

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANDREA BARTZ, CHARLES GRAEBER,
and KIRK WALLACE JOHNSON,
individually and on behalf of
others similarly situated,

Plaintiffs,

v.

ANTHROPIC PBC,
Defendant.

Case No. 24-CV-5417-WHA

San Francisco, California
Date: May 22, 2025
12:00 p.m.

.....

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT
ORAL ARGUMENT

BEFORE THE HONORABLE WILLIAM H. ALSUP
SENIOR UNITED STATES DISTRICT COURT JUDGE

Proceedings recorded by machine shorthand,
transcript produced by computer-aided transcription.

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P R O C E E D I N G S

(Court called to order at 11:52 p.m.)

DEPUTY CLERK: Now calling Case Number 24-cv-50417, Bartz, et al., versus Anthropic PBC.

Counsel, could you please come forward to the podiums and announce your appearances beginning with plaintiffs.

MR. NATH: Good afternoon, Your Honor. Rohit Nath from Susman Godfrey on behalf of the plaintiffs. With me here today is Craig Smyser and Alejandra Salina from Susman Godfrey, Jacob Miller and Reilly Stoler from Lieff Cabraser.

I'll add my partner Mr. Nelson and Ms. Geman could not make it to the hearing today after it was rescheduled from yesterday to -- from tomorrow to today because there was a simultaneous hearing in the OpenAI matter which Judge Stein requested the attendance of lead counsel.

THE COURT: All right. Thank you.

And?

MR. FARRIS: Good morning, Your Honor. Joe Farris with Arnold & Porter for Anthropic. I'm here with my colleagues Doug Winthrop and Jessica Gillotte from Arnold & Porter, Joe Wetzel from Latham & Watkins, and my client Devon Hanley Cook and Brian Israel.

THE COURT: Who are all those people on your side of the room back there?

MR. FARRIS: Too many people to introduce, but there

1 are other Arnold & Porter lawyers and other Anthropic
2 representatives.

3 THE COURT: All right. Welcome to all of you.

4 I see you don't have as many people on your side
5 today.

6 MR. NATH: This time unfortunately not.

7 THE COURT: I'm just teasing. It's okay.

8 All right. This is a motion, but while I got you both
9 here, the -- I'm going to hold up something. This is the under
10 seal part -- part of the record, and you see the redacted out
11 things?

12 How am I supposed to rule in favor of either side when
13 you're hiding the deck of cards? This is not a deck of 52.
14 This is a deck of about 40 cards. And I can't -- I don't know
15 what the hidden cards are.

16 Now, you're the one that wants to win the motion, so
17 I'm going to start with you. Now, this was submitted by the
18 authors. It's not -- you didn't submit it, but it looks like
19 it's one of your documents.

20 So how am I supposed to -- how am I supposed to rule
21 in your favor if these materials are being redacted?

22 MR. FARRIS: Because the redactions you're pointing to
23 there are privileged redactions. I recognize them from the
24 document.

25 And so we may have an issue where you're not able to

1 distinguish what's privileged versus what's being sealed based
2 on the format. I don't know if we --

3 THE COURT: Is there someplace -- how am I supposed to
4 know that that's allegedly privileged?

5 MR. FARRIS: Well, we were envisioning that you'd be
6 reviewing the highlighted versions of the documents where you
7 can see yellow highlights for what we're seeking to seal. We
8 were not envisioning that you would be --

9 THE COURT: Did we get any such document?

10 He says we didn't get any such document where we could
11 see through the document. Do you think you submitted one? If
12 so, there's been a snafu.

13 MS. GILLOTTE: So it's the --

14 THE COURT: Why don't you come up here so -- if you're
15 talking to me, I can't hear you.

16 MR. FARRIS: Sorry. I didn't file this motion, so I
17 want to make sure I get it right.

18 MS. GILLOTTE: Hello, Judge. Are those the copies
19 that plaintiffs filed --

20 THE COURT: These are from what plaintiff filed, but
21 it looks like it's your documents.

22 MS. GILLOTTE: So if there are no -- if there are no
23 highlights, then it might be that the entire -- we haven't had
24 a chance to review plaintiffs' renewed or revised motion to
25 file under seal from last night yet.

1 (Interruption for clarification by the court reporter.)

2 THE COURT: There is the yellow that says books --
3 what?

4 DEPUTY CLERK: Please state your appearance.

5 MS. GILLOTTE: Oh, hi. My name is Jessica Gillotte.
6 I'm counsel for Anthropic.

7 THE COURT: All right. We have a remote court
8 reporter today. Thank you.

9 Well, let's go ahead with the argument. No one is
10 going to win this motion, it will be denied, unless this is
11 sorted out so that I can see what I'm supposed to see instead
12 of 40 cards out of a deck of 52. Okay?

13 I want you to look here, Ms. Jessica. Look at that,
14 what I got there, and that's what is supposedly under seal now.
15 This is not the public version. This is the under seal
16 version. I want you to see what I'm up against.

17 MR. FARRIS: So these are definitely privileged
18 redactions, and we --

19 THE COURT: It doesn't say that.

20 MR. FARRIS: You're correct. One thing we could do is
21 go back and redo these and literally write privileged
22 redactions every place it's a privileged redaction to make that
23 abundantly clear.

24 THE COURT: Well, what if it's a phony -- I'm going to
25 tell you, in my experience only about 20 percent of assertions

1 of privilege are legit. The rest of them are phony boloney,
2 and they're just dressed up and called privileged. Now, maybe
3 you're in the 20 percent.

4 But would it be fair for somebody to win or lose this
5 case based on phony privilege assertions? I don't know.

6 You're going to have to tell me -- submit today by
7 midnight something that tells us if these are privileged and
8 what the basis for the privilege is.

9 MR. FARRIS: Okay.

10 THE COURT: And if there was anyone who was not a
11 lawyer who is copied on it, that blows the privilege unless the
12 individual is the one -- all the time putting a business lawyer
13 on it and then making business decisions with lawyers getting
14 cc'd.

15 MR. FARRIS: We're aware of that. You may notice
16 several of the documents are actually marked attorney-client
17 privilege, and we produced them anyway because we thought there
18 were lawyers on it, but nonetheless, we didn't think it was
19 privilege. So we really were aware of that when we went
20 through.

21 Now, we can go through, we can mark them all --

22 THE COURT: Please do that.

23 MR. FARRIS: -- and tie it to a privilege log as well
24 so you can see that.

25 THE COURT: Thank you. All right. Do that by

1 midnight.

2 Okay. Now we're going to turn to the actual argument,
3 so who's going to do that?

4 MR. FARRIS: That's me, Your Honor.

5 THE COURT: All right. You get to go first.

6 You get to sit down.

7 Go ahead.

8 MR. FARRIS: Thank you, Your Honor.

9 I'd like to start by reading just one very short quote
10 from their papers that I think cuts to the quick of what's
11 going on with the plaintiffs' case here. "Claude itself is not
12 a substitute for books." That's from their papers, from their
13 expert.

14 THE COURT: Sorry. I didn't -- you read it too fast.
15 Read it slowly.

16 MR. FARRIS: "Claude itself is not the substitute for
17 books." That's from James Malackowski, their expert, their
18 licensing person. It's at paragraph 38.

19 THE COURT: Please adjust the microphone so it catches
20 your voice better. You don't have to bend over. Make sure
21 you've got it as close as you can get it. But the people in
22 the back are not going to be able to hear you.

23 MR. FARRIS: Okay. I'll focus on talking into the
24 microphone.

25 THE COURT: That's much better. Thanks.

1 MR. FARRIS: No problem.

2 This particular admission that Claude is not the
3 substitute for books creates an insurmountable problem for
4 them. It's because there's one claim in this case. It's a
5 claim that Claude was trained, and that is the claim of
6 infringement based on the training.

7 There's no claim that anything Claude has ever output
8 has caused infringement, has been expressive content that's
9 similar to what the plaintiffs produce. That gives them
10 nowhere to really go on factors one and four.

11 So if you hold that thought for a second, I can
12 address kind of what I think the heart of our position on
13 factors one and four is.

14 For factor one, we all know the central question is
15 transformativeness. That comes from the *Campbell* case. That
16 was reiterated by the *Warhol* case very recently. Whether the
17 secondary work supersedes the original or has a further purpose
18 and different character, *Warhol* called that a problem of
19 substitution.

20 The *Warhol* court also emphasized that
21 transformativeness is a matter of degree. So if you think
22 about it as a sliding scale as the court put it in *Campbell*,
23 the more transformative a work is, the less will be the
24 significance of other factors. I think that's a very important
25 principle to bear in mind as you're looking at this case.

1 THE COURT: Read that to me again and don't leave
2 anything out of that sentence. Read to me what the Supreme
3 Court said that you just read to me.

4 MR. FARRIS: This is from the *Campbell* case, so the 2
5 Live Crew case, the more transformative a work is, the less
6 will be the significance of other factors. I do have ellipses
7 at the end of that sentence.

8 THE COURT: Give me the page number.

9 MR. FARRIS: The page number is 579.

10 THE COURT: Thank you.

11 MR. FARRIS: Okay. All right. So when you look at
12 what cases they're citing to on transformativeness and what
13 cases we're citing, I think it will become clear why that's
14 important.

15 So on one end of the scale, their side, they're citing
16 cases where the courts are consistently finding not
17 transformative uses, and the consistent theme, what's happening
18 in those cases is that the original work is being repackaged,
19 redistributed, but is essentially just a means of getting the
20 original creative expression to the end-user, just a new way of
21 doing something like that, that -- a new way of shifting the
22 original expression to a new person.

23 Now, that describes *Napster*, the peer-to-peer file
24 sharing cases they cite. They cite six of those cases.
25 They're all about substituting for someone's work, providing an

1 exact substitute.

2 It also describes the Second Circuit *Texaco* case they
3 cite and rely on heavily about the oil scientists who were
4 photocopying scientific journals and handing them off to each
5 other. Again, just providing the direct substitute for the
6 original work with the expressive content in it.

7 These are their lead cases. These are the cases they
8 tell you are most comparative here on transformativeness. That
9 should tell you a lot.

10 Now, on the other end of the spectrum, the cases we
11 cite, you actually see something new that's being created that
12 is not a substitute for the original. That's the *Sega* case,
13 the *Connectix* cases. These are the reverse-engineering cases,
14 you know, with PlayStation, Sony, and Sega Genesis cartridges
15 where a direct competitor reverse-engineered, copy copyrighted
16 expression as an intermediate copy, and then created a new
17 product.

18 *Google versus Oracle* goes a step further. The copying
19 wasn't even intermediate there. The expression was in the end
20 product, but they created a new product. That was
21 transformative.

22 *Perfect 10, Ariba*, the search engine cases, copied
23 images from the Internet to create a search engine. Same
24 expression was there in the end product, but it was a new
25 product, so it was transformed.

1 And the last group of cases I point you to really
2 focus on are the *Google Books* and *HathiTrust* cases. They
3 copied entire libraries to create a new tool that did something
4 different, that expanded the functionality of the works, rather
5 than just delivering --

6 THE COURT: What was the fact pattern in the *Google*
7 *Books* case?

8 MR. FARRIS: Yeah, so there's two of them. The
9 *HathiTrust* is the one that comes first, and that is where the
10 nonprofit collective of universities are working with Google to
11 scan their entire libraries. And in that case they built a
12 more rudimentary search tool where they could kind of count
13 where words appeared in the books. So that was a fair use
14 case. Frankly, an easier one because of the facts.

15 About a year later the *Google Books* case, Google
16 itself got sued as part of the same project. They had the same
17 scan of the entire library of books, but now it was a
18 commercial entity, obviously, so it was a harder decision, and
19 Google was doing different things with the books too.

20 The thing I think that was closest to the line that
21 Google was doing was creating a search functionality but then
22 allowing readers to review snippets of the books, so you could
23 pull up at a time, like, three snippets and just read
24 expressive text from the books. The author said, well, you're
25 taking our market by doing that, you're showing people our

1 portions of our books, and we're not getting paid for that. So
2 they argued this is substitution. This is very close to the
3 line.

4 And Judge Laval, who was the judge in the Second
5 Circuit who decided that case, who is obviously well respected
6 as far as fair use issues, he said, no, that's not. And he
7 said that it was sort of close to the line. He really looked
8 at the facts. He said, you know, how easy is it to access the
9 replicated expression.

10 You could get, I think, up to a total of 16 percent of
11 it shown for those snippet views, but it was out of order and
12 it was jumbled, and it was a lot of work to get to it. And he
13 said, you know, that's not enough. There's an expansion of the
14 utility of this works going on here. We've transformed it.
15 We've created a valuable tool. We're expanding the knowledge
16 that society can get from these books. So a good thing.

17 And that outweighs -- yes, that's going to cause some
18 harm on the book. He acknowledged that's going to cause some
19 loss of sales. You people aren't going to buy those books
20 because they're going to get everything they need from snippet
21 view, said that is outweighed by the transformative value by
22 this new technology.

23 THE COURT: Did -- I'm confused on one -- how did
24 Google get its hands on the books to begin with? Did it buy
25 the books and scan that and how did that happen?

1 MR. FARRIS: There were a group of university
2 libraries, you know, big state schools like the University of
3 Michigan I think was the lead school, and they had a
4 partnership with Google where they said you can scan all the
5 books in our library.

6 And the libraries got to keep archival copies of their
7 books. They got access to these tools, and the Google got to
8 scan the books and keep the dataset and build tools out of it.

9 THE COURT: Why wasn't that scanning held to be a
10 violation of the Copyright Act?

11 MR. FARRIS: Because it was fair use, because it was
12 bound up in the process of creating the transformative tool
13 that Google and the libraries created.

14 And of course the authors didn't think so, right?
15 They sued and they said that's a violation. You digitized our
16 works without our permission, this is unauthorized, you weren't
17 entitled to do that. And the court said, well, you may not
18 have been entitled to it, but you did something that really
19 advanced the progress of arts and science here, so it's fair
20 use.

21 THE COURT: All right. So that was which case?

22 MR. FARRIS: That's the *Google Books* and the
23 *HathiTrust* cases.

24 THE COURT: That's Judge Laval?

25 MR. FARRIS: Yeah, he's in the second one.

1 THE COURT: What did the Supreme Court do in that
2 case?

3 MR. FARRIS: Did not hear it. It didn't go to Supreme
4 Court.

5 THE COURT: And the year of that decision?

6 MR. FARRIS: 2015.

7 THE COURT: Okay. All right. So keep going. So
8 that's really the -- do you rely on any of those other factors
9 under Section 107?

10 MR. FARRIS: Which other factors --

11 THE COURT: Well, the purpose and character of the
12 use, whether it's commercial or for a nonprofit, educational
13 purpose; (2) the nature of the copyrighted work; (3) the amount
14 and substantiality of the portion used in relation to the
15 copyrighted work as a whole.

16 MR. FARRIS: Right.

17 THE COURT: And the effect of the use upon the
18 potential market or value of the copyrighted work.

19 MR. FARRIS: Right, yes. So we think they all favor
20 us here. In the second factor whether the work is expressive
21 or not, obviously plaintiffs represent a very diverse group of
22 books, and some of them will be more expressive than others.

23 But this is summary judgment. We're going to assume
24 for this purpose that their books are highly expressive and the
25 kind of thing that Copyright Act favors and protects.

1 But that said, I ask you to look at, again, the *Google*
2 *Books* here and see what Judge Laval said about factor two. He
3 found it favored Google there. He said -- and I can read the
4 quote -- "The second factor favors fair use not because
5 plaintiffs' works provide valuable information about -- excuse
6 me -- because --

7 THE COURT: Start over.

8 MR. FARRIS: I'll start over.

9 "The second factor favors fair use not because
10 plaintiffs' works are factual, but because the secondary use
11 transformatively provides valuable information about the
12 original rather than replicating protected expression in a
13 matter that provides a meaningful substitute for the original."

14 THE COURT: Okay. You've said it, but remind me what
15 the transformative use was.

16 MR. FARRIS: Developing a way to search those books,
17 taking an old, dusty library where nobody could get access to
18 the information sitting in the back of the library, digitizing
19 it, and creating a tool to search through it so you could now
20 go find, you know, what -- information that was never
21 accessible before and get to it quickly, efficiently, and
22 broaden the scope of human knowledge.

23 THE COURT: If that was a particular phrase you wanted
24 and didn't know where it came from, you could put that in, and
25 it would search a million books and tell you -- tell you where

1 that phrase appears?

2 MR. FARRIS: Yep, that's correct. But it would do it
3 in a limited fashion. It would show you, like, three snippets
4 at a time, and you could refresh it and keep doing it, but it
5 wouldn't show you the whole book because they were conscious.
6 They didn't want this to be a mechanism to just deliver the
7 book, deliver the expression to the user.

8 And our case -- I think it's a critical comparison to
9 our case because you can't get any expression from the books to
10 the user in our case, right. There's no claim that you can.

11 Certainly we copy their books. That is part of the
12 process of training Claude, but Claude transforms that. It
13 does a statistical analysis on that book and millions of other
14 books and millions of other data points.

15 And what comes out of Claude is not -- not the books.
16 We've transformed it into entirely new things. It's a tool
17 that can do analysis, a tool that can answer questions, a tool
18 that can write code. Can generate prose for sure, but is not
19 alleged to have generated any prose that looks like the prose
20 of the plaintiffs.

21 So for that reason we don't think we're actually using
22 any expressive content under the second factor, and we think
23 this is more like the *Google Books* case where this factor
24 favors us.

25 And the other thing I'll quickly point out --

1 THE COURT: Is there an analogous Ninth Circuit
2 decision that follows Judge Laval?

3 MR. FARRIS: That follows Judge Laval?

4 THE COURT: Or cites him with approval. We are in the
5 Ninth Circuit, not the Second Circuit.

6 MR. FARRIS: There is a case -- well, first of all, I
7 say the Supreme Court cites Judge Laval with approval. If you
8 read the *Andy Warhol* case, that *Google Books* case is cited four
9 times.

10 THE COURT: It is?

11 MR. FARRIS: It is.

12 THE COURT: Well, that's a good thing.

13 MR. FARRIS: Yeah.

14 THE COURT: By the majority?

15 MR. FARRIS: By the winning side.

16 THE COURT: Okay. Well, that's something maybe the
17 other side has got to answer. All right.

18 MR. FARRIS: Okay. So one last point on the second
19 factor, very briefly, just for you to bear in mind as you read
20 the cases, one thing that is often critical under that factor
21 is whether a work is published or not.

22 So there's this 1985 Supreme Court case, *Harper & Roe*,
23 where The Nation Magazine was accused of scooping part of
24 Gerold Ford's memoirs and publishing them, kind of stealing the
25 right of first publication, which basically zeroed out the

1 value from the rights holder from the original work.

2 In that case factor two weighed heavily against the
3 defendant, and there's some other cases they cite, usually in
4 the context of news reporting and scooping people.

5 So bear that in mind. There are a few cases where
6 there's no fair use where that is actually really significant.
7 And that's not an allegation here. These are all the published
8 books.

9 The third factor, you know, the amount substantiality
10 of the use, case after case of the ones I've cited are in
11 harmony here. They all basically state the principle that if
12 you need to take the amount of the work you take to justify
13 your innovation, you can take the entire work.

14 So *Perfect 10*, *Ariba*, the search engine cases, you can
15 scrape the whole image out of the Internet. Google, you can
16 scan the whole books. There's a case called *iParadigms*, which
17 is a good one here too, where there were -- it was a tool, a
18 technological tool to compare student papers against other
19 student papers to detect plagiarism. You had to scan the
20 entire paper, put it into an archive for the machine to work.
21 Another fair use case. If the amount you need was necessary to
22 justify the tool, fair use weighs in favor of the defendant.

23 So the final factor, factor four, which is the market
24 harm factor, I think the most important thing for you to think
25 about here is to think about what they're actually claiming in

1 this case as the theory of harm. And in their brief, there is
2 one theory of harm based on the training of Claude, is that
3 they lost licensing fees for that. They don't say that Claude
4 has actually harmed them but that they should be paid a
5 licensing fee.

6 And that should be a red flag. Over the years courts
7 have said when that's the theory, when that's the only theory
8 of harm, this poses the risk of vice of circular reasoning
9 where the demand for a licensing fee itself becomes the proof
10 that there is a market for this use that is being disrupted.

11 To quote the Nimmer treatise on this, "It is a given
12 in every fair use case the plaintiff suffers a loss of a
13 potential market if that potential market is defined as the
14 theoretical market for licensing the very use at bar."

15 And the Ninth Circuit quoted that -- I'm quoting that
16 from Nimmer just because the Ninth Circuit quoted it, quoted it
17 just a few years ago in the *Tresona Multimedia v. Burbank High*
18 *School* case, which is in our papers.

19 That was a cause of action where the rights holder for
20 an Olivia Newton John song sued a high school musical that had
21 intermixed her song into a play that the school was putting on,
22 and the court found that that's not a cognizable harm under the
23 fourth factor. You're trying to invent a licensing market that
24 didn't exist of high schools licensing old Olivia Newton John
25 songs for musicals.

1 The Ninth Circuit cited to the *Bill Graham* case there,
2 and the *Bill Graham* case is from the Second Circuit. That's
3 *Bill Graham*, the promoter for The Grateful Dead. He sued a
4 maker of a book of coffee table art who had come to him, and
5 the coffee table art maker had said, hey, we'd like to put some
6 old Grateful Dead posters in our coffee table book about The
7 Grateful Dead, and Bill Graham said no.

8 They went out, they did it anyway. They put the
9 posters in there, but they did it in a transformative way.
10 They didn't just display the posters as art; they used them as
11 tiny, shrunken, reduced images along a timeline of The Grateful
12 Dead to illustrate kind of -- to be biographical anchors.

13 The court said, well, you didn't use the work for its
14 original expressive content; you used it for a transformative
15 use there, so therefore, we're not going to find that there's
16 going to be a licensing market for that where there never was
17 one before, even though the plaintiff had asked for a license.

18 I'll give you one more case on why there shouldn't be
19 a licensing market deemed here. That's the *HathiTrust* case
20 that I described earlier. That's the earlier version of the
21 *Google Books* case.

22 In that case the authors claimed, well, we could have
23 licensed you our books to use in that search engine, so you
24 should find factor four favors us. And the court in
25 *HathiTrust*, not Judge Laval, the other one, he said, no, it

1 doesn't favor you because the Copyright Act is concerned with
2 only one type of economic injury; the harm that results because
3 the secondary use serves as a substitute for the original
4 works. It further explained that by definition transformative
5 uses are not substitutes.

6 And this gets me back to the very beginning of the
7 presentation. You know, our expert, Dr. Steve Peterson, the
8 economist, has opined as a matter of economics Claude is not a
9 substitute for a book.

10 Their expert came in. He agreed with that. That's
11 the first thing I said today. So we don't have a dispute about
12 whether Claude substitutes for a book.

13 There should not be a dispute about whether Claude is
14 transformative, and that means factor four is going to weigh in
15 our favor, and you cannot find a licensing market in that
16 situation or a potential licensing market.

17 THE COURT: Okay. Let me hear from the other side,
18 and I'll give you a chance for rebuttal.

19 UNIDENTIFIED SPEAKER: May I approach, Your Honor?

20 MR. NATH: It's slides, Your Honor.

21 THE COURT: Oh, hand it to the clerk. Thank you.
22 Okay.

23 MR. NATH: Your Honor, I want to start by saying this
24 is obviously -- we're on a motion for summary judgment in the
25 middle of discovery. The Defendant Anthropic needs to

1 establish that they can win on fair use on their affirmative
2 defense beyond any dispute of material fact, and there's
3 several material facts, factual disputes that preclude summary
4 judgment here.

5 But I want to start with one principle that the *Warhol*
6 case teaches us, which is that each use, each separate use
7 needs to be treated differently. And in that context this
8 means that each copy that Anthropic makes needs to be analyzed
9 in its context.

10 And why is that important here? Because there are two
11 separate theories of infringement and two separate fair use
12 issues at issue in this case.

13 The first is that Anthropic downloaded content free
14 from known pirated websites like a website called Pirate
15 Library Mirror and did so to avoid purchasing it. And the
16 question is whether that is fair use. Then the second thing
17 they did is they made reproductions of books for the purpose of
18 LLM training.

19 Both of those two questions need to be treated
20 separately, and I'd like to start with the first and why
21 downloading free from a pirated website to avoid paying for a
22 copy of a book is under a -- decades of unbroken line of
23 authority not fair use.

24 So the first slide we have here is an example of
25 the -- from the record of the websites that they visited. The

1 first is Library Genesis. It openly advertises that it's a
2 project in blatant violation of the copyright laws. And the
3 second is Pirate Library Mirror, and it says we deliberately
4 violate the copyright law in most countries.

5 These are the sources, the places that Anthropic went
6 to, to go get their books. They said we need -- we want
7 books -- and we're going to walk into the purpose and the
8 character of that use, the reason why Anthropic wanted books.
9 We want books, and so instead of going out in the open market,
10 going to Amazon like most of us do when we want a book, they
11 went to these websites.

12 So why does that matter? There's a long line of
13 authority including Judge Easterbrook's decision in *BMG versus*
14 *Gonzalez* in the Seventh Circuit from 2005, in the *Napster* case,
15 *A&M Records versus Napster* from 2001, holding that downloading
16 music for free, downloading copyrighted works for free to avoid
17 paying for it is not fair use and is copyright infringement.

18 And that makes sense because it has an obvious
19 substitutive effect. If Anthropic or any human, man, or
20 machine goes and downloads a copy of a book or a movie or a
21 piece of music instead of paying for it, that is not considered
22 fair use because it has an obvious substitution effect.

23 THE COURT: Wait. You may be right on that, but the
24 other side said that Judge Laval said you were wrong and that
25 the original copying of all those books and the university

1 libraries was okay because they were eventually going to do
2 some transformative use.

3 MR. NATH: Well, Your Honor, that's actually --

4 THE COURT: Is he -- I'd like to hear whether -- what
5 you say to that argument.

6 MR. NATH: Yes. So Judge Laval -- first of all, the
7 book scanning in *Google Books* was a very different situation,
8 the book scanning -- or the book downloading at issue here.

9 In *Google Books* there was a consortium of libraries
10 who had lawfully acquired books, and they made scans of it and
11 shared it with Google. There was a bilateral agreement. Very
12 different -- it would have been a very different case had
13 Google -- Judge Laval did not sanction Google going to a place
14 like Pirate Library Mirror or Library Genesis to source their
15 books.

16 There are a couple of other distinctions --

17 THE COURT: Wait. Did those university libraries have
18 the legal right to allow Google to copy those works?

19 MR. NATH: That was the issue in dispute in that case.
20 But there are a couple of other distinctions, Your Honor,
21 between *Google Books* and this case that I would like to point
22 out.

23 First of all, the libraries obviously had a lawful
24 copy and presumably had paid for that copy in the first place.
25 There's no question that the libraries that Anthropic turned to

1 did not have authorized copies of the works, and that is
2 something that wasn't at issue in *Google Books*.

3 The second issue is the question of substitution here,
4 and the purpose and character of the use is very different. So
5 I want to just focus -- I want to start with the purpose and
6 character of the use and then explain why the market harm for
7 Anthropic's free downloads from pirated websites is different
8 in this case than in that one.

9 So let's look at the record. Actually, let me take a
10 step back. *A&M Records versus Napster*, it was an indirect
11 copyright infringement claim, and the court ultimately
12 concluded that any users of Napster who were downloading copies
13 of music for the purpose of avoiding paying for it, they were
14 the copyright infringers.

15 It didn't actually matter in that case ultimately.
16 The court analyzed a variety of circumstances in which, you
17 know, if you do this with the music or do something else with
18 the music, whether that's fair use. The court said, no, none
19 of this is fair use.

20 But let's take a look at what Anthropic did here and
21 why it made copies of books. The first point, this is from the
22 record. This is Exhibit 3 to our opposition for summary
23 judgment. Why did Anthropic want to get books? This is very
24 different from *Google Books*.

25 Anthropic wanted, quote/unquote, good writing. The

1 exhibit on the screen in front of you is Anthropic's
2 description of what they said is the good writing hypothesis.
3 They wanted examples of -- for example, you know, Robert Caro's
4 *The Power Broker* or something like that because good writing,
5 the protected expressive elements of the works they wanted to
6 help train their large language model.

7 Google in *Google Books*, that is not what they were
8 after. They were not after good quality writing. They just
9 wanted to index the world of books so that you could search for
10 it.

11 So thereafter the expressive elements of the books --
12 I wanted to -- I quote my opposing counsel in distinguishing
13 the *Graham* case -- or sorry, citing the *Graham* case, he said
14 the key distinguishing factor in that case was that the
15 defendant did not want to, quote, use the work for its original
16 expressive content.

17 In this case that is exactly why Anthropic went to get
18 books, of why Anthropic went to pirated libraries to get books.

19 The second issue is in -- critical in the *Napster*
20 case, critical in the *BMG versus Gonzalez* case was the purpose
21 of the defendant in those cases, the downloader, was to avoid
22 paying for a lawful copy of the work.

23 There is no evidence in the record in *Google* about
24 Google trying to avoid paying for lawful copies of the works.
25 They actually went to great lengths to go to libraries. They

1 entered bilateral agreements. They did a lot of work on that
2 project.

3 THE COURT: Well, did they pay for any of those
4 copies?

5 MR. NATH: They ultimately didn't pay for the actual
6 copies of the work. They went to a legal library.

7 But let's look at the record here. MSJ opposition
8 Exhibit 27 explains -- Anthropic CEO explaining why they went
9 to pirated libraries instead of when they had a choice, we can
10 go out and buy copies of these books and we go download them
11 free from Pirate Library Mirror. This is the explanation: "It
12 would be a huge legal/practice/business slog." That is Exhibit
13 27. That was the reason why they went to these libraries.

14 And so in total, if you look at the first factor on
15 their actual original download from these pirated libraries,
16 they're in exactly the same position as end-users in *Napster* or
17 *BMG Records*. The end-users in those cases, they wanted music.
18 They wanted music for their expressive elements. Here
19 Anthropic wanted books. They wanted books for its expressive
20 elements, which is a critical difference from any of the cases
21 that Anthropic cites. And I'll get into that in more detail as
22 I proceed with the presentation.

23 And then they also wanted to avoid paying for actually
24 copies out in the open market.

25 Now, in the second principle factors, factor four --

1 and actually I just want to make one more point. The rule that
2 Anthropic is asking this court to endorse -- I just want to
3 make it clear. The rule that Anthropic is asking this court to
4 endorse is something frankly extraordinary in copyright law.

5 In page -- I think it's page 2 of their reply brief is
6 what we have up on the screen. This is the rule that they
7 fashioned here. Courts have consistently held that
8 unauthorized copies made as part of a process of creating new,
9 noninfringing, public-facing content is fair use. That is --
10 that is the rule they fashioned so that they can protect
11 themselves while still being consistent with the long line of
12 cases -- still trying to be consistent with other cases that
13 exist.

14 Your Honor, if that is the rule, then *A&M Records*
15 *versus Napster*, *BMG versus Gonzalez*, the long line of cases
16 that were peer-to-peer file sharing would no longer be the law.
17 It would essentially be a blanket --

18 THE COURT: I don't -- their answer to that is none of
19 -- those were just scrape, follow, or file copying cases and
20 not one shred of transformative use, just some kid in the
21 garage that wanted to listen for free to all the records they
22 wanted to. No, there's no transformative use.

23 Go ahead.

24 MR. NATH: Sorry. Apologies, Your Honor.

25 That actually is -- what they're saying is that any

1 time that you're creating new public-facing content, you're
2 downloading content for the purpose of creating new public-
3 facing content, you are no longer an infringer, and that is
4 fair use. In the age of the Internet, that is not a rule that
5 is workable that would prevent piracy.

6 I have a GoodReads account, which is a social media
7 account where I can post, you know, reviews of books. Everyone
8 has an Amazon account where they can post reviews of books.
9 You can imagine that virtually any of the infringers in *BMG* or
10 *Napster* could have avoided liability in that circumstance by
11 just saying that, you know, we post content about the books,
12 whether it's a bad book review, whether it's a bad music
13 review. In the age of the Internet, that is not a limiting
14 principle that will prevent the piracy effectively --

15 THE COURT: How many any of those kids in the garage
16 are really going to be putting reviews of the records on the
17 Internet? Maybe one or two, but that doesn't sound to me
18 like -- it would be so hard to sort that out.

19 MR. NATH: Your Honor, I think it actually would be if
20 you, you know, sort through Amazon and look at any book, there
21 are, you know, hundreds, thousands of reviews written by
22 anybody about the quality of the book. And under Anthropic's
23 proposed rule that would -- that would be dispositive of a fair
24 use defense.

25 But I want to also move on to something else because

1 there's another really --

2 THE COURT: All right. Let me put in my own words
3 what you're saying because it's a fair point.

4 You're saying under Anthropic's view of the law, you
5 could blatantly download in the same way that *Napster* people
6 did so long as you are able to show that you did it for the
7 purpose of fair use, which might be as simple as a short review
8 on Amazon.

9 MR. NATH: Exactly. And the critical feature here,
10 Your Honor, is one of the cardinal sins in copyright law is
11 that the court cannot be privileging high art over low art,
12 right? You're not making a distinction between -- so a really
13 bad book review would be a noninfringing public-facing content
14 that would be automatically fair use if Anthropic were to win
15 this case.

16 And so there's no way -- it would effectually
17 legitimize piracy and create this gigantic loophole in *BMG* and
18 *Napster* decisions.

19 There are a couple of other reasons why in this case
20 that the piracy really cannot be fair use, and at a minimum
21 there are factual disputes --

22 THE COURT: I want to stick with your point a minute.

23 MR. NATH: Okay.

24 THE COURT: Let's say that the judge were to hold or
25 the law were to hold that, yes, you're right, the first copy

1 that they acquired, they should have paid for it. And so you
2 figure out what Amazon would have charged for a used book, so
3 let's say it's \$8. But from that point on it's all fair use.

4 So your authors would get \$8 per book or whatever the
5 -- you know, I'm going through libraries where they have a book
6 sale, you can buy a book for \$1. And I have. They're good
7 deals. If you go through them long enough, you find the one
8 you want.

9 So wouldn't that be enough to -- if they had bought
10 these books to begin with, from that point on, once they buy it
11 legit, from that point on, it's fair use?

12 Help me -- I see your first point, but you're not
13 coming to grips with the rest of the timeline.

14 MR. NATH: Right, Your Honor. So if I'm
15 understanding, the question is -- the question is, okay, maybe
16 the piracy or the initial acquisition is unfair use --

17 THE COURT: Make them pay for the piracy part, but
18 everything else was transformative.

19 MR. NATH: After that the additional copies maybe are
20 justified under the fair use doctrine. We think --

21 THE COURT: That's what I'm trying to get you to
22 answer.

23 MR. NATH: And the answer to that is *American*
24 *Geophysical Union versus Texaco*. That case was a Second
25 Circuit case. It's been cited favorably in the Ninth Circuit

1 several times, including in the *A&M Records versus Napster*
2 decision, and I want to briefly describe --

3 THE COURT: Is that the one where they copied the
4 parts so each engineer could have their own chapter?

5 MR. NATH: Exactly. So I won't go through the facts,
6 but --

7 THE COURT: But I don't even see why that would be
8 transformative. Why is that analogous?

9 MR. NATH: It is the 1980s-1990s analog to exactly
10 what Anthropic is doing today.

11 So it was undisputed in that case that *Texaco*, much
12 like Anthropic, was using these -- using those journal articles
13 in the course of research to develop new inventions that
14 judge -- that -- in that case the Second Circuit held that,
15 okay, this -- these inventions might benefit the public, right,
16 that you are making copies of a journal article to read the
17 journal articles to help you with your scientific research.

18 Here, what is Anthropic doing? They're using --
19 they're using books for their expressive purpose. They're
20 analyzing -- this is the Kaplan declaration at 47. That's one
21 of Anthropic's co-founders. He acknowledges that what is
22 happening during the training process, they're analyzing how
23 words fit together, how paragraphs fit together. They actually
24 want the expressive content of the books in order to create a
25 machine that generates output that mimics quality human

1 expression. So they needed quality human expression, which is
2 why they're getting the books.

3 And just like in *Texaco*, at the very end of the line
4 there is something that both defendants claim benefits the
5 public; it's research, it's development, it's scientific
6 progress. But that wasn't enough.

7 Why the critical distinction between *Texaco* and all
8 these other cases is twofold. One, they're using the
9 expressive content of the works here.

10 THE COURT: What did they -- what did the *Texaco* case
11 hold?

12 MR. NATH: The *Texaco* case held that the reproduction
13 of photocopying in the course of scientific research in that
14 case was not fair use. It held that it was not a
15 transformative use.

16 They were building a research library without paying
17 just the -- a basic licensing fee and a customary licensing fee
18 in that industry and that it held that the fourth factor, which
19 is -- which considers licensing revenues, so lost licensing
20 revenues, weighed sharply against *Texaco* in that case.

21 So in the subsequent copies, we think *Texaco* is the
22 most on point case. *Google Books* doesn't get them quite there
23 because you're talking about a search engine, right? The
24 search engine is not exploiting the expressive qualities of the
25 work.

1 And the other important factor -- and this is under
2 the *Warhol* case. Justice Sotomayor's decision in the *Warhol*
3 case made it clear that the court under the first factor also
4 needs to consider the justification for the use.

5 And what does that mean? Well, the quintessential
6 example of a justification for the use that justifies what
7 you're doing under the first factor is like the parody in
8 *Campbell versus Acuff-Rose* where there was 2 Live Crew who
9 parodied the song "Pretty Woman." And Justice Sotomayor said,
10 look, you can't make a parody without borrowing and mimicking
11 the original, and so that is a high level of justification for
12 the use.

13 But if you're below that, right, if you don't have
14 that kind of justification, you may not be able to satisfy your
15 burden under the first factor to establish that a
16 transformative use actually weighs in your favor under the
17 first factor.

18 We think the use is not transformative because they're
19 exploiting the expressive elements of the work, and in fact,
20 the memorization of the model proves that, that the model
21 actually memorizes the expression -- expressive content of the
22 work.

23 But even so, they lack a justification. It's not that
24 Anthropic needed these books to train a model. You can train a
25 large language model without books. It is that the books gave

1 them a competitive advantage.

2 And I'd like to just cite a few examples from the
3 record.

4 Can we go to slide 20.

5 So this is an example of an internal document. This
6 is our opposition Exhibit 4 describing why books are so
7 important. And this internal document says, "We have a fairly
8 high level of confidence of one trillion of book data would
9 make our models 10 percent more efficient, which effectively
10 means that we can train future models for 10 percent less
11 compute."

12 The importance of books was not that they were
13 essential to be able to develop a model that generated -- that,
14 you know, generated the output that they're talking about, but
15 it give them a competitive advantage and helped them save money
16 and made it more efficient.

17 Why is this critical? Because in *Texaco* the
18 description, the ultimate -- what ultimately basically was
19 dispositive of the fair use defense there was that *Texaco* used
20 these journal articles effectively as a factor of production in
21 their ultimate research operation, and that is exactly what's
22 happening here.

23 A couple of -- one -- a couple of other examples are
24 MSJ opposition Exhibit 1, the exhibit that Your Honor was
25 looking at at the very beginning of the hearing I believe,

1 which says that Anthropic has staying neck and neck with OpenAI
2 on model capabilities despite using 5X fewer resources.

3 And how does it do that? High quality data, high
4 quality expression in its training set. It says adding high
5 quality data --

6 THE COURT: What does it mean other than the sentence
7 has got a noun, a verb, you know, no sentence fragments? It's
8 well written in the sense that a third grader could do it if
9 you know it's got to have a noun, it's got to have a verb,
10 maybe an object. What are you getting at in this high quality
11 writing?

12 Is it more than that? Is it more than just sentence
13 structure?

14 MR. NATH: It is more than that, Your Honor.

15 THE COURT: Explain what it is.

16 MR. NATH: So they want to create a model that has a
17 variety of applications and commercial applications that can --
18 it can write a research paper. It can write a book, for
19 example. It can -- it can ingest a book and then spit out data
20 that mimics the quality of a book.

21 And to do that, they can't, for example, use, you
22 know, a training dataset that is -- is exclusively tenth grade
23 research papers. Or at least if they did that, they would have
24 a product that's worse.

25 And so why do they need books? They need books for

1 its expressive content because they're using it for the purpose
2 of generating a model that mimics that longer quality of
3 expression, right? So a book is a -- long stretches of
4 coherent texts. That's from our expert, Ben Zhao, who says
5 it's actually the coherence and the long stretch of coherent
6 text that makes books -- that is why books are particularly
7 valuable training data.

8 And at a minimum, Your Honor, I think this confirms
9 that there is at least a dispute of fact at this stage of the
10 proceedings over whether Anthropic's use is truly
11 transformative, unlike -- and I'd just like to point, for
12 example, they cited *Sega versus Accolade*. In *Sega versus*
13 *Accolade* the principle issue was -- and I'll pull up a quote
14 from that case actually.

15 Could we go to slide 14. Sorry. Slide 23.

16 In *Sega versus Accolade* and *Google v. Oracle* I want to
17 point the court to what was really principally happening in
18 those cases. So, for example, in *Google v. Oracle*, Google
19 copied these lines not because of their creativity or beauty
20 but because they would allow programmers to bring their skills
21 to build the new smartphone computing environment.

22 Anthropic is taking these expressive works for
23 precisely the protected -- the protected expression, exactly
24 what the Copyright Act protects. And that is the important
25 consideration.

1 That's why even though I think it's absolutely clear
2 that they needed to pay for the initial acquisition, right,
3 that downloading free from a pirated website is copyright
4 infringement, they still needed to pay for a license for the
5 additional reproductions they made.

6 Unlike the search engine cases they're citing, unlike
7 the computer code cases they're citing, this is a case where
8 they're actually mining the protected expression at issue.

9 I want to turn to -- if it's okay, Your Honor, I would
10 like to turn back to the piracy point because I think there are
11 a couple of other points, one of which is something that's
12 developed somewhat recently.

13 So with respect to the piracy question, I think Your
14 Honor had it right that they really should have paid --

15 THE COURT: No. I don't have anything right yet.

16 MR. NATH: Fair enough.

17 THE COURT: I was just positing that.

18 MR. NATH: Yeah.

19 THE COURT: So don't say that that's what the judge is
20 going to rule. I'm asking if that's your best -- that's your
21 clearest point is that they should have paid for the first use
22 instead of stealing it off the Internet. That is your best
23 point. But after that it's not so clear.

24 But you want to go back to that, fine, go ahead.

25 MR. NATH: I'd like to address a couple of other

1 issues related to that. One of the arguments that they made is
2 that under factor four we haven't shown any harm to the market
3 in connection with whether it's a theory of piracy or something
4 else. So I'd like to address that specifically.

5 As to the harm to the market, with respect to their
6 downloads of pirated books, the court considers in the fourth
7 factor not just what Anthropic did but the court needs to
8 imagine if Anthropic's conduct was widespread, how that would
9 impact the market for books.

10 And obviously every download of a pirated book will
11 have a significant -- you know, is money that's not spent in
12 the book market more generally. And that's why Judge
13 Easterbrook noted that was -- that was an obviously substitute
14 of use.

15 The Malackowski declaration, our damages in factor
16 four expert, paragraphs 31 through 32 also confirms that
17 there's harm to the book market from their downloads. But the
18 actual factor four harm doesn't stop there.

19 Anthropic -- this was attached -- this actually came
20 to our attention quite recently. This is in the class cert
21 reply, Exhibit 53, is a post on something called Anna's
22 Archives. It's on the screen right now.

23 And what Anthropic's actually doing, the acts of
24 Anthropic to download massive amounts of books, there's
25 evidence in the record that confirms that this is actually

1 sustaining shadow libraries. It's keeping these shadow
2 libraries alive.

3 And that has a very different market effect and a
4 much -- a very strong market effect for book authors because
5 that means that these shadow libraries will continue to exist
6 and maybe flourish not just for Anthropic or other AI companies
7 to download books, but that means that those books will remain
8 freely available as substitutes for anyone that wants to
9 download a book.

10 THE COURT: I don't understand. How does downloading
11 from -- by Anthropic for something that is free and Anthropic
12 doesn't pay for it, how does that support -- since there's no
13 payment, how does that support the website?

14 MR. NATH: Well, take a look at -- we've discovered
15 this somewhat recently, but I'll point the court to Exhibit 53
16 on the slide. This is from Anna's Archive. Anna's Archive is
17 the successor to the Pirate Library Mirror. So this is why
18 this came to our attention somewhat recently is because we
19 discovered the Pirate Library Mirror issue only two months ago.

20 So this is what it says on the website. "Not too long
21 ago shadow libraries were dying. CyHub, the massive illegal
22 archive of academic papers had stopped taking in new works due
23 to lawsuits. Z-Library" --

24 (Interruption for clarification by the court reporter.)

25 MR. NATH: Sorry. "Z-Library, the largest illegal

1 library of books saw its alleged creators arrested on criminal
2 copyright charges." Then -- it says, "Then came AI. Virtually
3 all major companies building LLMs contacted us to train on our
4 data. Most but not all U.S.-based companies reconsidered once
5 they started the illegal nature of the work."

6 We don't know exactly why AI use is sustaining these
7 libraries, but it's clear from the library itself the successor
8 to Pirate Library Mirror, that at least they think it's having
9 this effect. At a minimum this is a triable question of fact
10 as to whether their use of these libraries could sustain these
11 shadow libraries' existence.

12 THE COURT: Tell me, you said at the outset there were
13 some issues of fact, and I want to make sure I understand what
14 they are. So that's one, keeping the pirate libraries alive.

15 MR. NATH: Keeping the pirate libraries alive, Your
16 Honor. Whether their download of pirated books -- whether
17 they're downloading pirated books for the use -- for an
18 expressive use, whether they're downloading pirated books for
19 the purpose of avoiding paying for a copy, that's the critical
20 purpose that on which *Napster* and *BMG* depend on, and then
21 whether their use actually helps sustain pirate libraries.

22 Those are the key questions -- those I think are the
23 key disputed questions of fact that this court would have to
24 resolve in order to resolve the piracy question.

25 Then there's a separate question of whether they can

1 make additional copies of works that they acquired for LLM
2 training. For that under the bucket of transformativeness this
3 court would have to decide how the LLM training process works,
4 whether it is actually mining the expression of these works as
5 we contend or whether it is just doing a statistical analysis
6 and not doing anything related to the protective expressive
7 elements of those works.

8 THE COURT: What does our record here contain on the
9 subject of the intermediate use?

10 In other words, does one of these declarations tell me
11 what the intermediate uses are?

12 MR. NATH: There are a few declarations that describe
13 what the intermediate uses are and how they're using it, how
14 they're actually using the books, if I'm understanding the
15 court's question.

16 THE COURT: Well, then -- but why then is there a fact
17 issue?

18 MR. NATH: So there is a fact issue because they're
19 dueling descriptions of what the AI process -- what the AI
20 training process actually does, and there's a dispute --
21 there's an expert battle over what it's actually doing.

22 THE COURT: All right. Give me one example of the
23 battle of the experts on that point.

24 MR. NATH: Sure, Your Honor. So Dr. Zhao in his
25 declaration, if you look at paragraphs 70, 71, and 72, he

1 describes the training process. He says it's similar to what's
2 called lossy compression, which one way to describe it is if
3 you have a giant file and you compress it into a ZIP file, you
4 lose some of the contents of the work, but effectively you're
5 just actually compressing the file.

6 And Dr. Zhao says that that is an accurate way to
7 describe what the training process is doing, that it's actually
8 taking the expressive content of the training data and
9 compressing it down into a model. And that confirms that
10 there's no actual transformative use going on here, that
11 it's -- that what the model is doing is actually just repeating
12 over and over the training data over and over again.

13 Now, they make the point that they're not actually
14 distributing copies of the work. The only reason that's the
15 case is that they have a -- outside of the model there is a
16 separate filtration system that just checks it against the
17 training data and makes sure that there aren't exact copies of
18 works going out there. But the actual model training process
19 itself is, one, mining the expressive content of the work, and
20 it is not transformative. So that's what Dr. Zhao says.

21 Their experts -- they rely on their own scientist,
22 Dr. Kaplan, describe this as more of a statistical process.
23 They say that Dr. Zhao's compression analogy is not accurate
24 and doesn't accurately describe the training process.

25 One really important thing here for summary judgment,

1 Your Honor, is no one really knows what these LLMs are actually
2 doing, and you don't have to take our word for it. Anthropic's
3 own CEO has said this -- I think he said it a couple of weeks
4 ago. He says that -- so that we do not understand how our AI
5 creations work. This lack of -- I'm skipping a little bit. It
6 says, "This lack of understanding is essentially unprecedented
7 in the history of technology. Modern generative AI systems are
8 opaque in a way that fundamentally differs from traditional
9 software."

10 So at bottom we're on a summary judgment record --

11 THE COURT: Then how is the jury supposed to figure it
12 out?

13 MR. NATH: Your Honor, I think this is a
14 quintessential jury question because there is a substantial
15 question about what Anthropic is doing.

16 We have our expert who has given his take on what the
17 training process looks like. They have an expert, Dr. Kaplan,
18 and their own founders will describe what the training process
19 is, and they'll describe it as something that they think is
20 much more transformative. But at a minimum there's going to
21 have to be a trial over whether and what exactly the training
22 process is doing.

23 THE COURT: That leads me to a different question.
24 What does the Supreme Court say is the role of the judge and
25 the role of the jury when it comes to these factors and the

1 transformative -- what are the issues that the jury should
2 decide? And then what is it that the judge must decide and
3 cannot delegate to the jury?

4 MR. NATH: So this is -- in *Google versus Oracle* the
5 court answered this question essentially, and Your Honor is
6 going to have to ultimately weigh the factors after the --
7 after there is fact-finding.

8 So any factual disputes, for example, if there's a
9 battle of the experts over whether Anthropic's technology is
10 actually focused on the expressive elements of the work or not,
11 that can be decided by the jury.

12 The other example of a factual dispute that would go
13 to a jury described in *Google v. Oracle* is whether there is an
14 existing licensing market or whether there's actually been
15 market harm in connection with a particular secondary use.
16 Those are the types of questions that would go to the jury.

17 I think what we would probably have in this case is we
18 would have a trial -- I want to be optimistic and say a class-
19 wide trial -- and we'd have a trial on these questions. And
20 then the court on a full record, after it gets answered to
21 special interrogatories from a jury, would -- Your Honor would
22 weigh the factors and enter a decision on the fair use defense.

23 THE COURT: Now, in the *Google* case on the second
24 trial, I did exactly that. I gave the jury interrogatories.
25 They answered them. I ruled for Google. The federal circuit

1 said, no, as a matter of law it should have gone the other way.
2 And then the Supreme Court said, no, the federal circuit was
3 wrong, and as a matter of law, you know, it should have gone in
4 favor of Google.

5 So but if I read the Supreme Court's decision, the
6 jury findings didn't figure into the issue of law very much or
7 maybe not at all. The Supreme Court just found that it was
8 transformative, and that seemed to override everything else.

9 MR. NATH: So I think --

10 THE COURT: I'm troubled about this. What is the -- I
11 know that that's the leading decision on it, but has there been
12 law since the *Google-Oracle* case that helps us understand the
13 role of the judge versus the role of the jury?

14 MR. NATH: From the Supreme Court that is the last
15 indication of what -- of the role of the judge versus the jury.

16 But I think -- I would hesitate to read too much into
17 the court's decision on the four factors in that case as it
18 relates to this case. Certainly Justice Breyer's description
19 of the role of the judge and the jury is the Supreme Court's
20 kind of last word on the issue, and Justice Breyer makes it
21 absolutely clear that there is a role -- the jury definitely
22 does have a role, that the jury decides factual questions, and
23 then the court will be involved in weighing the factors after
24 the jury decides factual questions.

25 In that case I think Your Honor is correct that the

1 jury findings may not have been that -- may not have weighed
2 that heavily for a couple of reasons. First of all, as Your
3 Honor held very early in that case, there was -- if there was
4 anything copyrightable -- Your Honor held that there wasn't any
5 copyrightable expression at all.

6 THE COURT: That was the first time. That was on the
7 first appeal. Then we came back down for the fair use issue.

8 MR. NATH: Yeah, and Justice Breyer doesn't deal with
9 the transformative use or the transformativeness question
10 first. The first question he addresses was the nature of the
11 copyrighted work. That was what loomed large in that case
12 because Justice Breyer basically says if this is copyrightable
13 at all, it's about as thin as copyright can get.

14 Computer code is already considered relatively thin
15 copyright, and Justice Breyer said even in the realm of
16 computer code, this is really, really thin and very functional.

17 THE COURT: But he did -- the opinion did assume it
18 was copyrightable.

19 MR. NATH: It absolutely did assume it was
20 copyrightable, but the very thin copyright played a role in the
21 decision.

22 THE COURT: And assumed to be legit.

23 Well, in your case you have authors who do expressive
24 content, so your point there is you have a better copyright,
25 and it's not -- not as thin as in *Oracle*. That's a good point.

1 All right. I need to give the other side a rebuttal.
2 You get to make one more point.

3 MR. NATH: Okay. If I can make one more point, I
4 would say that the other issue with *Google v. Oracle* and
5 frankly all of the other copying cases they're talking about is
6 they are -- the driving concern there is that a finding of fair
7 use would effectively have given a copyright holder a monopoly
8 over the functional elements of the work, the nonexpressive
9 elements of the work. That is not what is at issue here, so
10 there really isn't any concern about that.

11 If I could make one last point in two sentences, which
12 is that with respect to the training copies that they make on
13 factor four, I didn't really end up having a chance to respond
14 to that, but *American Geophysical Union versus Texaco* solves
15 what they call a circularity problem and says that as long as
16 we focus on markets that are either likely to develop or
17 traditional markets, then you can consider lost licensing
18 revenue as a factor under factor four.

19 And we have evidence from our expert that confirms
20 that there actually is a licensing market. There have been
21 over \$2.5 billion worth of licensing deals in the AI space
22 where AI companies are going to rights holders and getting
23 licenses.

24 THE COURT: Well, how many companies have done that?
25 I know of one. Are there more than one?

1 MR. NATH: More than one, Your Honor. Virtually --
2 most companies in the space, most of the big players in the
3 space have made deals. The American Association of Publishers
4 estimates at least from public reporting there are at least --
5 or they have reported that there have been at least 66 deals
6 that they are aware of. And public reporting -- among their
7 members, so actual publishers.

8 And then public reporting, we've counted over 100
9 actual AI licensing deals, and that's in a very short time
10 period.

11 THE COURT: Any AI licensing of books?

12 MR. NATH: AI licensing of copyrighted materials.
13 Some of these deals are for books, and some of them are for
14 other types of copyrighted works.

15 THE COURT: Okay. Let's hear your rebuttal. I'll
16 give you a short surrebuttal, time permitting.

17 Go ahead, please.

18 MR. FARRIS: Thank you. I'll just go through the
19 order of the arguments.

20 On the issue of the piracy and initial acquisition of
21 the work and whether that should be a different theory, I just
22 want to clarify for *Google Books*, absolutely did not have
23 permission there. That's why the authors sued, right? When
24 they found out the libraries were doing that and making those
25 copies with Google, they sued.

1 There was --

2 THE COURT: Now, who did they sue?

3 MR. FARRIS: They sued the libraries and they sued
4 Google.

5 THE COURT: Okay. What did the -- how did that one
6 come out?

7 MR. FARRIS: They both came out as fair use, and the
8 court did not consider the initial digitization of unauthorized
9 copies separate from the overall ultimate purpose.

10 I think that --

11 THE COURT: Again, that's Judge Laval?

12 MR. FARRIS: That is.

13 THE COURT: The Second Circuit?

14 MR. FARRIS: It is. But there's other --

15 THE COURT: But then they come back and give me the
16 *Texaco* case. That was also the Second Circuit, wasn't it?

17 MR. FARRIS: Many years before it was, and it was a
18 nontransformative use. It was photocopying scientific journals
19 at a corporation. Rather than buying multiple licenses, just
20 buying one license for the corporation and sharing it among the
21 scientists.

22 THE COURT: But the idea was to come up with a great
23 invention so the engineers would have -- use that -- the
24 textbooks for their R&D to come up with a good invention, and
25 they were trying to do something transformative.

1 MR. FARRIS: They were. And I think the court
2 recognized rightly there that this can get too attenuated at
3 some point. You can't just bless yourself by saying I have a
4 research purpose and, therefore, go and take any textbook you
5 want. That would destroy the academic publishing market if
6 that were the case.

7 You have to actually look at what you're doing with
8 the work, not what the person's intentions generally -- in our
9 case obviously our intentions and what we're doing with the
10 work are both transformative. So it's quite different than
11 just passing around versions of the journal.

12 And I'll note in the *Texaco* case there was an
13 established licensing market. I think there were like 11 oil
14 companies that subscribed to this journal, and there was a
15 market for how you could count the photocopies you made, and
16 you'd buy special licenses for that. And *Texaco* just didn't do
17 it, so they were acting in direct contravention of a market
18 doing something that was nontransformative. That's why it's a
19 pretty poor fit here.

20 As far as piracy in the initial acquisition too, it's
21 not just *Google Books*. I'd urge you to think about it in the
22 context of the *Perfect 10* and *Ariba* search engine cases. That
23 was Google going out and copying stuff from websites without
24 any permission or authorization.

25 And *Perfect 10* found out Google was doing that,

1 including copying from pirated websites that themselves didn't
2 have authorization. It sent cease and desist letters for three
3 years and said stop doing that. Google didn't do it, and then
4 there was a fair use determination that building a search
5 engine was transformative.

6 There was not a decision that acquiring the works
7 divorced from all other context was itself an infringement. In
8 fact, there's at footnote eight in the *Perfect 10* decision, the
9 court says specifically we're not going to find -- we're not
10 going to get rid of the fair use doctrine based on the idea at
11 the initial acquisition of a non-authorized work overrides it.

12 THE COURT: The initial acquisition did -- was that
13 specifically in play in that case? Or was that not
14 specifically briefed and litigated?

15 MR. FARRIS: I can't tell you the extent to which it
16 was briefed, but the footnote addresses it directly, so that
17 tells me that it was raised.

18 And I guess to zoom out a little broader from this,
19 the Supreme Court has now -- this is a version of the you acted
20 in bad faith, therefore you don't get a fair use defense
21 argument. The Supreme Court has now twice said they're
22 skeptical that bad faith has any role to play in the fair use
23 analysis.

24 THE COURT: What are those two types?

25 MR. FARRIS: In the *Campbell* case because 2 Live Crew

1 had gone to Roy Orbison and asked for permission, and Roy
2 Orbison had said no. And the Supreme Court said, well, we're
3 not going to hold that against 2 Live Crew, no permission need
4 be sought nor granted, and we're skeptical that allegations of
5 bad faith have anything to do with this.

6 The second time was your case, the *Google* case. The
7 court said we're skeptical that bad faith has any role in this
8 to play, which by the way the federal circuit was too, and the
9 federal circuit had heard that case and then it was sent back
10 down to you. They had ignored the allegations of bad faith.
11 That didn't stop Oracle from raising them.

12 We actually cite in our brief Oracle's Supreme Court
13 opening brief. They call Google a pirate, and they said the
14 code was purloined, right? So this is a common refrain, you're
15 acting in bad faith, you're a pirate, and the Supreme Court
16 ignored it. It didn't ignore it. It said we're skeptical it
17 has any role to play at all, but we don't need to weight it to
18 find fair use here.

19 THE COURT: All right. Your opponent says that your
20 argument proves too much because anyone could then download
21 anything from a pirate site and then put a short review on
22 Amazon and say, hey, I downloaded a free copy, but it was for
23 fair use to -- would that fly? It seems to me like it would
24 under your theory.

25 MR. FARRIS: I don't think it would because I think it

1 sounds like in the case you're giving, that person is right in
2 their view just to try to get out of jail on this, right?

3 THE COURT: No, not necessarily. Could be -- it might
4 seem that way, but it would be a very easy thing to write and
5 post was on Amazon, and maybe it is a get out -- but who -- who
6 is to tell whether it's good faith or bad faith?

7 MR. FARRIS: Well, in that case I would ask, you know,
8 did the person keep the copy afterwards? Did they consume it
9 and enjoy it? Did they have dual purposes here or were they
10 literally a person who only downloaded to write a review?

11 In that case actually the Copyright Act might favor
12 because that person has now put a new work into the world, and
13 the balance is in general the progress of art, however bad the
14 art was, was advanced.

15 THE COURT: I don't know. To me that doesn't sound
16 right that you could take down -- download from a pirate site,
17 even if you're going to use it for fair use. To me it's a
18 different thing than how you use the product later to develop a
19 transformative use.

20 I understand you're saying *Google Books* exonerated it.
21 Was that specifically briefed in the *Google Books* case?

22 MR. FARRIS: The bad faith was, yes.

23 THE COURT: Not bad faith, but the initial
24 acquisition, did the *Google Books* opinion say even the initial
25 copying was perfectly okay because it was all in the aid of a

1 transformative use?

2 MR. FARRIS: No. But it was -- the -- Google had
3 acquired the code in violation of a license.

4 THE COURT: No, no, no. I'm talking about the *Google*
5 *Books* case with the --

6 MR. FARRIS: Oh, sorry.

7 THE COURT: -- universities. You're talking about the
8 *Oracle* case. I mean, the *Google Books* case where they went to
9 the universities and downloaded all those millions of books.
10 That's the one.

11 Was that briefed, the initial acquisition briefed?

12 MR. FARRIS: I can't tell you what -- exactly how it
13 was briefed. I can tell you the court specifically referenced
14 digitization and talked about how the digitization itself was
15 not going to be an independent analysis. It was part of the
16 overall purpose.

17 THE COURT: Well, but if they -- how did -- see, I got
18 to look at it more. Sometimes people cite -- lawyers cite
19 decisions where the point they're trying to make was not
20 actually the point that was being litigated, and they draw an
21 inference from the outcome that it must have been litigated,
22 but actually it's not always litigated.

23 And I need to go back and look at that decision in the
24 *Google Books* to see if it went so far as to say even the very
25 initial copy by the university was perfectly legit, and you

1 don't seem to be saying that they went that far.

2 MR. FARRIS: Well, I think -- no, I think the opinion
3 goes that far. What I can't tell you is whether there was an
4 initial acquisition theory briefed because as far as I know,
5 this is a novel theory. Maybe it's being run in the other AI
6 cases, but this is not something that has actually been briefed
7 before specifically because it's not really a copyright claim.
8 Like, there is no exclusive right based on your initial
9 acquisition or getting access --

10 THE COURT: But if you -- if somebody downloads from
11 *Napster* a copy of a song, you could go to prison for that.
12 That is a copyright violation.

13 And now if you download from a pirate site a copy of
14 somebody's book, standing alone, you could go to prison for
15 that too.

16 So I don't -- that -- I have a hard time seeing that
17 you can commit what is ordinarily a crime and yet get
18 exonerated because you wind up using it for transformative use.

19 MR. FARRIS: Even in those *Napster* cases, which were
20 nontransformative uses, the court still does fair use analysis
21 and still considers the arguments that the defendants make
22 about legitimate reasons they had for doing it. So you can't
23 override the analysis just based on the initial acquisition.

24 I point out -- I understand, I recognize the court's
25 concern here that there could be a gap in the way copyright law

1 and fair use treat this, but this is the only claim in this
2 case.

3 Is there another way, another remedy against, for
4 example, these websites? Probably. There's probably other
5 remedies out there, but this is not a place where the Copyright
6 Act really gives a tool to deal with the --

7 THE COURT: Sure, it does. The Copyright Act deals
8 with downloading from pirate sites. That's what *Napster* was
9 all about.

10 I have a question for you. Counsel listed a few fact
11 questions. What is your view of a role of the judge versus a
12 role of the jury?

13 MR. FARRIS: I think for the most part he was correct,
14 but I would say there are multiple examples since the *Warhol* --
15 it's just ultimately the judge's -- the judge must make the
16 final decision and weigh the different factors; however, if
17 there's not genuine disputes of the subsidiary factual issues,
18 there's no obligation to send anything to the jury. It's like
19 any other summary judgment case. And we said --

20 THE COURT: It wouldn't be if -- if it's a material
21 fact, it has to go to the jury, doesn't it?

22 MR. FARRIS: That's right. So there could be. If you
23 think there's an actual factual dispute, you certainly could
24 send it to a jury, have them decide it, and then come back and
25 weigh the facts.

1 Our view is that there's nothing to have a trial about
2 here. We know how the technology works. We know what
3 Anthropic did. We know what the state of the market is. Those
4 facts aren't in dispute.

5 Now, how you weigh them, how you view them through the
6 lens of the law, that's a judicial job, but it's not a job for
7 the jury.

8 If I -- here is two fact issues. I can tell our
9 response on the two fact issues that were raised. The first
10 one is this claim that we're somehow keeping the pirate library
11 alive. That's a hail Mary argument. You will not see that
12 anywhere in their papers at all. That's the first time that
13 I've heard that really today. And I guess he cited his class
14 certification reply for that.

15 There is no evidence in the record of that whatsoever.
16 Anthropic, as you know, has stopped using these pirate
17 libraries. We hear that people object to it. We don't think
18 it was wrong under copyright law, but we've stopped. We
19 stopped quite some time ago. When we actually downloaded these
20 libraries was in 2021 and 2022. We did not pay for them. We
21 did not do anything to support those websites. So I don't even
22 know how it's conceivable that we would have supported them.

23 I think the exhibit we saw a short cut of from,
24 Mr. Nath says that some other actors did pay these libraries.
25 We didn't do that. So there's no facts in dispute about

1 whether we supported them. It's undisputed that we downloaded
2 one time from these libraries in 2021 and 2022. There's
3 nothing to have a trial about there.

4 The second factual dispute he raised was about how LLM
5 training works, and he relied on his expert Dr. Zhao's
6 declaration, which describes -- I think he said the all-in
7 training process is like a giant ZIP file or something along
8 those lines. I may not have used his exact words.

9 We specifically did not take issue with that in our
10 reply. We don't dispute it. We think you can decide the case
11 without deciding that.

12 Now, for the record, we think that's an
13 oversimplification of the process, but we think it's an attempt
14 to generate a factual dispute and one that doesn't get them to
15 a trial here.

16 The reason why is even if you take his opinion at face
17 value and you assume that all Anthropic is doing is just
18 compressing these books down into a model and that's what the
19 model is, fine. All these cases we've been talking about today
20 include perfect copies of works and transformative uses. The
21 search engine cases, you scrape the exact image, you put it
22 into the search engine, but you created something
23 transformative. It doesn't matter that you had an exact copy
24 of it.

25 The *Google Books* cases, it's an exact copy of a book.

1 It's a literal scan of a book, just like here, no compression
2 involved at all. So the idea that there's some kind of
3 compression going on here doesn't create a factual issue, and
4 we think you can decide the case --

5 THE COURT: Which expert is analogizing it to
6 compression?

7 MR. FARRIS: It's their expert. Our -- we didn't
8 submit an expert on this because our chief science officer
9 knows the technology as much as anybody. He put in an opening
10 declaration where he described the process. Their expert,
11 Dr. Zhao said, well, he hasn't described it the way I would
12 described it, I'd call it something different.

13 He's characterizing a part of it differently -- again,
14 we don't think accurately, but I don't think that that
15 difference of characterization gets them to a trial here
16 because the facts can be decided as they are.

17 THE COURT: That's a fast glide over thin ice. If you
18 say the facts can be decided as they are, that doesn't answer
19 whether there's a dispute. I think your better point would be
20 to say you assume all of the other side's fact version is true.

21 MR. FARRIS: I think you said it better than I did.

22 THE COURT: Yeah, and even under that version, your
23 best argument is the transformative use overrides it all.

24 MR. FARRIS: Yeah.

25 THE COURT: That's your best argument.

1 MR. FARRIS: That's correct.

2 THE COURT: And that may be correct, but I'm not there
3 yet.

4 All right. What else would you like to say?

5 MR. FARRIS: One last point they made, they cited the
6 *Andy Warhol* case, and I think the argument was something along
7 the lines that we are -- we're taking too much quality
8 expression. That was all the slides they had that said that.
9 They're not trying to just build this product; they're trying
10 to build the best product they can by getting the best
11 expressive quality from the books they can.

12 I think the response to that is quite simply that fair
13 use doesn't require us to build a bad product. If we can build
14 a better product by doing what is otherwise transformative, the
15 Copyright Act says build a better product. That's the whole
16 goal here. We want to advance the progress of arts and
17 science.

18 So I don't think the fact that Anthropic is using high
19 quality data to build a great product is anything the *Warhol*
20 court would frown on at all. That would be perfectly justified
21 under that rationale.

22 THE COURT: Okay. You can make one more point, and
23 then I'm going to give a surrebuttal to the other side.

24 MR. FARRIS: The last point I would make is -- I'd
25 direct you -- if you're thinking about this and you're thinking

1 this is a close call, there is a useful discussion in the *Sony*
2 *Betamax* Supreme Court case, you know, from the 1980s at pages
3 429 to 432.

4 And Justice Stevens there talks about how the
5 Copyright Act has been amended many times in history as
6 technology changes, and he notes that during times of rapid
7 technological change there has been a recurring theme of
8 judicial reluctance to expand the protections afforded by
9 copyright without explicit legislative guidance, which he calls
10 a sound policy.

11 In other words, the court is saying there if
12 technology is changing so rapidly that there are new interests
13 coming into the balance and there's a risk that we're going to
14 impede the progress of arts and science, we should be
15 circumspect and be careful about interjecting ourselves as the
16 courts.

17 So I think here where -- again, back to the very
18 beginning of my presentation, there's no harm demonstrated to
19 these authors anywhere in the record. On the one hand, there's
20 an obvious technological tool which is doing great things and
21 moving forward the progress of the arts. On the other hand,
22 the authors maybe want to benefit from that, but they're not
23 being harmed by it. And in that case the balance the Copyright
24 Act wants to strike is clear.

25 THE COURT: Okay. Surrebuttal.

1 MR. NATH: One of the things my friend on the other
2 side said was that Anthropic stopped using it -- stopped using
3 pirate libraries. They actually kept the copies that they got
4 from pirate libraries and still using them today. That is --
5 that is in the record.

6 It is clear that Anthropic's rule here would
7 essentially legalize piracy. I think I heard my friend on the
8 other side basically admit that, that as long as you create
9 some sort of review, if you -- even if you keep the copy or you
10 get rid of it, then post something online, then essentially you
11 are -- that is fair use under their interpretation.

12 That would have a massive impact on the incentive to
13 create. That means if you create books, movies, and music, you
14 know that those -- all of that work is available for free out
15 there. That is a huge problem.

16 There is no question that under *BMG* and under *Napster*
17 that getting copyrighted works for the purpose of getting its
18 expressive elements and to avoid paying is not fair use,
19 whether you're a multibillion dollar company or a person
20 getting copyrighted works in their garage.

21 Second, they have acknowledged -- as I hear it, they
22 admit that -- they admit that their model training is
23 essentially just compression, that it's compression of all of
24 the copyrighted works into a final model. That is not a
25 transformative use and certainly means that the court shouldn't

1 be able to grant summary judgment in their favor on --

2 THE COURT: Didn't your own expert -- he read the
3 final Claude does not output to any user any of the authors'
4 copyrighted works.

5 MR. NATH: Well --

6 THE COURT: It's been educated on all these works, but
7 then the answers -- it uses the language of good writing to
8 compose answers, but so what? That's what we all do. We read
9 good books and learn from them, and then we hope that we can
10 write as well as they can.

11 So I don't -- I don't -- so what if it's compression?

12 MR. NATH: First, Your Honor, I paid for my textbooks
13 in college and law school. Anthropic should be required to do
14 the same, right? If that's really what's going on here,
15 they're educating their models, they need to pay for the books
16 that they use to educate them.

17 THE COURT: Okay. Two dollars, you buy the book from
18 the local library.

19 MR. NATH: If that's the case --

20 THE COURT: That's not the case. You're after
21 thousands and thousands of dollars. You're not after the \$2.
22 So they -- yeah, probably they should have bought those books
23 instead of stealing them off the Internet, but they could have
24 done it for \$2, \$10, maybe even \$20 a book.

25 MR. NATH: Your Honor, if that's the case, the court

1 denies summary judgment on the copyright claim because that
2 means that the court will have found that there is at least a
3 dispute of fact over whether Anthropic committed copyright
4 infringement.

5 THE COURT: There's no dispute of facts. The record
6 is going to be one way or the other. Right now I'm inclined to
7 say that did violate the Copyright Act but that the subsequent
8 uses were fair use. That's kind of the way I'm leaning right
9 now.

10 MR. NATH: Your Honor, the subsequent uses in our view
11 were not fair use under the *Texaco* case, and I think --

12 THE COURT: I know, but he said no, no, no, the
13 connection between the R&D and some transformative future
14 product by *Texaco* was so attenuated that you could not say that
15 that was fair use.

16 In our case there was a direct use of these products
17 to create and train this artificial intelligence machine
18 learning. That is a much more 1 to 1 ratio. So I'm not sure
19 *Texaco* is on point.

20 MR. NATH: Your Honor, I think *Texaco* is on point for
21 the key distinguishing factor between this case and every other
22 case about LLM training, including Third Circuit judges --
23 Judge Bibas's decision in the *Ross Intelligence* -- or *Thomson*
24 *Reuters versus Ross Intelligence* case, which is that, one,
25 they're exploiting the expressive elements of the use in the

1 course of model training.

2 Just like the *Texaco* scientists were reading --
3 Anthropic describes it as consumptive use, that's the
4 distinguishing factor, that the scientists were reading the
5 articles for exactly what the articles were used for, and
6 exactly why people paid for them is because they wrote and
7 reported scientific findings that could help them in the lab.

8 Anthropic is taking books and using them to educate
9 its models in doing exactly what the books are intended to be
10 used for and making multiple reproductions of them.

11 The second piece is the court needs to consider factor
12 four. Even if the court gets past factor one and decides that,
13 okay, this is a transformative use, the court needs to consider
14 factor four, and there the court has to consider lost licensing
15 revenues.

16 Under the *Texaco* case, under the *TVEyes* case and even
17 some of the case they cite like *Seltzer versus Green Day*, it's
18 clear that regardless of where the court comes out on
19 transformativeness, the court needs to consider whether there
20 is an existing --

21 THE COURT: There's a circularity to that point.
22 Okay. So one of the -- at the last hearing one of the major
23 publishers entered into a license with a major company for a
24 lot of money for AI, but you can easily see that that was to
25 avoid this kind of litigation.

1 But these people want to do the litigation and
2 establish that they have a fair use right, which was not
3 established in that case, so they weren't willing to litigate
4 it.

5 They are willing to litigate it. Now, if they are
6 right, then that is not analogous. There is no potential
7 market.

8 MR. NATH: Well, the cases do not say potential
9 market. And I understand the cases have addressed the question
10 of circularity. In *Texaco* they refer to it as the vice of
11 circularity, and what *Texaco* concludes -- and it's been cited
12 several times since then, most recently by the Second Circuit
13 in *TVEyes*.

14 *Fox News versus TVEyes* in 2018 says we solve this
15 problem of circularity by limiting the number of markets we
16 look at when we're considering cognizable lost licensing
17 revenue harm.

18 We consider either traditional markets like the book
19 sale market, reasonable markets, or likely to develop. So we
20 need to show in order for licensing -- we need to have a trial
21 over -- in order to figure out whether licensing revenues are
22 cognizable, whether there's a likely-to-develop market for
23 AI -- for licensing AI training.

24 Now, there's a litany of evidence in the record to at
25 least create a material factual dispute. We think we're right

1 about that, but if we are right about that, then that is a
2 cognizable market harm that the court needs to consider on
3 factor four.

4 There's a second piece that I think the court should
5 also consider on factor four, which is the effect on the
6 incentive to create. Exhibit 38 is a statement from Anthropic
7 CEO Dario Amodei predicting what's going to happen over the
8 course of time as these model proliferate and advance, the
9 models that were trained on our clients' works.

10 And the ultimate conclusion is that human labor and
11 writers are generally going to be obsolete because the models
12 will advance to the point where they actually are replacing all
13 human written work product. And the copyright --

14 THE COURT: That's baloney. I don't believe that will
15 ever happen, that the world will be taken over by robots.

16 MR. NATH: Your Honor --

17 THE COURT: That's science-fiction.

18 MR. NATH: That is at minimum --

19 THE COURT: I'm sorry. I'm not going to buy that.

20 MR. NATH: At least on the fourth factor there is a
21 cognizable license on market harm.

22 The other issue on the fourth factor is the evidence
23 from our expert Dr. Malackowski, which says that currently
24 right now Anthropic's models present the threat of generating
25 cheap knock-offs and flooding the market generally with books.

1 THE COURT: They say that they have a guardrail in
2 place to prevent any use of the -- any feedback to the user of
3 copyrighted work.

4 MR. NATH: Right. We're not saying that it's
5 outputting exact replicas of the work. What Dr. Malackowski
6 confirms based on a view of the public record is that models
7 like Anthropic and other models are generating easy, cheap
8 knock-offs that basically just saturate or just generally
9 flooding the market with books because you can make a book at a
10 push -- something book length with a push of a button. That
11 makes it harder to differentiate yourself in the market. That
12 is a type of market harm.

13 THE COURT: Look, let's say this. How many mystery
14 novels involving murder do you think have ever been written?
15 I'm going to say 500,000. I don't know. It's not a lot of
16 them. And they all kind of go the same way.

17 Wouldn't it be easy for the computer to come up with
18 one, and it would kind of read like -- in parts like all
19 500,000? But it wouldn't be word for word this -- the
20 literal -- but all mystery novels are going to have a lot of
21 similarities, a lot.

22 So okay. Time to bring it to a close. I'll let you
23 make one last point, and then I've got to say good-bye.

24 MR. NATH: Your Honor, we'd focus on -- Anthropic has
25 downloaded millions of copyrighted books without authorization

1 from websites like Pirate Library Mirror and Library Genesis.
2 They are no different from the pirates of the *Napster* era, and
3 we think the court can deny summary judgment on that basis.

4 THE COURT: Thank you.

5 Okay. I'd like to give you a research assignment, and
6 you get three pages, no footnotes, no double-spacing
7 [verbatim], no appendixes. I just want double-space three
8 pages.

9 And the single question is: In the *Google Books*
10 decision did the decision expressly and explicitly say that the
11 original copying by the universities or by Google at the
12 universities was protected by fair use?

13 I'm not talking about the original digitization within
14 the Google setup. I'm talking about the original copying at
15 the university libraries.

16 And was that briefed. Second related question: Was
17 it briefed?

18 Now, I know you all have the ability to do this, so
19 5:00 p.m. tomorrow, 5:00 p.m. tomorrow. Can you do that? Are
20 you going to tell me that you have so many lawyers, you still
21 can't do that?

22 MR. FARRIS: We can do it.

23 MR. NATH: We can do that, Your Honor.

24 THE COURT: Okay. I look forward to reading that.

25 I'm going to read it myself, but I would like to have your --

1 MR. FARRIS: She wanted to ask you a question, but you
2 asked for the order by midnight.

3 THE COURT: Go ahead.

4 MS. GILLOTTE: Your Honor, this is Jessica Gillotte
5 again, counsel for defendant.

6 Would you like those documents with the privileged
7 stamp refiled on the docket or a copy for the court?

8 THE COURT: What do you want?

9 I want it to be filed the same way as the document
10 that was under seal, that says under seal. And then you should
11 send us a copy too. Send us both.

12 I'm going to give you -- what did I say --

13 MS. GILLOTTE: You said by midnight tonight.

14 THE COURT: No. I'm going to give you till 5:00 p.m.
15 tomorrow.

16 MS. GILLOTTE: Okay. Thank you very much.

17 THE COURT: All right.

18 All right. Most interesting -- and I don't have an
19 answer right now. Everything that I said was my way of
20 leaning. Sometimes I say that and change my mind. But I go
21 one step at a time.

22 All right, my friends. Thank you.

23 (Proceedings adjourned at 1:28 p.m.)

24

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C E R T I F I C A T E

1 I certify that the foregoing is a true and correct
2 transcript from the stenographically reported proceedings in
3 the above-entitled matter.

4 SIGNED 22nd of May, 2025

5
6 /s/Danielle R. Murray
7 DANIELLE R. MURRAY, RMR, CRR
8 United States Court Reporter
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