a theory (although he found it had not been established on the record
 22 before him). *Id.* This Court should not accept Plaintiffs’ invitation to apply that reasoning.

23 Recognizing theoretical market harm from works that are not “substantially similar” to a
 24 plaintiff’s work, Opp’n 22, cannot be squared with the Constitutional foundations or underlying
 25 purposes of copyright law and the fair use doctrine to promote—rather than restrict—expression.
 26 Such a view would transform copyright from a statute designed to foster the creation of new works
 27 into one that stifles competition. Copyright “serve[s] the cause of promoting broad public
 28 availability of literature, music, and the other arts.” *Aiken*, 422 U.S. at 156. Thus, copyright

1 protection, which exists “to stimulate artistic creativity for the general public good” (*id.*), extends
 2 only to “Authors[’] ... respective Writings,” rather than to concepts and ideas. U.S. Const. art. I,
 3 § 8, cl. 8. Indeed, copyright law has never been understood to stretch so far as to condemn works
 4 that do not actually infringe on specific expression. *See Woodland v. Hill*, 136 F.4th 1199, 1206
 5 (9th Cir. 2025) (infringement requires a showing of “copying of constituent elements of the work
 6 that are original”); *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 538 (5th Cir.
 7 1994) (copyright injunction may extend to “only those future versions ... *that are substantially*
 8 *similar*” to the infringed work) (emphasis added)). Fair use reflects this balance and “permits
 9 courts to avoid rigid application of the copyright statute.” *Google*, 593 U.S. at 18.

10 Plaintiffs’ dilution theory would brush aside the balance reflected in the Constitution and
 11 decades of copyright jurisprudence by recognizing purported “harms” to authors from competing
 12 *new* expression—indeed, harms to authors whose works have not been copied at all—thus
 13 advancing the very stifling and expression-suppressing effect fair use is intended to prevent. A
 14 generative AI model may help people create new stories that compete with books that were not
 15 used for training just as well as it helps create competitors to books that were. But dilution theory
 16 disregards completely whether the new books reproduced any protectable elements at all and
 17 condemns them simply because they might compete for story time. If accepted, that would be an
 18 extraordinary expansion of copyright law. On Plaintiffs’ theory, the millions of authors whose
 19 books were never used to train have the same dilution grievance as Plaintiffs whose books were.
 20 If the asserted harm occurs whether or not the plaintiff’s work is used, it is not harm caused by the
 21 use of the copyrighted work—which is what § 107(4) asks.

22 Consistent with the limited purposes in copyright, the fourth fair use factor—harm to the
 23 market for the copyrighted work—has never been understood to recognize as harmful the
 24 competitive pressure introduced by original, noninfringing works that do not *directly* substitute for
 25 the subject work. The fourth fair use factor is intended to assess the harm to “the potential market”
 26 for “*the* copyrighted work.” 17 U.S.C. § 107(4) (emphasis added). The question is whether *this*
 27 use substitutes for *these* works, not whether a category of technology may over time affect a market
 28 in which these and other works compete.

1 While the Supreme Court has explained that “[t]he fourth statutory factor focuses upon the
 2 ‘effect’ of the copying in the ‘market for or value of the copyrighted work,’” *Google*, 593 U.S. at
 3 35 (quoting 17 U.S.C. § 107(4)), it has also made clear that not all market harms are cognizable.
 4 In particular, the Court has repeatedly rejected efforts to expand the meaning of the fourth factor
 5 to preclude competition from transformative uses. In *Campbell*, for example, the Court held that
 6 it was fair use to publish a parody song despite the risk that such a song could “kill[] demand for
 7 the original.” 510 U.S. at 591-92 (noting that when a “lethal parody,” like a critical movie review,
 8 kills demand for the original, it does not produce a harm cognizable under the Copyright Act). The
 9 Court reasoned that not all uses “affect the market for the original in a way cognizable under [the
 10 fourth] factor” because not all market harms are “cognizable under the Copyright Act,” especially
 11 “when ... the second use is transformative” as opposed to “mere duplication of the entirety of an
 12 original.” *Id.*

13 Decades later, the Supreme Court in *Google* again rejected an effort to preclude a
 14 transformative use on the basis of market harm. 593 U.S. at 40. There, the Court held that it was
 15 fair use for Google to copy software code in pursuit of developing a new mobile operating system
 16 that, to have any chance of success, needed to attract developers familiar with the copied code. *See*
 17 *id.* at 29-33. The Court warned against letting Oracle control downstream “creative improvements”
 18 such as “new applications” and “new uses” under the guise of copyright. *Id.* at 39. That “would
 19 interfere with, not further, copyright’s basic creativity objectives.” *Id.* Indeed, the Court
 20 specifically rejected the myopic view that “a potential loss of revenue” is sufficient to establish a
 21 cognizable market harm—“even if directly translated into foregone dollars”—because such an
 22 “‘all or nothing’ [approach] would [not] be faithful to the Copyright Act’s overall design.” *Id.* at
 23 23, 35. Rather, courts must “consider not just the amount but also the source of the loss” and “take
 24 into account the public benefits the copying will likely produce,” such as “concern for the creative
 25 production of new expression.” *Id.* at 35. Dilution theory cannot be reconciled with *Campbell* and
 26 *Google* because it penalizes a quintessentially transformative use, *see supra*, precisely because it
 27 will facilitate the “broad public availability of literature, music, and the other arts” by enabling
 28

1 users to create new expression that may compete with the existing body of information. *Aiken*, 422
 2 U.S. at 156.

3 The Ninth Circuit has also long rejected copyright as a means of controlling competition.
 4 In *Sony Computer Ent., Inc. v. Connectix Corp.*, the court held that it was fair use to copy code
 5 from the plaintiff’s gaming devices to create a competing gaming system. 203 F.3d at 607. The
 6 court reasoned that creating “a legitimate competitor in the market for [gaming] platforms” is fair
 7 use despite “some economic loss by [plaintiff] as a result of this competition” because “copyright
 8 law [] does not confer [] a monopoly” to control “the market” for competing devices. *Id.*; *see also*
 9 *Sega Enters.*, 977 F.2d at 1523 (“a use which simply enables the copier to enter the market for
 10 works of the same type as the copied work” does not cause cognizable market harm). Plaintiffs’
 11 dilution theory is premised on the same market control theory that the Ninth Circuit has rejected.¹

12 As Judge Alsup explained in *Bartz*, “the fourth factor focuses on *actual or potential* market
 13 substitution” and “points against fair use when a copyist makes copies available that displace
 14 demand for copies the copyright owner already makes available or readily could.” 787 F. Supp.
 15 3d at 1031. But Plaintiffs’ dilution theory does something different:

16 [The plaintiffs’] complaint is no different than it would be if they complained that
 17 training schoolchildren to write well would result in an explosion of competing
 18 works. This is not the kind of competitive or creative displacement that concerns
 the Copyright Act. The Act seeks to advance original works of authorship, not to
 protect authors against competition.

19 *Id.* at 1032. Neither Plaintiffs’ nor *Kadrey*’s discussion of dilution seriously contends with this or
 20 other precedent.

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 24 ¹ Plaintiffs suggest that *Sega* and *Google* are confined to the copying of “functional or non-
 25 expressive elements of computer code.” Pls. Opp’n 23. But the principle those cases apply is not
 26 limited to code. *Sega* held that “a use which simply enables the copier to enter the market for works
 27 of the same type as the copied work” is not cognizable harm, 977 F.2d at 1523, and *Google* warned
 28 against allowing a rightsholder to “hold the key” to downstream “new applications” and “new
 uses,” 593 U.S. at 35, 39. These cases turned on the difference between substituting for a work
 and competing with it, not on the fact that the copyrighted work was computer code. In any event,
 in this case, the statistical patterns extracted during AI training are themselves factual, non-
 expressive elements contained within plaintiffs’ works, and copying the entire work as an
 intermediary step was necessary to access those unprotectible elements, just as was the case in
Sega and *Connectix*.

Finally, the Court should not take lightly the serious implications for expression that dilution theory invites by treating as a societal evil the greater and more efficient production of new, non-infringing expression. While “copyright’s built-in free speech safeguards are generally adequate to address” First Amendment rights, that presumption does not hold—and further First Amendment scrutiny is required—when the “traditional contours of copyright protection” have been altered. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *see generally* Edward Lee, *Copyright Dilution Under Constitutional Scrutiny*, 25 Chi.-Kent J. Intell. Prop. 1 (Feb. 18, 2026). Plaintiffs appear to have no evidence of a competing work generated by Defendants’ models, resorting instead to generic press clippings. *See* Pls. Opp. 20-21; Defs.’ Mot. 8, 19. But their dilution theory would nonetheless condemn the new, non-infringing works that users may create with such tools, and the messages they convey, as harmful—a grave and troubling expansion of the “traditional contours of copyright protection.” *Eldred*, 537 U.S. at 221. Importantly, AI tools can be used to create new content that expresses ideas that are different and even oppose the ideas expressed in copyrighted works used for training. Expanding copyright in the manner Plaintiffs suggest would effectively allow copyright holders to use their copyrights to interfere with the creation of original works with different or opposing points of view, a result that would be starkly inconsistent with the First Amendment.

The Court need not engage in a detailed First Amendment analysis because longstanding copyright jurisprudence makes clear that it would be antithetical to the Progress Clause and fair use doctrine to allow copyright owners to suppress technology that enables the creation of competing but non-infringing speech. Plaintiffs’ dilution theory can and should be rejected on that basis alone.

CONCLUSION

The Court should hold that training a generative AI model on copyrighted works is a fair use.

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Respectfully submitted,

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