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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.

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Case No. 3:24-CV-05417-WHA
Action Filed: August 19, 2024

**DEFENDANT ANTHROPIC PBC'S
RESPONSE TO MOTION TO
SUPPLEMENT**

Judge: Honorable William H. Alsup

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ANTHROPIC'S RESPONSE TO MOTION TO SUPPLEMENT

Even if Plaintiffs were correct on the law (and they are not, *see* ECF 280 at 3-9), Benjamin Mann's testimony does not support Plaintiffs' efforts to bar Anthropic from presenting an innocent infringement defense (or denying willfulness).

Mr. Mann specifically and repeatedly testified that he personally believed that downloading from sites like LibGen to train AI models was fair use and that he believed this based on his own "independent" research, *i.e.*, independent of advice of counsel. Ex. A (Mann Final Tr. [hereinafter Tr.] Vols. 1 & 2) at 92:15-17; *see also* Tr. 91:15-19 ("I had other beliefs than informed by attorneys.");¹ Tr. 91:22-24 ("In my personal capacity, I believed that this usage would be covered by fair use."); Tr. 91:25-92:5 ("I researched what fair use was and tried to come to my own understanding of whether what we were doing would be covered by that. And my – my personal feeling was that it would be."); Tr. 89:18-90:5 ("downloading this data set for the purposes of building large language models and doing science was the right thing to do"); Tr. 337:9-14 ("*Independent of what my attorneys may or may not have said*, my personal belief was that what we were doing was legal." (emphasis added)). He explained in great detail, over the course of more than 15 transcript pages, when and how he had conducted his independent research, beginning with an interest in high school and then subsequently again when he was doing AI work as an adult. Tr. 91:22-93:21; *see also* Tr. 341:2-355:1. Based on this independent research, he came to his own conclusions about fair use. Tr. 341:2-355:1; *see also* Tr. 396:18-397:13; Tr. 450:15-19.

After asking Mr. Mann about his beliefs as to "fair use," Plaintiffs also asked questions about Mr. Mann's belief in "legality." Although Mr. Mann had disclosed at length the independent basis for his and other company executives' beliefs about fair use, *see* Tr. 89:18-94:6, Tr. 94:21-95:6, he said that he could not offer an ultimate opinion on legality or lawfulness without divulging attorney-client privileged information. Tr. 98:1-20 (stating, in response to a

¹ The rough transcript of the deposition that plaintiffs attach contains a substantive error. *Compare* Pls.' Ex. A, Rough Tr. 85:5-6 ("I had other beliefs then, informed by attorneys."), *with* Anthropic's Ex. A, Final Tr. 91:18-19 ("I had other beliefs than informed by attorneys.").

question about whether what he was doing was “lawful,” that he could not “answer the question *as you’ve asked it*” (emphasis added)); *see also*, e.g., Tr. 144:14-146:14 (stating whether he was “a hundred percent sure that what you were doing was legal in June of 2021” would implicate privileged information); *see also generally* Tr. 90-92 (distinguishing questions about fair use and legality).

On the second day of his deposition, Mr. Mann clarified that he had understood the prior day’s questions about whether it was “legal to download” to be asking about the “exact bounds of the law,” which he did not “know,” Tr. 335:11-21, *i.e.*, he invoked privilege because he thought questions using the word “legal” or “lawful” were calling for an expert legal conclusion, not his own subjective belief about fair use.² He then clarified that in his “judg[ment] as a layperson,” he believed that “[e]verything we did ... would have been covered under fair use and I believe was legal, to the extent that I’m capable of judging that.” Tr. 335:17-336:7; *see* Tr. 351:19-23 (“We had a very different use from what these sources are usually used for, and I believe that was distinguishing in how we ended up using the data and my nonlegal expert view of its legality.”).

He then repeatedly stated that, based on his own, non-expert view about legality, he believed that Anthropic’s conduct was legal “[i]ndependent of what my attorneys may or may not have said.” Tr. 337:9-14. He later testified that, “[A]t the time my belief was substantially informed by my own research. And that *based on that*, I felt confident that what we were doing was legal.” Tr. 356:23-357:1 (emphasis added); *see also* Tr.336:8-21. Mr. Mann further explained that he had formed those independent beliefs in large part while working at his prior employer, OpenAI, where he also was “personally... involved in downloading” LibGen and used it to train models in 2019, at which time he researched fair use using Internet sources. Tr. 346:15-347:10; *see* Tr. 398:8-25.

² The Day 2 correction was not prompted in any way by any Anthropic attorney; as Mr. Mann testified, he had no communications with any Anthropic attorney and reviewed no deposition-related documents between the conclusion of the first day of his deposition and the start of the second day. Tr. 334:21-335:8. Mr. Mann simply independently realized that he had misunderstood the import of the questions.

1 To be sure, Mr. Mann candidly acknowledged that he could not testify that his “beliefs
2 have never been affected by anything counsel has ever said.” Tr: 356:23-357:4. But that is not
3 inconsistent with his testimony that he had an independent belief in fair use. And if that sort of
4 truthful testimony—that the witness had an independent source for his subjective belief, but four
5 years later he cannot say with certainty that *nothing* about his views was informed by counsel—is
6 enough to preclude an innocent infringement defense, no one who consulted an attorney could
7 ever offer such a defense.

8 *Finally*, even if the Court believed (1) that a party could impliedly waive privilege even if
9 it is not using or relying on privileged communications with the jury and (2) that Mr. Mann lacked
10 an independent source for his beliefs, that still would not support barring Anthropic from offering
11 an innocent infringement defense *at all*. At most, during the pretrial process, the Court could
12 consider whether to craft appropriate limits on the testimony elicited about Mr. Mann’s subjective
13 views. There would be no support for barring Mr. Mann from offering objective testimony
14 concerning his experience at OpenAI and that company’s use of downloaded books to train
15 models. Nor would there be any support for precluding any other witness from testifying.
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17 Dated: August 21, 2025

Respectfully submitted,

18 **ARNOLD & PORTER KAYE SCHOLER LLP**

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20 By: /s/ Douglas A. Winthrop
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CERTIFICATE OF SERVICE

I, Douglas A. Winthrop, am the ECF user whose identification and password are being used to file the foregoing **DEFENDANT ANTHROPIC PBC'S RESPONSE TO MOTION TO SUPPLEMENT**.

Dated: August 21, 2025

/s/ Douglas A. Winthrop
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