

Justin A. Nelson*
Alejandra C. Salinas*
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, TX 77002-5096
Telephone: (713) 651-9366
jnelson@susmangodfrey.com
asalinas@susmangodfrey.com

Rohit D. Nath (SBN 316062)
Michael Gervais (SBN 330731)
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067-2906
Telephone: (310) 789-3100
rnath@susmangodfrey.com
mgervais@susmangodfrey.com

Jordan W. Connors*
SUSMAN GODFREY L.L.P.
401 Union Street, Suite 3000
Seattle, WA 98101
Telephone: (206) 516-3880
jconnors@susmangodfrey.com

J. Craig Smyser*
Samir Doshi*
SUSMAN GODFREY L.L.P.
One Manhattan West, 51st Floor,
New York, NY 10019
Telephone: (212) 336-8330
csmyser@susmangodfrey.com
sdoshi@susmangodfrey.com
Co-Lead Class Counsel
**(Pro Hac Vice)*

Rachel Geman*
Jacob S. Miller*
Danna Z. Elmasry*
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Telephone: (212) 355-9500
rgeman@lchb.com
jmiller@lchb.com
delmasry@lchb.com

Daniel M. Hutchinson (SBN 239458)
Jallé Dafa (SBN 290637)
Reilly T. Stoler (SBN 310761)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
rstoler@lchb.com
jdafa@lchb.com
dhutchinson@lchb.com

Betsy A. Sugar*
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
222 Second Ave., #1640
Nashville, TN 37201
Telephone: (615) 313-9000
bsugar@lchb.com
Co-Lead Class Counsel

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

ANDREA BARTZ, ANDREA BARTZ,
INC., CHARLES GRAEBER, KIRK
WALLACE JOHNSON, and MJ + KJ, INC.,
individually and on behalf of others similarly
situated,

Plaintiffs,

v.

ANTHROPIC PBC,

Defendant.

Case No. 3:24-cv-05417-WHA

**PLAINTIFFS' OPPOSITION TO
ANTHROPIC'S MOTION FOR
CERTIFICATION OF
INTERLOCUTORY APPEAL OR, IN
THE ALTERNATIVE, FOR
RECONSIDERATION**

Hearing Date: August 28, 2025
Hearing Time: 8:00 a.m.
Judge: Honorable William H. Alsup

TABLE OF CONTENTS

Introduction	1
Background	3
Questions Presented For Certification	5
Legal Standard Under Section 1292(b).....	6
Argument.....	7
I. Anthropic’s Attempt to Rehabilitate Its Piracy Does Not Warrant an Interlocutory Appeal.....	8
a. The question of what constitutes a “use” in this case is inextricably fact-bound.	8
b. Resolving Anthropic’s first question in its favor would not be controlling and would not materially advance this case.	11
c. Anthropic overstates any difference of opinion about whether its piracy constitutes a use, and an ordinary split between two district courts is not the type of significant conflict that warrants immediate, interlocutory review	12
II. Anthropic’s Second Question Misrepresents the Court’s Opinion and is Deeply Fact-Bound In Any Event.	16
III. Reconsideration is unwarranted.	19
CONCLUSION	24

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>A&M Recs., Inc. v. Napster, Inc.</i> , 284 F.3d 1091 (9th Cir. 2002).....	14
<i>A&M Recs., Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).....	14, 15
<i>Am. Geophysical Union v. Texaco Inc.</i> , 802 F. Supp. 1 (S.D.N.Y. 1992), <i>amended</i> (Oct. 26, 1992),.....	11
<i>American Geophysical Union v. Texaco</i> , 60 F.3d 913 (2d Cir. 1994).....	2, 10
<i>Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith</i> , 598 U.S. 508 (2023)	3, 8, 14, 15
<i>Bartz v. Anthropic PBC</i> , 2025 WL 1741691 (N.D. Cal. June 23, 2025)	2
<i>Bayer v. Neiman Marcus Grp., Inc.</i> , 2018 WL 10425912 (N.D. Cal. July 30, 2018).....	21
<i>Blair v. Rent-A-Ctr., Inc.</i> , 2019 WL 529292, at *3 (N.D. Cal. Feb. 11, 2019).....	22
<i>BMG Music v. Gonzalez</i> , 430 F.3d 888 (7th Cir. 2005).....	15
<i>Bot M8 LLC v. Sony Corp. of Am.</i> , 2020 WL 1904102 (N.D. Cal. Apr. 16, 2020)	23
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	15, 17
<i>Carroll v. Nakatani</i> , 342 F.3d 934 (9th Cir. 2003).....	19
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978).....	6
<i>Cooter & Gell v. Hartmarx Corp.</i> , 496 U.S. 384 (1990).....	17
<i>Couch v. Telescope Inc.</i> , 611 F.3d 629 (9th Cir. 2010).....	15

1	<i>Delbridge v. Kmart Corp.</i> ,	
2	2013 WL 3475465 (N.D. Cal. July 10, 2013).....	21
3	<i>Doe By & Through Doe v. Petaluma City Sch. Dist.</i> ,	
4	949 F. Supp. 1415 (N.D. Cal. 1996).	23
5	<i>Drevaleva v. VA</i> ,	
6	2019 WL 3037549 (N.D. Cal. July 11, 2019).....	22
7	<i>Eisen v. Carlisle & Jacquelin</i> ,	
8	417 U.S. 156 (1974).....	1, 6
9	<i>Erickson Prods. Inc. v. Kast</i> ,	
10	2023 WL 5600095 (N.D. Cal. Aug. 29, 2023).....	19
11	<i>Etter v. Allstate Ins. Co.</i> ,	
12	No. 3:17-cv-00184 WHA (N.D. Cal. Jan. 23, 2018), Dkt. 79	20
13	<i>Firestone Tire & Rubber Co. v. Risjord</i> ,	
14	449 U.S. 368 (1981).....	1, 5, 6
15	<i>Flanigan v. Holder</i> ,	
16	2021 WL 5359429 (N.D. Cal. Oct. 26, 2021).....	19
17	<i>Georgia v. Public.Resource.Org, Inc.</i> ,	
18	590 U.S. 255 (2020).....	8
19	<i>Guity Hamzeh, v. Pharmavite LLC, et al.</i> ,	
20	2025 WL 1810082 (N.D. Cal. July 1, 2025).....	23
21	<i>Harper & Row Publishers, Inc. v. Nation Enters.</i> ,	
22	471 U.S. 539 (1985).....	8
23	<i>Henley v. Jacobs</i> ,	
24	2019 WL 8333448 (N.D. Cal. Oct. 25, 2019).....	6
25	<i>Herrera v. Fargo</i> ,	
26	2020 WL 7051097 (C.D. Cal. Oct. 8, 2020).....	16
27	<i>In re 5-Hour Energy Mktg. & Sales Pracs. Litig.</i> ,	
28	2017 WL 4772567 (C.D. Cal. Aug. 11, 2017).....	20
	<i>In re Cement Antitrust Litig.</i> ,	
	673 F.2d 1020 (9th Cir. 1981).....	6
	<i>J.B. v. G6 Hosp., LLC</i>	
	WL 4079207 (N.D. Cal. Sept. 8, 2021).	23
	<i>James v. Price Stern Sloan, Inc.</i> ,	
	283 F.3d 1064 (9th Cir. 2002).....	6

1	<i>Kadrey v. Meta Platforms, Inc.</i> ,	
2	No. 23-CV-03417-VC, 2025 WL 1752484 (N.D. Cal. June 25, 2025)	<i>passim</i>
3	<i>Kadrey, et al. v. Meta Platforms Inc.</i> ,	
4	Dkt. 610, July 11, 2025 Hearing Tr.	2, 5
5	<i>Kelly v. Arriba Soft Corp.</i> ,	
6	336 F.3d 811 (9th Cir. 2003).....	15
7	<i>Kona Enters., Inc. v. Estate of Bishop</i> ,	
8	229 F.3d 877 (9th Cir. 2000).....	19
9	<i>Lawson v. Grubhub</i> ,	
10	2023 WL 3726490 (N.D. Cal. May 30, 2023)	20
11	<i>Lenz v. Universal Music Corp.</i> ,	
12	815 F.3d 1145 (9th Cir. 2016).....	10
13	<i>Mason & Dixon Intermodal, Inc. v. Lapmaster Int’l, LLC</i> ,	
14	2009 WL 10681000 (N.D. Cal. Sept. 23, 2009)	23
15	<i>McLaughlin v. Wells Fargo Bank, N.A.</i> ,	
16	2015 WL 10889994 (N.D. Cal. Nov. 24, 2015).....	22
17	<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> ,	
18	508 F.3d 1146 (9th Cir. 2007).....	15
19	<i>Schoenborn v. Stryker Corp.</i> ,	
20	2011 WL 5881647 (D. Or. Nov. 21, 2011).....	16
21	<i>Sega Enterprises Ltd. v. Accolade</i> ,	
22	977 F.2d 1510 (9th Cir. 1992).....	9
23	<i>Shurance v. Plan. Control Int’l, Inc.</i> ,	
24	839 F.2d 1347 (9th Cir. 1988).....	11
25	<i>Sinatro v. Barilla Am., Inc.</i> ,	
26	2024 WL 4008715 (N.D. Cal. Aug. 29, 2024).....	21
27	<i>Sony Computer Entertainment, Inc. v. Connectix Corp.</i> ,	
28	203 F.3d 596 (9th Cir. 2000).....	9
	<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> ,	
	464 U.S. 417 (1984).....	8
	<i>Thomson Reuters Enter. Ctr. GMBH v. Ross Intel. Inc.</i> ,	
	765 F. Supp. 3d 382 (D. Del. 2025)	11
	<i>U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC</i> ,	
	583 U.S. 387 (2018).....	9

1	<i>U.S. Rubber Co. v. Wright</i> ,	
2	359 F.2d 784 (9th Cir. 1966).....	6
3	<i>UMG Recordings, Inc. v. MP3.Com, Inc.</i> ,	
4	92 F. Supp. 2d 349 (S.D.N.Y. 2000).....	15
5	<i>United States v. Slater</i> ,	
6	348 F.3d 666 (7th Cir. 2003).....	15
7	<i>Van Cauwenberghe v. Biard</i> ,	
8	486 U.S. 517 (1988).....	1, 6
9	<i>Van Slyke v. Capital One Bank</i> ,	
10	No. C 07-00671 WHA, 2007 BL 192475 (N.D. Cal. Dec. 3, 2007).....	22
11	<i>Vasquez v. USM Inc.</i> ,	
12	2014 WL 492039 (N.D. Cal. Feb. 5, 2014).....	23
13	<i>Wang v. Zymergen Inc.</i> ,	
14	759 F. Supp. 3d 1002 (N.D. Cal. 2024)	16
15	Statutes	
16	28 U.S.C. §1292(b)	<i>passim</i>
17	Copyright Act, 17 U.S.C. 101 <i>et. seq.</i>	3
18	Rules	
19	Civ. L.R. 7-9	23, 24
20	Other Authorities	
21	S. Rep. 85-2434 (1958).....	6

INTRODUCTION

Lagging years behind its competitors, Anthropic stole millions of books from notorious pirate libraries to avoid the “slog” of competing fairly. After it was sued for its infringement, Anthropic sought an expedited decision on its fair use defense before either fact or expert discovery was complete. Now, faced with an emphatic rejection of its core position—that it could steal books with impunity—Anthropic urges this Court to get out of the way so it can jump straight to the Ninth Circuit. That is not how litigation works.

The final judgment rule has remained a central feature of our federal court system for more than 200 years. The rule deters “the harassment and cost of a succession of separate appeals,” *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); spurs efficient “judicial administration,” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); and safeguards “the independence of the district judge, as well as the special role that individual plays,” *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988). Interlocutory appeals under Section 1292(b) are a narrow exception to this rule, granted in only in the rarest of cases where resolving a controlling, pure question of law that has actually divided the federal courts would materially advance the termination of the litigation. But they are not granted in cases like this one. The questions Anthropic seeks to certify are steeped in fact, they have divided few jurists (if any), and Anthropic will face a trial on its copyright infringement regardless of how these questions are resolved.

The linchpin of Anthropic’s argument is the decision in *Kadrey v. Meta Platforms, Inc.*, No. 23-CV-03417-VC, 2025 WL 1752484, at *1 (N.D. Cal. June 25, 2025), which Anthropic claims reflects an “opposite approach” on piracy allegations “in a very similar case.” Dkt 241 at 2. But Anthropic’s arguments about *Kadrey*—a single district court decision decided on a different record, where the District Judge also rejected a similar request for interlocutory review—fall far short of

1 satisfying 28 U.S.C. §1292(b). For starters, both this Court’s Order on Fair Use and the *Kadrey*
2 decision rise and fall on the particular facts of each case—critically, here, evidence of Anthropic’s
3 creation of a permanent, private library of pirated works akin to the shelved copies of journal
4 articles maintained in *American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1994); Dkt.
5 231 at 20–21. Nor would an appeal at this juncture materially advance termination of the litigation.
6 Even under Anthropic’s apparently preferred legal framework (the *Kadrey* decision), Anthropic’s
7 would still face a trial. Judge Chhabria recognized that the same type of evidence Plaintiffs
8 presented here—that AI has “the potential to flood the market with endless amounts of . . . books”
9 or that downloading unauthorized content supports pirate websites—is in “most cases” dispositive
10 of a fair use defense. *Kadrey*, 2025 WL 1752484, at *1; *Bartz v. Anthropic PBC*, 2025 WL 1741691,
11 at *17 (N.D. Cal. June 23, 2025) (citing record evidence that “training LLMs will result in an
12 explosion of works competing with their works”). Because Anthropic’s fair use defense is the type
13 of fact-bound issue inappropriate for interlocutory review, and because Anthropic fair use defense
14 fails under either court’s decision, an interlocutory appeal is far more likely to prolong—rather than
15 efficiently advance—this litigation.
16

17
18 What is more, any purported conflict between this Court’s decision and the *Kadrey* case is
19 at best inchoate. Just last week, the *Kadrey* Court ordered supplemental summary judgment briefing
20 on whether Meta’s torrenting from pirate websites qualifies as fair use and rejected Meta’s request
21 for an interlocutory appeal. *See* Ex. A (*Kadrey, et al. v. Meta Platforms Inc.*, Dkt. 610, July 11,
22 2025 Hearing Tr.) at 25:24-21. This Court too should not pause the progress of this case for
23 interlocutory review.
24

25 This Court should deny Anthropic’s motion for interlocutory appeal under Section 1292(b),
26 along with Anthropic’s attempt to relitigate this case in a motion for reconsideration.
27
28

BACKGROUND

From the moment it began, Anthropic knew there were “many places from which” it could lawfully obtain the books it wanted. Dkt. 231 at 2 (Court’s Order on Fair Use). But the “legal/practice/business slog” of obtaining them, CEO Dario Amodei explained, was simply too great. *Id.* So Anthropic cheated. It stole ~200,000 books in January 2021; ~5,000,000 books in June 2021; and ~2,000,000 books in July 2022, using a variety of online pirate libraries.¹ Anthropic recognized that doing so was wrong “for legal reasons,” *id.*, but it did not care. It had amassed a collection of books rivaling California’s biggest libraries—all without paying a cent.

Plaintiffs represent a certified class of copyright owners whose books are found in two of the pirated libraries that Anthropic used. *See* Dkt. 244 at 31. They bring suit under the Copyright Act, 17 U.S.C. 101 *et. seq.*, seeking to hold Anthropic accountable for reproducing their works without permission. *See, e.g.*, Dkt. 70 (Am. Compl. ¶¶ 45–47). Earlier this year, Anthropic urged the Court to resolve summary judgment in its favor before fact discovery could conclude. *See* Dkt. 92. In Anthropic’s view, the entirety of its mass theft was excused by the fact that it trained LLMs. Dkt. 231 at 8.

This Court did not agree. While finding that Anthropic’s copying of books in the course of LLM training was fair use, Dkt. 231 at 30–31, the Court concluded that Anthropic’s downloads from pirated libraries and copies made for its internal pirate library had a different use and a different purpose. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 533 (2023). Anthropic planned to store those books “forever,” even if they would not be “used for training LLMs.” Dkt. 231 at 5. That “‘general purpose’ library” retained the stolen “work[s] as a ‘hard resource’ for other uses” beyond “training at all.” *Id.* at 7. And while Anthropic claimed no

¹ These are *total* numbers of books, not the smaller subset of books in the certified class. *See* Dkt. 244. Plaintiffs expect the total number of class works to be substantially lower, after de-duplication of the data sets and reduction for other class criteria such as registered United States copyrights and ISBN or ASIN numbers.

1 such library existed—a claim it reprises now—it failed to “offer up what [evidence] possessed in
2 support of” it. *Id.* Short-circuiting discovery did not permit Anthropic, as it had hoped, from
3 “resist[ing] putting into the record” evidence relating to its acquisition and storage of books from
4 pirated sites. *Id.* at 8.

5
6 The Court next emphatically rejected Anthropic’s attempt to justify its piracy. Anthropic
7 was not free to pocket “all the works in the world and keep them forever with no further
8 accounting.” *Id.* at 14. The Court “doubt[ed],” indeed, whether “any accused infringer could ever
9 meet its burden of explaining why downloading source copies from pirate sites *that it could have*
10 *purchased or otherwise accessed lawfully* was itself reasonably necessary to any subsequent fair
11 use.” *Id.* at 18. Still, the Court concluded that it “need not decide” Anthropic’s summary judgment
12 motion on that basis. Anthropic’s training defense, instead, simply could not apply to pirated works
13 that were not used for training. And here, “not every book Anthropic pirated was used to train
14 LLMs.” *Id.* at 19. “They were acquired and retained,” instead, “as a central library of all the books
15 in the world”—“a central library that one could have paid for.” *Id.* at 21. In that way, Anthropic’s
16 “piracy was the point.” *Id.*

17
18 In reaching its decision, the Court plainly considered the facts and issues Anthropic now
19 argues the Court overlooked. Most importantly, the Court acknowledged Anthropic’s argument that
20 the collection and storage of books data is a step in LLM training process, but concluded that
21 “[p]irating copies to build a research library without paying for it, and to retain copies should they
22 prove useful for one thing or another, was its own use—and not a transformative one.” Dkt. 231 at
23 19.

24
25 Two days after this Court’s decision, Judge Chhabria ruled on a summary judgment motion
26 in *Kadrey v. Meta Platforms, Inc.*, 2025 WL 1752484, at *2 (N.D. Cal. June 25, 2025). In granting
27 partial summary judgment for Meta, the *Kadrey* court concluded that—unlike here—*all* the works
28

1 that Meta pirated “had the ultimate purpose of LLM training.” *Kadrey*, 2025 WL 1752484, at *12.
2 In addition, the *Kadrey* Court ordered additional briefing regarding whether Meta made pirated
3 books available to the public when it downloaded them from shadow libraries and whether that was
4 fair use, confirming that the issue of piracy remains live in *Kadrey* itself. *See* Ex. A at 25:24-21
5 (Court requesting schedule for summary judgment briefing schedule on torrenting distribution).
6 The *Kadrey* Court also held that interlocutory appeal was inappropriate. *See id.* at 14:18-20 (“I
7 think that the best way to manage this case is to get it all adjudicated, and then, once judgment is
8 entered, whoever loses on what issue can appeal.”); *id.* at 14:6-18 (Meta’s suggestion that the Court
9 take appeal *sua sponte*).

11 Notwithstanding these facts and the different posture, the *Kadrey* case lies at the heart of
12 Anthropic’s Motion and, in Anthropic’s words, “cannot be reconciled” with this Court’s decision
13 in two ways. Motion at 16. As explained below, however, Anthropic’s framing is both incorrect
14 and immaterial. These two decisions rest on their own facts. And regardless, interlocutory appeal
15 remains inappropriate even incorrectly assuming a conflict exists.

17 QUESTIONS PRESENTED FOR CERTIFICATION

18 Anthropic requests this Court certify its summary judgment order for interlocutory review
19 under 28 U.S.C. §1292(b) so that “[t]wo specific questions of law” receive “immediate appellate
20 review.” Motion at 12.

22 The first question is: “Whether fair use is analyzed by reference to the defendant’s ultimate
23 use of a copyrighted work or by parsing the defendant’s use into subsidiary steps.”

24 The second question is: “Whether a defendant’s acquisition of a copyrighted work from an
25 unauthorized source counsels strongly against fair use, even if the defendant’s ultimate use of that
26 work is transformative.”

LEGAL STANDARD UNDER SECTION 1292(B)

Incorporated first into the Judiciary Act of 1789 and now codified at 28 U.S.C. §1291, the final judgment rule has long promoted “a number of important purposes” in the judicial system. *Firestone Tire*, 449 U.S. 368 at 374. The rule deters “the harassment and cost of a succession of separate appeals,” *id.*; spurs efficient “judicial administration,” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); and safeguards “the independence of the district judge, as well as the special role that individual plays,” *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988).

Congress recognized the importance of the final judgment rule when enacting Section 1292(b). The Senate Report provides that appeals under the Section would “be used only in exceptional cases,” S. Rep. No. 85-2434, 1958 WL 3723, at 5259 (1958), a principle which the Ninth Circuit has frequently reaffirmed since, *see U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (“only in extraordinary cases”); *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1068 n.6 (9th Cir. 2002) (“rare circumstances”); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981) (“exceptional circumstances”).

To ensure its limited use, Section 1292(b) is circumscribed in three ways. An interlocutory order may be appealed only if it “involves a controlling question of law;” only if there is a “substantial ground for difference of opinion” on that question; and only if resolving the question “materially[s] advance the ultimate termination of the litigation.” 28 U.S.C. §1292(b). These requirements are “construed narrowly,” *James*, 283 F.3d at 1068, and Anthropic accordingly bears “a heavy burden” to demonstrate they are met, *Henley v. Jacobs*, 2019 WL 8333448, at *2 (N.D. Cal. Oct. 25, 2019). Section 1292(b) seldom allows “a departure from the basic policy of postponing appellate review until after the entry of a final judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

ARGUMENT

Anthropic has not carried its heavy burden to demonstrate that this is the rare case in which an interlocutory appeal is warranted. That is because it is not.

The first question Anthropic seeks to certify—whether training was its only use of pirated works—is inextricably fact-bound. This Court made express factual findings, relying on ample record evidence that Anthropic’s piracy went beyond training. Anthropic fails to recast those extensive factual determinations as legal ones in the sole paragraph of its brief (at 8) where it tries to do so. No more persuasive is Anthropic’s attempt to suggest that a focus on “ultimate use” would even matter here—as this Court found, that argument lacked any basis “in[] the record,” Dkt. 231 at 8. That fact-bound conclusion led the Court to likewise correctly hold—as have a legion of other courts—that piracy is not shielded by fair use simply because a defendant might also do something transformative with the works at issue.

The second question Anthropic seeks certified—whether piracy “counsels strongly” against fair use—is no more appropriate for interlocutory review, as it too is fact-bound and an issue on which there is no meaningful difference of opinion. The Court found that Anthropic pirated books and kept them for purposes beyond LLM training, and that these “actual uses” of the books were unprotected. Dkt. 231 at 20. And while the Court correctly observed that “[t]here is no decision holding” that pirating books which could have been “accessed lawfully was itself reasonably necessary to any subsequent fair use,” the Court stated it was not “decid[ing] this case” on that basis. *Id.* at 18–19. In that regard, the Court’s decision accords with *Kadrey*, which similarly noted that the pirated nature of works could diminish their claim to fair use while ultimately declining—again like this Court—to resolve fair use on those grounds. 2025 WL 1752484, at *11.

Certifying an interlocutory appeal under these circumstances will thus have no benefit. But the costs will be steep. By the time this Court decides the Motion, trial will likely be fewer than

three months away, fact discovery will have concluded, expert reports will have been served, and the notice process for class members will be around the corner. Thrusting this case into an appellate posture at the eleventh hour—leaving this Court, Plaintiffs, and scores of class members in the lurch—cannot be the right decision, least of all to address a series of fact-bound questions on which there is little meaningful dispute.

I. Anthropic’s Attempt to Rehabilitate Its Piracy Does Not Warrant an Interlocutory Appeal.

a. The question of what constitutes a “use” in this case is inextricably fact-bound.

Anthropic first takes aim at the Court’s purported failure to “focus[] on Anthropic’s ultimate purpose of using the works to develop its LLMs,” which Anthropic contends is a *legal* error. Motion at 14. That is wrong. This Court’s decision about the uses to which Anthropic put pirated books turned on the specific facts of this case. It had to.

“[A]s the Supreme Court has emphasized, the fair use inquiry is highly fact dependent, and there are few bright-line rules.” *Kadrey*, 2025 WL 1752484, at *2. Fair use “requires a case-by-case determination” of the “particular use,” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549, 560 (1985), which is a “notoriously fact sensitive” inquiry that “often cannot be resolved without a trial,” *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 275 (2020). Every fair use case must thus “be decided on its own facts.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31 (1984) (quotation marks omitted); *see also Warhol*, 598 U.S. at 533 (fair use “requires an analysis of the *specific ‘use’* of a copyrighted work,” and even the very “same copying may be fair when used for one purpose but not another.”)

The Court adopted precisely this fact-specific approach here, grounding its conclusion that Anthropic’s downloaded pirated works and maintained them in a private library long after it determined not to use them to train an LLM. For instance, the Court identified evidence that “Anthropic planned to ‘store everything forever’” and that Anthropic would not “‘delete a book’—

1 even if not used for training LLMs.” Dkt. 231 at 5; *see also id.* at 19. The Court also accurately
2 recounted Anthropic’s efforts to “build[] more tools for searching its ‘general purpose’ library and
3 for accessing books.” *Id.* As the Court noted, “[n]o initial copy was ever deleted, even if never used
4 or no longer used.” *Id.*

5
6 The Court covered the training process from beginning to end. What it did *not* do, however,
7 was expand Anthropic’s training-is-fair-use defense to inoculate Anthropic’s decision to download
8 free copies of books from pirate websites to avoid a “legal/practice/business slog.” MSJ Opp. Ex.
9 27. Though acknowledging correctly that pirating works for free when they are otherwise available
10 on the open market is “inherently, irredeemably infringing,” the Court, in a careful examination of
11 the record, also recognized that training was “not the only use at issue.” Dkt. 231 at 14.

12
13 The Court’s treatment of the precedent on which Anthropic relied confirms that its fair use
14 conclusion turned on factual, rather than legal determinations. In distinguishing the intermediate
15 copying cases, for instance, the Court observed that *Sega Enterprises* “reached only one result
16 *because on those facts* there was only one ‘overall purpose’ for the unauthorized copies.” Dkt. 231
17 at 22 (quoting *Sega Enterprises Ltd. v. Accolade*, 977 F.2d 1510 (9th Cir. 1992) (emphasis added)).
18 And in *Sony Computer*, fair use was found only after the court concluded that the specific “conduct”
19 at issue was “necessarily” and “solely” relevant to the defendant’s ultimate purpose. Dkt. 231 at 23
20 (citing *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000)).

21
22 Anthropic can thus do little to defend the purported legal character of the question it
23 presents. Motion at 13. It spends just one paragraph—shorn of any explanation, let alone any
24 relevant authority—declaring that the question it poses “requires the court ‘to expound on the law’
25 and ‘elaborat[e] on [the] broad’ fair use ‘legal standard.’” *Id.* (quoting *U.S. Bank Nat’l Ass’n v. Vill.*
26 *at Lakeridge, LLC*, 583 U.S. 387, 396 (2018)).

27
28 But Anthropic’s question does no such thing, and even Anthropic ultimately concedes as

1 much. Anthropic grants that if it “were to subsequently use retained works for purposes other than
 2 LLM development activities . . . then those separate uses would be subjected to their own fair use
 3 analysis.” Dkt. 241 at 15 n.1. But whether Anthropic “retained works for purposes other than LLM
 4 development” is precisely one of the fact questions that this Court already resolved against
 5 Anthropic:

6
 7 But not every book Anthropic pirated was used to train LLMs. *And, every pirated library copy was retained even if it was determined it*
 8 *would not be so used.* Pirating copies to build a research library
 9 without paying for it, *and to retain copies should they prove useful*
 10 *for one thing or another, was its own use—and not a transformative*
 11 *one.*

12 Dkt. 231 at 19 (emphases added). As Anthropic admitted at oral argument: “[I]f a purported fair
 13 user had retained pirated copies for uses beyond the fair use, then her piracy would not be excused
 14 by the fair use.” Dkt. 231 at 8. Exactly.

15 Anthropic’s other justifications for certifying its first question likewise confirm its fact-
 16 bound nature. Anthropic contends that, had the Court “adopted Anthropic’s argument that it should
 17 look only at the ultimate use of the downloaded works,” “the outcome would likely have been
 18 different” because “Anthropic’s actions were all interconnected, necessary elements in pursuit of
 19 the single purpose of LLM development.” Motion at 14 (cleaned up). But whether Anthropic’s
 20 piracy was “interconnected” and “necessary” to LLM development is a question of fact—one that
 21 the Court decided against Anthropic based on the record in this case. *Id.* The same is true of whether
 22 Anthropic “acquired, stored, and organized books” only “so that they could be used for . . .
 23 developing LLMs, *id.* at 15; whether Anthropic “put the works to some other use”; *id.*; or whether
 24 Anthropic’s “only” “objective [was] developing LLMs,” *id.*

25 For that reason, Anthropic’s identification of only three cases in the past 31 years that have
 26 granted interlocutory review on issues of fair use, *see* Motion at 13, is beside the point. *Lenz* did
 27 not consider any aspect of the fair use doctrine itself; only whether copyright holders were required
 28

1 to consider fair use before sending takedown notifications and, if so, whether the copyright holder
 2 there had done so. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1154 (9th Cir. 2016). In *Texaco*,
 3 both parties agreed there was “a strong public interest in having prompt appellate review of the fair
 4 use issue”—an issue that the district court had already held a full-blown bench trial to consider.
 5 *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 30 (S.D.N.Y. 1992), *amended* (Oct. 26,
 6 1992), *aff’d*, 60 F.3d 913 (2d Cir. 1994). And in *Thomson*, Judge Bibas, sitting by designation,
 7 certified an interlocutory appeal to the circuit court on which he presides only *after* fact discovery
 8 closed, *after* the facts were “undisputed,” and *after* the issues were “squarely in[] the legal realm.”
 9 *Thomson Reuters Enter. Ctr. GMBH v. Ross Intel. Inc.*, 765 F. Supp. 3d 382, 397 (D. Del. 2025).

11 Here, by contrast, the first question that Anthropic poses, and the many subsidiary questions
 12 it entails, inescapably turn on the facts. Resolving those fact-bound questions is not what
 13 interlocutory review is for. That is most of all true in a case like this one, where trial is just months
 14 away and ongoing fact discovery will address the very issues that Anthropic’s Motion concerns.
 15 See, e.g., *Shurance v. Plan. Control Int’l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) (denying leave
 16 to appeal under Section 1292(b) where the appeal “could not be completed before . . . when trial is
 17 currently scheduled” and thus threatened “delaying the resolution of this litigation”).

19 **b. Resolving Anthropic’s first question in its favor would not be controlling and**
 20 **would not materially advance this case.**

21 Even if the Ninth Circuit were to conclude that “fair use is analyzed by reference to the
 22 defendant’s ultimate use of a copyrighted work” as Anthropic urges, that resolution would not
 23 control the outcome of this case.

24 That is for a simple reason: this Court’s conclusion that the “ultimate use” of Anthropic’s
 25 pirated copies *was not solely to train LLMs* would remain intact. As the Court explained,
 26 “[b]uilding a central library of works *to be available for any number of further uses was itself the*
 27 *use* for which Anthropic acquired these copies.” Dkt. 231 at 19 (emphasis added). “Pirating copies
 28

1 to build a research library without paying for it, and to retain copies should they prove useful for
 2 one thing or another, was its own use.” *Id.* Anthropic’s concession that “separate uses” beyond
 3 training “would be subjected to their own fair use analysis,” Motion at 15 n.1, is thus dispositive.
 4 This Court concluded that Anthropic engaged in those separate uses. Dkt. 231 at 19. And Anthropic
 5 admits that conclusion would not be altered by an appellate decision in its favor. Motion at 15 n.1.

7 Anthropic’s reliance on *Kadrey* confirms why even its success on appeal would only
 8 prolong—not advance—this litigation. As the *Kadrey* Court held, evidence that a generative AI
 9 product “will likely flood the market with similar works, causing market dilution” will be sufficient
 10 in most cases to defeat a fair use defense. 2025 WL 1752484, at *2. This is precisely the type of
 11 evidence present in this case. Dkt. 231 at 17. *Kadrey*, moreover, also confirmed that downloading
 12 from shadow libraries can weigh against fair use. *Id.* at *12. In short, even if the Ninth Circuit were
 13 to adopt Anthropic’s preferred fair-use framework in the *Kadrey* decision wholesale, Anthropic’s
 14 fair use defense on this record and in this lawsuit would still fail.

16 **c. Anthropic overstates any difference of opinion about whether its piracy**
 17 **constitutes a use, and an ordinary split between two district courts is not the**
 18 **type of significant conflict that warrants immediate, interlocutory review**

19 Anthropic aims to disrupt this case months before trial because, less than a month ago, a
 20 district court judge in a different matter issued a ruling that Anthropic apparently likes. That recent
 21 decision—Judge Chhabria’s in *Kadrey*—“cannot be reconciled” or “squared” with this Court’s
 22 summary judgment order, Anthropic says. Motion 16. So instead of allowing a nascent conflict
 23 between two district courts to resolve in the ordinary course, Anthropic demands a rush to
 24 judgment. But Anthropic misapprehends the *Kadrey* case, and once more ignores the critical role
 25 that facts play in the fair use analysis.

26 ***There is no meaningful difference of opinion.*** *Kadrey* and this Court began by sharing
 27 common ground on the issue most important to Anthropic’s Motion—what constitutes a use.
 28

1 *Kadrey* held that the defendant’s initial downloading of pirated works was “a *different use* from
2 any copying done in the course of LLM training.” 2025 WL 1752484, at *12 (emphasis added).
3 This Court held the same. *See* Dkt. 231 at 23.

4 *Kadrey* then observed that such “downloading must still be considered in light of its ultimate
5 . . . purpose.” 2025 WL 1752484, at *12. The purpose in *Kadrey*, the Court held, was the
6 defendant’s LLM training. *Id.* The Court reached that conclusion, however, based on its review of
7 the record before it. *Kadrey* found that “*all of the downloads* the plaintiffs identify had the ultimate
8 purpose of LLM training.” *Id.* (emphasis added). Some of those downloads were used to validate
9 “good training data.” *Id.* Other downloads were “used as training data” themselves. *Id.* But together,
10 every download served the ultimate purpose of LLM training. The *Kadrey* plaintiffs, according to
11 the court, had simply “provide[d] no evidence” at all “that [it] was actually the case” that “only
12 some [pirated works] ever made it into an LLM for training.” *Id.* (emphasis added). And, notably,
13 the *Kadrey* Court both reserved for later proceedings whether pirated works that Meta made widely
14 available during its downloading were entitled to fair use, and concluded that an interlocutory
15 appeal was unwarranted. *See Kadrey*, July 11, 2025 Hearing Tr. at 25:24-2. Training is not the
16 cover-all that Anthropic claims, even in the *Kadrey* case on which Anthropic heavily relies.

17 Here, by contrast, the Court found evidence that “not every book Anthropic pirated was
18 used to train LLMs”; that “every pirated library copy was retained even if it was determined it
19 would not be so used”; that Anthropic had compiled a “general-purpose library of works for various
20 uses” outside LLM training; and that Anthropic “kept these pirated copies in its library even after
21 deciding it would not use them to train its AI (at all or ever again).” Dkt. 231 at 18–19, 30.

22 To be sure, this Court recognized correctly that Anthropic’s decision to turn to criminal
23 organizations to obtain massive tranches of copyrighted books that “it could have purchased or
24 otherwise accessed lawfully” was “inherently, irredeemably infringing even if the pirated copies
25

1 are immediately used for the transformative use and immediately discarded.” Dkt. 231 at 18–19.
2 This accords with an unbroken line of *Napster*-era decisions holding that downloading copies of
3 otherwise-available copyrighted works for free to avoid paying for them is a manifestly unfair,
4 substitutive use, as the infringer “get[s] for free something they would ordinarily have to buy.”
5 *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001), as amended (Apr. 3, 2001),
6 *aff’d sub nom.*, 284 F.3d 1091 (9th Cir. 2002), and *aff’d sub nom. A&M Recs., Inc. v. Napster, Inc.*,
7 284 F.3d 1091 (9th Cir. 2002); Dkt. 158 (MSJ Opp.) at 6–8. But the Court also recognized that it
8 “need not decide this case on that rule,” given the extensive evidence that Anthropic “retained
9 pirated copies even after deciding it would not use them . . . for training its LLMs ever again.” Dkt.
10 231 at 19.
11

12 Anthropic thus resigns itself to repeatedly citing *Kadrey*’s stray comment, offered in the
13 alternative at the end of its factual analysis, that “even if Meta did download some copies that
14 weren’t ultimately used for training, fair use doesn’t require that the secondary user make the lowest
15 number of copies possible.” 2025 WL 1752484, at *13. But that passing statement, offered in the
16 alternative after paragraphs of factual analysis, cannot possibly be the basis to upend this case and
17 thrust it into an interlocutory posture.
18

19 That is especially so because *Kadrey*’s “lowest copies” remark fails to reflect the scope of
20 the fair use analysis conducted here. *See* Dkt. 231 at 8–9. As the Court observed, Anthropic in fact
21 conceded at oral argument “that if a purported fair user had retained pirated copies for uses beyond
22 the fair use, then her piracy would not be excused by the fair use.” Dkt. 231 at 8. And it concluded
23 that, based on the record evidence, Anthropic had indeed “acquired and retained [] a central library
24 of all the books in the world” that would “be available for any number of further uses” besides
25 LLM training. *Id.* at 19.
26

27 No more apt is Anthropic’s attempt (at 17) to posit a conflict between this Court’s decision
28

1 and precedent from the Supreme Court or Ninth Circuit. *Warhol*, for example, did not yield to the
 2 artist’s claim that fair use turned on whatever end purpose the artist ascribed to it. The Court
 3 explained, instead, that fair use “must be evaluated in the context of the specific use at issue,” 598
 4 U.S. at 545, even if that risked “indifference to purposes beyond the” use itself, *id.* at 577 (Kagan,
 5 J., dissenting). Anthropic’s reliance on *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th
 6 Cir. 2007), and *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003), are even further afield.
 7 Neither case concerns piracy at all. *See* Dkt. 153 at 15 (MSJ Opp.).

8
 9 By contrast, the case law that does consider piracy uniformly holds that piracy is
 10 unprotected by fair use.² And here, the Court concluded—as a matter of fact, and in view of the all-
 11 purpose “central library” Anthropic created—that “piracy was the point.” Dkt. 231 at 21.

12 ***Differing opinions amongst district courts is generally insufficient to warrant***
 13 ***interlocutory review.*** Anthropic at last suggests that interlocutory review is warranted because the
 14 “legal issue here will recur in the many pending copyright challenges to generative AI tools.”
 15 Motion 17. Anthropic does not identify a single pending motion in any case in which this issue is
 16 live, let alone any decision besides *Kadrey* in which a purported conflict has emerged. It is “well
 17 settled,” however, “that the mere presence of a disputed issue that is a question of first impression,
 18 standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.” *Couch*
 19 *v. Telescope Inc.*, 611 F.3d 629, 634 (9th Cir. 2010) (quotation marks and citation omitted).

20
 21 As a result, the most Anthropic is willing to say is that plaintiffs in other cases “*could* seek
 22
 23

24 ² *See, e.g., A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001), as amended (Apr.
 25 3, 2001) (affirming that users’ downloading music files using the Napster directory is not fair use);
 26 *United States v. Slater*, 348 F.3d 666, 668 (7th Cir. 2003) (rejecting “Pirates With Attitudes”
 27 defendants’ argument that district court erred by declining to give a fair use jury instruction); *UMG*
 28 *Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (rejecting fair use
 defense even when the downloader already owned one purchased copy); *BMG Music v. Gonzalez*,
 430 F.3d 888, 890 (7th Cir. 2005) (“the only appellate decision on point has held that downloading
 copyrighted songs cannot be defended as fair use”); *see also Campbell v. Acuff-Rose Music, Inc.*,
 510 U.S. 569, 578 n.10 (1994) (“most infringements are simple piracy,” but “such cases are worlds
 apart from many of those raising reasonable contentions of fair use” (quotation omitted)).

to” prevail on piracy, which “*could* well shape the outcome” of those cases. Motion at 18 (emphasis added). But even if that speculation were correct, it would not matter. Certification is regularly denied even where district courts *are* in open conflict, because a “substantial ground for difference of opinion generally exists *only* where the *circuits* are in dispute on the question and the court of appeals of the circuit has not spoken on the point.” *Wang v. Zymergen Inc.*, 759 F. Supp. 3d 1002, 1011 (N.D. Cal. 2024) (first emphasis added, quotation marks and citation omitted); *see also* *Herrera v. Fargo*, 2020 WL 7051097, at *4 (C.D. Cal. Oct. 8, 2020) (“[T]he fact that district courts have applied the [law] differently is insufficient to find a substantial grounds for a difference in opinion[.]”); *Schoenborn v. Stryker Corp.*, 2011 WL 5881647, at *2 (D. Or. Nov. 21, 2011) (“[T]he court’s recognition of and disagreement with other district court opinions does not constitute a basis for interlocutory certification.”).

If, as Anthropic says, many district courts are soon to consider these issues, that is a feature, not a bug. Percolation enhances review. Shortcutting the normal appellate process does not.

II. Anthropic’s Second Question Misrepresents the Court’s Opinion and is Deeply Fact-Bound in Any Event.

The second question Anthropic presents—whether piracy categorically defeats fair use—is also inapt for interlocutory review.

The question is fact-bound and not controlling. Anthropic initially frames this Court’s analysis as turning on whether piracy “inherently” defeats fair use. Motion 19. But while the Court concluded (correctly) that it “doubt[ed] that any accused infringer could ever meet its burden of explaining why” piracy “was itself reasonably necessary to any subsequent fair use,” Dkt. 231 at 18, the Court stated that “this order need not decide this case on that rule,” *id.* at 19. The Court noted, furthermore, that its “doubts” of the availability of fair use in the context of piracy stemmed from representations made by Anthropic’s own counsel at oral argument: “You can’t just bless yourself by saying I have a research purpose and, therefore, go and take any textbook you want.”

1 *Id.* at 18 (citing May 22, 2025 Hearing Tr. at 53).

2 Recognizing as much, Anthropic alternatively claims that the disputed question is whether
3 piracy “counsels strongly” against fair use. Motion at 19. But here, the Court found that fair use
4 was unavailable because Anthropic “retained pirated copies even after deciding it would not use
5 them or copies from them for training its LLMs ever again.” Dkt. 231 at 19. And when Anthropic
6 argued that the bad faith of “pirating copies cannot somehow short-circuit the fair use analysis,”
7 the Court responded by stating—again—that the bad faith of piracy was “not the basis for this
8 decision.” *Id.* (cleaned up).

10 Anthropic’s “[f]act-bound” disputes with the Court’s conclusions do not present the type of
11 issue likely to be “made uniform through appellate review.” *Cooter & Gell v. Hartmarx Corp.*, 496
12 U.S. 384, 405 (1990). Piracy may be inimical to fair use in many ways. Sometimes, piracy may
13 benefit pirate “libraries or their other users,” which risks greater piracy by others—amongst the
14 types of evidence that Plaintiffs anticipate adducing here. *Kadrey*, 2025 WL 1752484, at *21. So
15 too might piracy’s impact be so significant in a given case—“destroy[ing] the academic publishing
16 market,” as Anthropic’s counsel offered—that the applicability of fair use wanes. Dkt. 231 at 18.
17 Likewise, piracy might be entirely unjustified based on the knowledge or motivations of the
18 defendant, which Plaintiffs expect to be part of their case as well. *Cf. id.* at 3–6, 18–19. The
19 pertinent *legal* question, however, remains the same: whether “the particular copying done” is
20 entitled to protection. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 573 (1994). That is the
21 question that this Court sought to answer, and one that is entirely fact dependent.

24 ***There is no meaningful difference of opinion.*** Anthropic’s motion once again resorts to
25 exaggerating the differences between this case and *Kadrey*, claiming that piracy made all the
26 difference here but no difference there. But that divergence is one of Anthropic’s own making.
27 *Kadrey* and this Court both *agreed* that piracy could be a relevant consideration in fair use analysis.
28

1 *Kadrey* made that clear right out of the gate. Meta was “wrong to suggest,” *Kadrey* held in
 2 addressing factor one, “that its use of shadow libraries is irrelevant to whether [Meta’s] copying
 3 was fair use.” *Kadrey*, 2025 WL 1752484, at *11. That was because piracy could indeed matter in
 4 at least “a few different ways.” *Id.* It might inform whether a defendant acted in bad faith. *Id.* It
 5 might “help[] others acquire copyrighted works . . . without paying for them.” *Id.* And it might “be
 6 relevant if it benefitted those who created the libraries and thus supported and perpetuated their
 7 unauthorized” activities. *Id.* at *12. *Kadrey* thus did not suggest that piracy could not weigh against
 8 fair use. It did the exact opposite: “In the *vast majority of cases*, *Kadrey* stated “this sort of peer-
 9 to-peer file-sharing will constitute copyright infringement.” *Id.* And indeed, further proceedings
 10 about pirated books remain live in *Kadrey* itself.

11
 12 Anthropic’s one-paragraph effort (at 20–21) to recast the fact-bound nature of piracy into a
 13 legal question about the role of bad faith does not pass muster. For one, Anthropic’s second question
 14 does not inquire about bad faith at all. *See id.* And for another, neither this Court nor *Kadrey* relied
 15 on bad faith in issuing their decisions. *See* Dkt. 231 at 19 (“[Anthropic’s] bad faith is not the basis
 16 for this decision.”); *Kadrey*, 2025 WL 1752484, at *11 (“[B]ad faith . . . doesn't move the needle
 17 here, given the rest of the summary judgment record.”). Crucially, as Anthropic itself
 18 acknowledges, *Kadrey* and this Court agreed (yet again) about the only *legal* issue at stake. The
 19 status of bad faith in fair use analysis, both courts observed, remains “in flux” and “not yet
 20 reappraised” by the Ninth Circuit. Motion at 20–21 (first quoting *Kadrey*, 2025 WL 1752484, at
 21 *11; second quoting Dkt. 231 at 20–22 n.5).

22
 23
 24 Left with nothing else, Anthropic declares that a difference of opinion *must* exist because
 25 the issue of piracy “carries significant implications for the many pending copyright cases involving
 26 generative AI technology.” Motion at 21. Anthropic cites no case at all in this portion of its brief;
 27 the only “difference of opinion” it posits is the one between itself and this Court. “If a contrary
 28

position” to Anthropic’s “were widely adopted,” Anthropic urges, “then LLM training by any company that downloaded works from third-party websites like LibGen or Books3 could constitute copyright infringement.” Motion at 21. But *whether* “a contrary position” to Anthropic’s has in fact been “widely adopted” is the whole point of the “meaningful difference” analysis. And on that score, Anthropic has simply nothing to say.

Anthropic’s question is incapable of advancing this case. In four sentences on the last page of its argument for interlocutory review, Anthropic predicts it will prevail here if the pirated nature of its works “should play little if any role in the [fair use] analysis.” Motion at 21. But, as explained, the impact of piracy on this case is a fact-bound question unsuitable for interlocutory review. Certifying an interlocutory appeal on that basis will not advance this litigation; it will only do the opposite.

III. Reconsideration is unwarranted.

Anthropic’s alternative request for reconsideration of this Court’s carefully considered summary judgment decision also fails.

To safeguard “the interests of finality” and preserve the “conservation of judicial resources,” *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (quotation marks and citation omitted), reconsideration of a prior ruling is permitted only “sparingly,” *Erickson Prods. Inc. v. Kast*, 2023 WL 5600095, at *1 (N.D. Cal. Aug. 29, 2023) (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). Reconsideration thus demands “highly unusual circumstances”—for instance, a court’s manifest failure to consider critical facts or the emergence of an intervening change in controlling law on a dispositive issue. *Flanigan v. Holder*, 2021 WL 5359429, at *1 (N.D. Cal. Oct. 26, 2021) (Alsup, J.) (quoting *Marylyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009)). Reconsideration is not available, by contrast, merely where a Court draws different conclusions from the factual record than the moving

1 party would have wished. Nor is reconsideration warranted simply because another district court
 2 drew purportedly different conclusions from the distinct factual record before it.

3 Anthropic cannot meet its heavy burden to demonstrate reconsideration is proper here. Once
 4 again, it raises only fact-bound disputes with this Court’s summary judgment decision. But “a do-
 5 over” is not what motions for reconsideration are for. *In re 5-Hour Energy Mktg. & Sales Pracs.*
 6 *Litig.*, 2017 WL 4772567, at *4 (C.D. Cal. Aug. 11, 2017). Indeed, Anthropic’s request for fact-
 7 bound reconsideration itself belies Anthropic’s 1292(b) motion, which claims that the real issue is
 8 one of law that requires no examination of the factual record. *Lawson v. Grubhub*, 2023 WL
 9 3726490, at *4 (N.D. Cal. May 30, 2023) (“[A]n application of a settled legal standard to particular
 10 facts” is not “any true question of law” (quotation marks and citations omitted)).

11
 12 **A. The Court Properly Considered the Record Evidence Regarding Anthropic’s Use of
 13 Pirated Books.**

14 Anthropic first argues that the Court manifestly failed to consider material facts because it
 15 is supposedly “undisputed” that every book Anthropic pirated was used for developing its LLMs.
 16 Wrong: “What defendants repeatedly characterize[] as ‘no evidence’ . . . [is] actually just evidence
 17 that defendants disagreed with”. *Etter v. Allstate Ins. Co.*, No. 3:17-cv-00184 WHA, at 2 (N.D. Cal.
 18 Jan. 23, 2018), Dkt. 79 (Alsup, J.) (denying motion for reconsideration).

19
 20 ***The Court did not ignore the record.*** Anthropic suggests that the Court failed to consider
 21 that Anthropic’s collection and storage of pirated books data was only for the purpose of LLM
 22 training. Motion at 17–19. Not so. The Court expressly considered the argument that the collection
 23 and storage of books data is a step in LLM training process, but nevertheless concluded that
 24 “[p]irating copies to build a research library without paying for it, and to retain copies should they
 25 prove useful for one thing or another, was its own use—and not a transformative one.” Dkt. 231 at
 26 19; *see also* Class Cert. Order, Dkt. 244 at 24–25 (“The summary judgment order makes clear that
 27 Anthropic is liable for all pirated copies regardless of whether they were used for training[.]”).
 28

1 A motion for reconsideration is not an appropriate vehicle to quibble with the factual
 2 inferences that the Court drew from the record. *See, e.g., Sinatro v. Barilla Am., Inc.*, 2024 WL
 3 4008715, at *2 (N.D. Cal. Aug. 29, 2024) (denying reconsideration where movant “largely rehashes
 4 previous arguments regarding the sufficiency of Plaintiffs’ evidence”); *Bayer v. Neiman Marcus*
 5 *Grp., Inc.*, 2018 WL 10425912, at *1 (N.D. Cal. July 30, 2018) (denying reconsideration where
 6 movant “presents no new facts that were unavailable to the Court at the time it made its decision,
 7 and the Court considered the record as a whole in making its ruling”); *Delbridge v. Kmart Corp.*,
 8 2013 WL 3475465, at *1–2 (N.D. Cal. July 10, 2013) (Alsup, J.) (denying motion for leave to file
 9 motion for reconsideration where court considered evidence in multi-factor analysis).

11 ***Plaintiffs presented sufficient facts about Anthropic’s usages of pirated books.*** Anthropic
 12 also argues that because Plaintiffs did not advance a “general library theory,” Anthropic did not
 13 have a chance to respond to it. Motion at 19. But both the record and Plaintiffs’ opposition to
 14 Anthropic’s summary judgment motion provided ample evidence that Anthropic pirated books and
 15 created a central, all-purpose library of them. For instance, as the Court recognized, Anthropic
 16 admitted that it retained the LibGen dataset even after it stopped using that dataset to train LLMs.
 17 *See* Dkt. 231 at 4 (citing Opp. Ex. 17 at 93–94). Anthropic also committed itself to “building a
 18 research library” that would be “voluminous.” *See id.* (citing Opp. Ex. 22 at 145). And when
 19 Anthropic employees stated that they would “open . . . the books” contained in the pirated datasets
 20 that in part comprised that library, they did not mention LLM training at all. *See* Opp. Ex. 12 at -
 21 0391318. Unsurprisingly, Anthropic concluded that it planned to “store everything forever”
 22 because there was simply “no compelling reason to delete a book.” CC Br. Ex. 12 at -0144509.

25 Anthropic’s real objections to this extensive record evidence are not that it is novel, but
 26 instead that the Court should have drawn different inferences from it. But as the Court made clear,
 27 that gets the pertinent summary judgment standard exactly backward, especially in light of
 28

1 Anthropic’s repeated efforts to resist discovery on disputed factual questions. As the Court
2 explained, “Anthropic has resisted putting into the record what copies or even sets of copies were
3 in fact used for training LLMs,” even though “[w]e know that Anthropic has more information
4 about what it in fact copied for training LLMs (or not).” Dkt. 231 at 8. For that reason, “[a]ll
5 deficiencies must be held against Anthropic and not the other way around.” *Id.*

6
7 Anthropic contends at last contends that the “*complete record* will not support a conclusion
8 that there was a separate “general-purpose library.” Motion at 23. But developing the “complete
9 record” is precisely what Anthropic is trying to prevent now, just as it did prior to summary
10 judgment. Anthropic had ample opportunity to respond to the facts it now contests. Reconsideration
11 is not the proper means for doing so. *See McLaughlin v. Wells Fargo Bank, N.A.*, 2015 WL
12 10889994, at *2 (N.D. Cal. Nov. 24, 2015) (Alsup, J.) (denying motion for reconsideration where
13 the court had already considered the arguments and facts movant raised in motion); *Van Slyke v.*
14 *Capital One Bank*, 2007 WL 4259405, at *2–3 (N.D. Cal. Dec. 3, 2007) (Alsup, J.) (similar);
15 *Drevaleva v. VA*, 2019 WL 3037549, at *6 (N.D. Cal. July 11, 2019) (Alsup, J.) (“Each of plaintiff’s
16 briefs, motions, and other filings are read and carefully considered before a determination is
17 made.”).

18
19 The sole case Anthropic relies upon to support its argument is inapposite. In *Blair v. Rent-*
20 *A-Ctr., Inc.*, the plaintiff sought reconsideration of this Court’s finding that individualized issues
21 would predominate for establishing a particular shipping cost. 2019 WL 529292, at *3 (N.D. Cal.
22 Feb. 11, 2019) (Alsup, J.). The Court had “erred in assuming,” based on plaintiff’s “overreaching”
23 initial motion, that the defendant’s records could establish individualized issues, when in fact, the
24 record was silent on the cost. *Id.* at *4. By contrast, the question of how Anthropic uses pirated
25 books was put squarely before the Court based on the record. Plaintiffs addressed Anthropic’s
26 piracy separate from its LLM training in its opposition brief, to which Anthropic responded in its
27
28

1 reply. *See* Dkt. 158 at 7–8, 11–12; Dkt. 181 at 14.

2 **B. The *Kadrey* Order Is Not a Change in Controlling Law.**

3 Anthropic next argues that the *Kadrey* Order should be treated as an “intervening change of
4 law” warranting reconsideration. Motion at 20. Yet “[o]nly changes of *controlling* law warrant
5 leave under Rule 7-9(b)(2).” *Guity Hamzeh, v. Pharmavite LLC, et al.*, 2025 WL 1810082, at *2
6 (N.D. Cal. July 1, 2025) (emphasis added). And *Kadrey* is not controlling: Anthropic acknowledges
7 as much itself. Motion at 20. That should be the end of the matter. *See Mason & Dixon Intermodal,*
8 *Inc. v. Lapmaster Int’l, LLC*, 2009 WL 10681000, at *1 (N.D. Cal. Sept. 23, 2009) (noting that the
9 intervening decision, “which emanated from a federal district court in Michigan, does not control”
10 and “such a development should not be viewed as a material difference or change in law”); *Bot M8*
11 *LLC v. Sony Corp. of Am.*, 2020 WL 1904102, at *1 (N.D. Cal. Apr. 16, 2020), *aff’d*, 4 F.4th 1342
12 (Fed. Cir. 2021) (Alsup, J.) (denying leave to move for reconsideration in part because party offered
13 “no [intervening] *binding* decision”) (emphasis added); *Vasquez v. USM Inc.*, 2014 WL 492039, at
14 *1 (N.D. Cal. Feb. 5, 2014) (Alsup, J.) (denying leave to move for reconsideration on basis of single
15 decision from the California Court of Appeal).

16 Anthropic cannot create a new exception to Local Rule 7-9, demanding that cases involving
17 a “rapidly changing area of the law” tolerate reconsideration in the face of only “merely persuasive”
18 authority. Anthropic’s lead case—*J.B. v. G6 Hosp., LLC*—did not even address the standard for
19 reconsideration under Local Rule 7-9 and turned on a pure question of law under Section 230 of
20 the Communications Decency Act. 2021 WL 4079207 (N.D. Cal. Sept. 8, 2021). In that case,
21 moreover, the context was a motion to dismiss, not a fact-bound motion for summary judgment.
22 Anthropic’s other case, *Doe By & Through Doe v. Petaluma City Sch. Dist.*, granted reconsideration
23 only after considering several intervening decisions from the courts of appeal interpreting Supreme
24 Court precedent. 949 F. Supp. 1415 (N.D. Cal. 1996).

1 In any event, nothing in the *Kadrey* decision warrants reconsideration of the Court’s order
2 in this case. *Kadrey* repeatedly emphasized that “the fair use inquiry is highly fact dependent, and
3 there are few bright-line rules.” *Kadrey*, 2025 WL 1752484 at *2. In addition, in the time since
4 Anthropic filed this motion, the *Kadrey* Court has set future briefing on how certain of the pirated
5 books in that case were used, further demonstrating that the fair use analysis in *Kadrey* is not
6 complete. *See* Ex. A at 25:24-21 (Court requesting schedule for summary judgment briefing
7 schedule on torrenting distribution).

9 Without intervening controlling law—or any (let alone a significant number of) intervening
10 persuasive rulings—Anthropic fails to satisfy Civil Local Rule 7-9(b)(2).

11 CONCLUSION

12 Anthropic’s motion for certification of interlocutory review under 28 U.S.C. §1292(b), and
13 Anthropic’s motion for reconsideration, should both be denied.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Dated: July 28, 2025

By: /s/ Samir Doshi

2 Justin A. Nelson *
3 Alejandra C. Salinas *
4 **SUSMAN GODFREY L.L.P**
5 1000 Louisiana Street, Suite 5100
6 Houston, TX 77002-5096
7 Telephone: (713) 651-9366
8 jnelson@susmangodfrey.com
9 asalinas@susmangodfrey.com

10 Rohit D. Nath (SBN 316062)
11 Michael Gervais (SBN 330731)
12 **SUSMAN GODFREY L.L.P**
13 1900 Avenue of the Stars, Suite 1400
14 Los Angeles, CA 90067-2906
15 Telephone: (310) 789-3100
16 rnath@susmangodfrey.com
17 mgervais@susmangodfrey.com

18 Jordan W. Connors *
19 **SUSMAN GODFREY L.L.P**
20 401 Union Street, Suite 3000
21 Seattle, WA 98101
22 Telephone: (206) 516-3880
23 jconnors@susmangodfrey.com

24 J. Craig Smyser *
25 Samir Doshi*
26 **SUSMAN GODFREY L.L.P**
27 One Manhattan West, 51st Floor,
28 New York, NY 10019
Telephone: (212) 336-8330
csmyser@susmangodfrey.com
sdoshi@susmangodfrey.com
Co-Lead Class Counsel

Rachel Geman *
Jacob S. Miller*
Danna Z. Elmasry*
**LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP**
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Telephone: (212) 355-9500
rgeman@lchb.com
wdozier@lchb.com
afreymann@lchb.com
jmiller@lchb.com

Daniel M. Hutchinson (SBN 239458)
Jallé Dafa (SBN 290637)
Reilly T. Stoler (SBN 310761)
**LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP**

275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
rstoler@lchb.com
jdafa@lchb.com
dhutchinson@lchb.com

Betsy A. Sugar*
**LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP**
222 Second Ave., #1640
Nashville, TN 37201
Telephone: (615) 313-9000
bsugar@lchb.com

Co-Lead Class Counsel