

[The Licensing Journal, **LICENSING BY AI COMPANIES OF COPYRIGHTED WORKS IN THE WAKE OF WARHOL, THE COPYRIGHT OFFICE'S DRAFT REPORT ON GENERATIVE AI TRAINING, AND RECENT DECISIONS IN REUTERS, BARTZ, AND KADREY**, \(Apr. 1, 2026\)](#)

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LICENSING BY AI COMPANIES OF COPYRIGHTED WORKS IN THE WAKE OF WARHOL, THE COPYRIGHT OFFICE'S DRAFT REPORT ON GENERATIVE AI TRAINING, AND RECENT DECISIONS IN REUTERS, BARTZ, AND KADREY

Aimée Scala

Aimée Scala is a Partner in the Los Angeles office of Mazzola Lindstrom LLP where her practice focuses on litigation as well as transactional law, particularly in the areas of fine art, intellectual property, media, and entertainment law. Aimée represents clients in a variety of creative fields, including the visual arts, new media, emerging technologies, photography, publishing, and entertainment industries.

Introduction

The recent emergence and rapid widespread adoption of generative artificial intelligence models, along with recent judicial decisions and policy statements, have been adding to and shaping the evolving contours of the fair use defense in copyright law. Given the changing nature of the defense, and its impact on both current and future litigation and the marketplace, it is important for practitioners and thinkers to consider these often complex issues.^[1]

The Fair Use Defense in Copyright Law

Scholars, judges, and practitioners will likely all agree that the fair use defense is thorny. In 1945, in *Dellar v. Samuel Goldwyn, Inc.*,^[2] Judge Learned Hand of the Second Circuit Court of Appeals noted that “the issue of fair use... is the most troublesome in the whole law of copyright....” That remains the case today, perhaps even more so than at the time Judge Hand decided *Dellar*.

Fair use is an affirmative defense, meaning the burden of proving the applicability of fair use is on the defendant. While the statute that codifies the fair use doctrine lists these four factors, fair use is a “flexible concept.”^[3]

A particular factor “may prove more important in some contexts than in others.”^[4] And application of the factors “requires judicial balancing, depending upon relevant circumstances, including ‘significant changes in technology.’”^[5]

The Fair Use Factors

Factor 1 of the doctrine asks about the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”^[6] In addition to balancing the statutory factors, in *Warhol*, the Supreme Court made clear that the first fair use factor “focuses on whether an allegedly infringing use has a further purpose or different character, **which is a matter of degree, and the degree of difference must be weighed against other considerations.**”^[7]

Factor 2 of the doctrine asks about the nature of the original work.^[8] The judicial inquiry involves “focus[ing] on the degree of creativity inherent to the work,”^[9] or whether the work instead is more factual. Put simply, works that express more individual creativity get more protection. This factor also asks whether the original work was published or unpublished.^[10]

Factor 3 focuses on how much of the work was used and how substantial the portion used was relative to the whole.^[11] The appropriate inquiry is whether the usage was “reasonable in relation to the purpose of the copying.”^[12] Courts consider both “the quantity of the materials used” and “their quality and importance.”^[13] To win on this factor, the alleged copier must not take the “heart” of the work.^[14]

Factor 4 considers the likely effect of the copying on the market for the original, considering not only current markets but also potential derivative ones “that creators of original works would in general develop or license others to develop.”^[15] Particularly within the context of new technologies, a consideration of the “public benefits the copying will likely produce” is also considered when evaluating the fourth fair use factor.^[16]

Of these four factors, two in particular have more weight than the others, namely, factors 1 and 4.

The First Fair Use Factor in Depth

As we saw above, the first fair use factor considers how the new work is used, and whether it is used in the same or similar context as the original. Crucially, this analysis requires asking whether the secondary use is “transformative.” The idea of transformativeness originally came from a law review article written by Judge Pierre Leval^[17] and was cemented in copyright jurisprudence in the case of *Campbell v. Acuff-Rose*, involving 2 Live Crew’s parody of Roy Orbison’s classic song, *Pretty Woman*. In *Campbell*, the Supreme Court interpreted the first fair use factor to include this question of transformativeness.^[18]

The Supreme Court leaned into the question of the extent to which a new work is “transformative” in *Campbell*, but did not specify whether the “addition of something new”—but without any comment or criticism of the original copyrighted work—was fair use. As we will see below, subsequent jurisprudence, in particular the *Cariou* case^[19] which came out of the second circuit, played an important role in the evolving answer to this question. Accordingly, before delving into the *Warhol* case, it is important to note the context in which the *Warhol* case arose, particularly with respect to the transformativeness test as it was applied in *Cariou*.

The Fourth Fair Use Factor in Depth

In *Harper and Row v. Nation Enterprises*, the Supreme Court called the fourth fair use factor “undoubtedly the single most important element of fair use.”^[20] This is because it “focuses on actual or potential market substitution.”^[21] This factor looks to both the “extent of market harm caused by the particular actions of the alleged infringer” and also asks “whether unrestricted and widespread conduct of the sort engaged in by the defendant... would result in a substantially adverse impact on the potential market for the original.”^[22]

While there may be all sorts of market harm to a copyright holder from a secondary use (such as, for example, a withering criticism that effectively kills demand for the work) these harms are not relevant for purposes of fair use. The only relevant harm for fair use purposes is the harm of market substitution.

Particularly for tech cases, also relevant to this factor are “the public benefits the copying will likely produce.” *Oracle*, 593 U.S. at 35. The impact of AI-generated works on various markets turns on how narrowly or broadly we define those markets. As we will see below, this question became particularly acute in *Kadrey v. Meta Platforms*.^[23]

Constitutional Underpinnings of the Fair Use Doctrine and Its Application to Emerging Technologies

Copyright owners have long had a tense relationship with the advent of new technologies, and the history of copyright law in the U.S. can be viewed, at least in part, as attempts to balance the incentives to create creative works while not hindering the development of new technologies. In approaching fair use claims involving new technologies, courts have sought to further copyright's "basic purpose" of promoting progress as set forth in the U.S. Constitution by striking a balance between protecting authors' exclusive rights in their works while also enabling others to build upon those works.^[24] But this balance is often difficult to strike; indeed, "[t]he more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff."^[25]

The advent and popular adoption of photography, for example, generated copyright litigation concerning whether photographs could be copyrightable subject matter at all. In the historic case of *Burrow-Giles Lithographic Co. v. Sarony*,^[26] the Supreme Court tackled the question of whether photographs should be considered original works of authorship (and therefore protectable under the Copyright Act). The defendant in *Burrow-Giles* argued that a photograph merely accurately represented an object that already exists—there is no art or originality involved, and there is no *author* or *artist*, only a mere camera operator. The Court, however, thought differently, finding that for a work of art to be protectable under copyright law, it must be "representative of original intellectual conceptions of the author," which requires an element of "novelty, invention, [and] originality" which the Court found the photograph at issue (a portrait of a young Oscar Wilde, posed on a sofa holding a book in one hand and his head in another) to have.

Similarly, at the turn of the century, alarm was raised over the proliferation of player pianos and the impact of this new technology on the rights of copyright holders with respect to making copies of musical compositions on piano rolls. This impact ushered in litigation and in 1908, the Supreme Court held in *White-Smith Publishing Co. v. Apollo Co.*^[27] that perforated piano rolls were not "copies" under the copyright statute. After this decision, Congress added the nonexclusive right of copyright holders to make and distribute, or authorize others to make and distribute, mechanical reproductions (known today as phonorecords) of their nondramatic musical works.^[28]

With the invention of the Betamax and VCR, copyright owners again brought suit,^[29] this time against Sony for selling equipment that allowed the public to record television programs. The copyright holders contended that, because users would inevitably use the technology for infringing purposes, Sony was liable for copyright infringement because it was knowingly facilitating such infringement. The Supreme Court, however, found that simply selling a product that was capable of copying does not necessarily constitute infringement, explaining that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."^[30]

In the early days of the Internet, copyright owners once again sought court protection of their rights in the face of yet another new technology, this time the peer-to-peer file-sharing application known as Napster. In that case,^[31] music copyright holders brought suit seeking to enjoin the company from engaging in or facilitating copyright infringement. Applying *Sony*, the court determined that, because Napster failed to demonstrate that its platform was capable of commercially significant non-infringing uses, it could be liable for contributory copyright infringement after it receives notice of specific infringing files and fails to halt their distribution.^[32]

The Supreme Court addressed a similar set of factual circumstances four years later in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*^[33] There, the Court remanded the case to determine whether the defendants were liable for inducing infringement, given that evidence demonstrated they were aiming to satisfy a known source of demand for infringement by targeting the market of former Napster users, as well as other factors such as their advertising revenue model and a failure to develop monitoring and filtering tools to diminish infringing

activity. On remand, the district court found the defendants liable under the inducement doctrine, where one who “distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”^[34]

Outside of the technology space, in the arts, this tension has been embodied in various legal disputes involving appropriation artists. Jeff Koons relied on the fair use defense in the cases brought against him, and more recently, appropriation artist Richard Prince has been involved in litigation involving his appropriation of other works and using those works in his own work, in particular the case of *Cariou v. Prince*.^[35]

The Warhol Case

Context and Background—the *Cariou* Case

In 2000, Patrick Cariou published “Yes, Rasta” a book of black and white photographs of the Rastafarian community in Jamaica. In 2007, Richard Prince created the “Canal Zone” series and exhibited it at the Gagosian Gallery in 2008. Prince’s “Canal Zone” series incorporated numerous works from Cariou’s “Yes, Rasta,” in some cases incorporating wholesale an image from the book and adding only minor alterations. In 2009, Cariou sued for infringement.

In 2011, the district court granted Cariou’s motion for summary judgment on infringement, ruling that Prince’s uses were not fair use. The court ordered that Prince’s unsold works, and Rizzoli’s catalogs, be impounded and destroyed. The SDNY found that the works were not transformative, in part because Richard Prince did not claim to be “commenting upon” the original works.

On appeal, the Second Circuit held “that all except five (*Graduation*, *Meditation*, *Canal Zone* (2007), *Canal Zone* (2008), and *Charlie Company*) of Prince’s artworks make fair use of Cariou’s photographs. We express no view as to whether the five are also entitled to a fair use defense. We remand with respect to those five so that the district court, applying the proper standard, can determine in the first instance whether any of them infringes on Cariou’s copyrights or whether Prince is entitled to a fair use defense with regard to those artworks as well.”^[36] After remand, the case settled in 2014.

Legal commentators, including Nimmer and another appellate circuit, had criticized *Cariou* in particular and the Second Circuit in general as giving too great a weight to transformative use in determining fair use.

The Warhol Decision Was Narrow and Turned on the Issue of Licensing

Lynn Goldsmith, a renowned photographer known for taking photographs of musicians, created a series of photographic portraits of Prince, taken in her studio in New York City in December 1981. In 1984, Vanity Fair licensed the photograph from Goldsmith for use as source material for an artist to create an illustration of Prince, and she was credited as its source in the 1984 publication.^[37]

The artist that Vanity Fair gave Goldsmith’s photograph of Prince to was Andy Warhol, who ultimately created 15 artworks of Prince based on Goldsmith’s photograph.^[38] When Prince passed away in 2016, Vanity Fair contacted the Andy Warhol Foundation for the Visual Arts, Inc., the holder of most of Warhol’s copyrights, to use the image of Prince it had originally published in 1984, but learned from the Foundation that Warhol had created the series of Prince works, and wound up licensing another of Warhol’s works from the series for the cover, paying a licensing fee to the Foundation of \$10,000.^[39] Goldsmith did not receive any licensing fee or a credit.^[40] After Goldsmith contacted the Foundation about Warhol’s unauthorized use of her work, the Foundation brought suit against Goldsmith for a declaratory judgment of noninfringement, or in the alternative, fair use, and Goldsmith counterclaimed for copyright infringement.^[41]

The Supreme Court's decision is a narrow one, limited to licensing uses only.^[42] Notably, it does **not** decide the question of whether the underlying artworks by Warhol, as artworks, make fair use of the photograph. The Court also only evaluates the first fair use factor, noting that different uses must be considered separately, but that "the same copying may be fair when used for one purpose but not another."^[43] The Court further explained that uses do not turn on "the subjective intent of the user;" instead, they turn on "an objective inquiry into what use was made, *i.e.*, what the user d[id] with the original work."^[44]

The majority opinion's decision turns in large part on the issue of licensing. In particular, in the context of the first fair use factor, the Foundation's commercial licensing of the Warhol artwork was significant; the Court noted that the focus must be on "whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism."^[45] Viewed through this lens, the original photograph and the Foundation's licensing of Warhol's artwork "share substantially the same purpose" (thereby providing a substitute for Goldsmith's photograph), the "copying use is of a commercial nature," and, despite Warhol having added new expression to Goldsmith's photograph, the first fair use factor favored Goldsmith, not the Foundation.^[46]

The majority opinion also made clear that it was concerned with the standard for transformativeness under the first fair use factor, subsuming the derivative work right.^[47] Even significant alterations will not be enough if the use ultimately serves a purpose similar to that of the original and may instead produce a derivative work and demonstrate the need for licensing: "an overbroad concept of transformative use, one that includes any further purpose, or any different character, would narrow the copyright owner's exclusive right to create derivative works. To preserve that right, the degree of transformation required to make 'transformative' use of an original must go beyond that required to qualify as derivative."^[48]

Despite being a narrow holding that turned primarily on the licensing aspects of the decision, in that the decision is limited to the Foundation's use of an image of Warhol's artwork in the context of commercial licensing only, not whether the underlying artworks make fair use of the photograph, and only evaluates the first fair use factor, the *Warhol* decision seems to be being interpreted broadly. Indeed, some commentators have raised concerns that Warhol, while "a narrow decision on its face, its impact on the transformative use inquiry will be significant in the uncharted copyright disputes on the horizon."^[49]

The Copyright Office Draft Report

The Copyright Office has released three reports since July of 2024 on issues stemming from AI and Copyright. In large part, the reports evaluate and analyze the comments that the Copyright Office received in response to its Notice of Inquiry ("NOI"), which was published in the Federal Register in August 2023.^[50] Part 3 of the series of reports, which was released in May 2025 and identified as a "pre-publication version," addresses the training of generative AI models and the copyright issues arising from the use of copyrighted works in the course of training such models.

As highlighted at the time by Aaron Moss of Copyright Lately, as well as others, issuing "pre-publication" reports is not standard practice for the Copyright Office and the release of the report was "sandwiched between two extraordinary firings."^[51] On May 8, 2025, the day before it was posted on the Copyright Office's website, the Trump administration abruptly dismissed Dr. Carla Hayden, the longtime Librarian of Congress who had appointed Register of Copyrights Shira Perlmutter.^[52] Then, on Saturday, May 10—less than 24 hours after the report went live—Perlmutter was also fired. Some have speculated that the report itself triggered Perlmutter's dismissal, however, Moss seemed to indicate his belief that it is more likely that the Copyright Office raced to release the report before a wave of leadership changes could delay—or even derail or delete—its conclusions.^[53]

On May 22, 2025, Perlmutter brought suit in the U.S. District Court for the District of Columbia, challenging her removal.^[54] Perlmutter's lawsuit initially failed to secure emergency relief in the district court, but on appeal, she won a temporary injunction that reinstated her while her broader legal challenge to her removal proceeds through the courts, and she remains in office until the legal challenge is resolved.

Accordingly, it remains to be seen whether the Report will be given significant weight in the future, however, it does provide a good evaluation and analysis of applicable issues and the perspectives of the various stakeholders who responded to the August 2023 NOI.

Regarding the first fair use factor, particularly whether the use of copyrighted works to train generative AI models is "transformative," the Copyright Office did not provide much clear guidance, noting instead that each determination would likely turn on its own facts: Each model must be evaluated individually and there will be a spectrum of results—some systems will undoubtedly be "transformative" while others will not rise to that level.^[55]

The Copyright Office also obliquely raises the issue of what I call "statistical similarity." While not currently a way to assess whether one work is "substantially similar" to another for copyright infringement purposes, given the tokenization, or breaking down into fragments called tokens, of training data by the models, it may be a novel way to begin to understand the concept of substantial similarity in the wake of generative AI, a way to understand and bridge copyright principles and standards of infringement with the complexity of AI models. In the *Kadrey* case, for example, the court notes the relationship between copying statistical elements of the plaintiffs' books and how that does in fact copy the creative expression embodied within them: as the court explains, "even though LLMs may only learn about "statistical relationships," those relationships are the product of creative expression."^[56] This notion of "statistical similarity," then, may become significant to an analysis of substantial similarity in the context of assessing whether the output side of a generative AI model infringes on any works used as training data for the model.

Regarding the fourth fair use factor, particularly concerning the issue of market harm, the Copyright Office alludes to the idea of the harm of broader market dilution, a currently novel harm but one which the Copyright Office deemed potentially relevant and actionable, though not currently a clearly actionable market harm precluding a fair use defense outside of generative AI contexts.

In Part IV.D.3. of the Copyright Office's draft report, the issue of lost licensing opportunities in the context of generative AI is squarely addressed in the analysis of the fourth fair use factor. Specifically, the Copyright Office acknowledges that licensing is "core to the business model of many content industries," and notes that may commentators responding to the NOI made clear that "individual and collective licenses for AI use were already in existence or under development."^[57]

In addition to considering the issue in the context of the fourth fair use factor, Part V of the Copyright Office's draft report also specifically addresses the issue of licensing. The NOI asked several questions concerning the viability of direct or collective voluntary licensing, potential issues, and whether Congress should consider implementing a compulsory licensing scheme for the use of copyrighted works by AI companies developing generative AI models.^[58] While the Copyright Office considers the various stakeholders who took the position that the financial and practical challenges associated with licensing so many copyrighted works could pass off increased costs to consumers or even deter companies from pursuing AI projects altogether, it seemed to find more persuasive the perspective that there is already a licensing market, licensing deals are already occurring, and that arguments concerning costs have less force when AI companies are already spending extraordinary sums on development and computing power.^[59]

Thomson Reuters Enterprise Centre GMBH v. ROSS Intelligence Inc.

Before the Copyright Office released its report on generative AI training, the U.S. District Court for Delaware issued the first significant decision in this area. In that case, Thomson Reuters, the owner of Westlaw, sued Ross for using Westlaw headnotes—summaries of key points of law and case holdings—to train a competing,

AI-driven legal research search engine.^[60] The *Ross* Court granted summary judgment to Thomson Reuters, finding that Ross committed copyright infringement for a portion of the copied headnotes at issue, finding actual copying and substantial similarity. On the fair use defense, the court found that the fair use defense did not apply. In analyzing the first factor, Ross's use was for a very similar purpose, and was a commercial use, which was not transformative. Importantly, even though this case concerned artificial intelligence technology, Ross was *not* employing a generative AI model. Accordingly, it is likely distinguishable as precedent for other AI cases. The all-important fourth factor also went to Thomson Reuters. The court determined that the derivative market for AI training purposes was harmed by Ross's use, and found significant that Ross also meant to compete with the Thomson Reuters Westlaw product by creating an impermissible direct market substitute. The court also found that Westlaw's headnotes were original for copyright purposes and therefore warranted copyright protection, rendering their copyright registrations valid.

Ross has appealed this decision to the Third Circuit, so it remains to be seen whether this decision will be affirmed.

Bartz et al. v. Anthropic PBC

The *Bartz* case, for which a summary judgment ruling was issued about four months later, addressed very different issues than *Ross*, and is a significant decision in the fair use and generative AI landscape.^[61]

In *Bartz*, Anthropic moved for early summary judgment on its fair use defense before class certification. Significantly for the overall decision and outcome, the *Bartz* court made a distinction between the library copies of copyrighted works that Anthropic had lawfully purchased and those that Anthropic pirated, or stole from so-called "shadow libraries." The *Bartz* court concluded that the legal issue differed for each. In particular, the *Bartz* court found that the first fair use factor favored Anthropic's **lawful** copying, given that "the 'purpose and character of using works to train LLMs was transformative – spectacularly so."^[62] The court noted that "the first fair use factor favors fair use for the digital library copies converted from purchased print library copies — **but these do not excuse the pirated library copies.**"^[63]

With respect to the pirated copies of copyrighted works that Anthropic copied and used as training data, the court explained that "[s]uch piracy of otherwise available copies is inherently, irredeemably infringing even if the pirated copies are immediately used for the transformative use and immediately discarded."^[64] The *Bartz* court also specifically distinguished the *Google Books* cases, explaining that the "university libraries and Google went to exceedingly great lengths to ensure that all copies were secured against unauthorized uses — both through technical measures and through legal agreements among all participants. Not so here."^[65]

Accordingly, Anthropic's lawful use of purchased copies to train Claude and its precursors was transformative and ultimately a fair use under the Copyright, but the "first factor *points against* fair use for the central library copies made from pirated sources — and no damages from pirating copies could be undone by later paying for copies of the same works."

As to the fourth fair use factor, it favored Anthropic based on the court's determination that "the kind of competitive or creative displacement" the plaintiffs complained of is not of the kind that concerns the Copyright Act, likening the plaintiffs' position to be complaining that "training schoolchildren to write well would result in an explosion of competing works."^[66] Unlike the *Kadrey* court, the *Bartz* court was unconcerned with the "novel" form of harm articulated by the Copyright Office, namely, this notion of market dilution or indirect market substitution.

Of course, Anthropic settled this action shortly after this decision, paying what is the largest settlement sum to date to resolve a dispute of this nature.

Kadrey v. Meta Platforms, Inc.

The *Kadrey* case was brought in 2023 by a group of book authors against Meta in connection with its open-source LLM Llama. Despite bringing suit on behalf of a class of similarly-situated authors, like in *Bartz*, the parties moved for summary judgment on the claims of only the individual plaintiffs before class certification, which has interesting procedural implications for the individual plaintiffs as well as the potential class members whose claims are not bound by the court's summary judgment ruling. The summary judgment decision in this case, issued just two days after the *Bartz* case, dealt with many of the same issues but reached different conclusions, emphasizing that the law in this area is far from settled.

Like the *Bartz* decision, the *Kadrey* court also concluded that the use of copyrighted works to create LLMs was highly transformative. In comparing the purpose of the uses, the court noted that the purposes of the plaintiffs' books were to educate or entertain, whereas the purpose of Meta's copying was to train LLMs.^[67] Seemingly disregarding the point that the first fair use factor requires critique or commentary on the original to be transformative, the *Kadrey* court declined to address *Warhol*, instead pointing to a line of cases in the technology context that consider whether the use furnishes valuable information on subjects of public interest or provides a valuable public service, which supported its finding that the first fair use factor favored Meta.^[68]

Like the *Bartz* court, the *Kadrey* court also squarely addressed Meta's use of "shadow libraries" and noted that this issue would not provide an "automatic win" for plaintiffs because "the whole point of fair use analysis is to determine whether a given act of copying was unlawful."^[69]

On the point of unlawful copying, while the *Bartz* and *Kadrey* courts differed in their analysis, the significance of the pirated works to the *Bartz* court may usher in a new point of consideration within the fair use analysis. The issue of lawful use is relevant in the context of a discussion about bad faith, which is a consideration that should be taken up in an analysis of the first factor, although the law is unsettled concerning whether bad faith should be considered as part of the fair use analysis at all. That said, the *Kadrey* court did find it relevant whether or not the "shadow libraries" benefitted Meta such that it furthered their infringing activity. This is where the peer-to-peer file-sharing cases and the *Grokster* precedent in particular may be helpful for further consideration.

As to the fourth fair use factor, the *Kadrey* court determined—based on the record developed by the plaintiffs—that this factor favored Meta. The court, however, also spent considerable time delving into the "novel" form of harm articulated by the Copyright Office, namely, this notion of market dilution. Indeed, the court explained that "even if the model can't regurgitate their own works or generate substantially similar ones, it can generate works that are similar enough (in subject matter or genre) that they will compete with the originals and thereby **indirectly substitute** for them."^[70]

The *Kadrey* court emphasized that relevant market harm includes indirect market substitution, which was also discussed in the Copyright Office report – the idea that by flooding the market with AI-generated works that indirectly substitute for the originals, human creators will be disincentivized to create new works, resulting in an actionable harm.

The plaintiffs in *Kadrey* focused their arguments on this factor on the harm to the authors' licensing market. The court found this argument unpersuasive because the potential market for the secondary use is **always** a market harm that a plaintiff in a fair use case suffers: "plaintiff suffers a loss of a potential market if that potential [market] is defined as the theoretical market for licensing" the use at issue in the case.^[71] Therefore, to prevent the fourth factor analysis from becoming circular and favoring the rightsholder in every case, harm from the loss of fees paid to license a work for a transformative purpose is not cognizable.^[72]

Instead of more traditional market harm, the court chose to emphasize *in dicta* that actionable indirect harm results to the markets for the individual works as a result of AI-generated content—which were created by LLMs trained on the authors' own works—via indirect substitution: "People could thus use LLMs to create books and then sell them, competing with books written by human authors for sales and attention. Indeed, to some extent, this appears to be occurring already—one expert for the plaintiffs briefly discusses reports of AI-generated books 'flooding Amazon.'"^[73]

But because Plaintiffs did not develop any arguments concerning this novel and indirect market harm, and accordingly did not even raise a triable issue of material fact in this area, summary judgment was granted in Meta's favor. In other words, the *Kadrey* plaintiffs failed to identify the relevant market harm—indirect market substitution—and failed to raise a triable issue of material fact on this point, which resulted in Meta winning on summary judgment. Despite finding for Meta on this factor, the court, in articulating its position with respect to indirect market harm, essentially provided a blueprint for the next plaintiff to prevail against a fair use defense: “Indeed, it seems likely that market dilution will often cause plaintiffs to decisively win the fourth factor—and thus win the fair use question overall—in cases like this.”^[74]

Conclusion

The cases that have addressed fair use in the context of generative AI are grounded in vastly different rationales. It remains to be seen whether fair use remains a viable defense in this context, and to what extent the Warhol decision and the Copyright Office's policy statements will have an impact on future litigation. For now, private actors seem to be filling the void, entering into licensing agreements and settling litigation in this space, which may also have an impact on judicial determinations going forward.

Footnotes

- 1 Before delving into recent developments, however, it is important at the outset to clarify that, with respect to generative AI, this article is limited to consideration of the use copyrighted works to train generative AI models, in particular large language and diffusion models. Accordingly, it addresses only the issues raised with the “input” side of the generative AI copyright equation, not the “output” side, which concerns whether responses to prompts generated by these models rise to the level of “substantial similarity” such that a license may need to be obtained in advance of providing such output in response to a user's prompt. Considerations of the “output” side of the equation, though significant and also evolving, is, unfortunately, beyond the scope of this article.
- 2 [104 F.2d 661](#), 662 (CA2 1939)
- 3 *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al.*, 598 U.S. 508, 527 (2023) (quotation marks omitted) (quoting *Google LLC v. Oracle America, Inc.*, 593 U.S. 1, 20 (2021)).
- 4 *Oracle*, 593 U.S. at 19.
- 5 *Id.* (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984)).
- 6 [17 U.S.C. § 107\(1\)](#).
- 7 *Warhol*, 598 U.S. at 509 (emphasis added).
- 8 [17 U.S.C. § 107\(2\)](#).
- 9 4 *Nimmer on Copyright* § 13F.06.
- 10 *Id.*, at § 13F.06[A].
- 11 [17 U.S.C. § 107\(3\)](#).
- 12 *Campbell v. Acuff-Rose Music, Inc.*, [510 U.S. 569](#), 586 (1994).
- 13 *Id.* at 587.
- 14 *Id.*
- 15 *Campbell*, [510 U.S. at 590](#), 592.
- 16 *Google*, 593 U.S. at 35.
- 17 Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990).
- 18 *Campbell v. Acuff-Rose Music, Inc.*, [510 U.S. 569](#) (1994).
- 19 *Cariou v. Prince*, [714 F.3d 694](#) (2d Cir. 2013).

- 20 [471 U.S. 539](#), 566 (1985).
- 21 *Warhol*, 598 U.S. at 536 n.12.
- 22 *Campbell*, [510 U.S. at 590](#) (quoting 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05 (1993)).
- 23 *Kadrey v. Meta Platforms, Inc.*, No. 23-CV-03417-VC, 2023 U.S. Dist. LEXIS 207683, (N.D. Cal. Nov. 20, 2023).
- 24 [U.S. Const. Art. I, § 8, cl. 8](#).
- 25 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, [545 U.S. 913](#), 928 (2005).
- 26 [111 U.S. 53](#) (1883).
- 27 [209 U.S. 1](#) (1908).
- 28 See *Music Licensing Reform: S. Hrg. 109-1021 Before the Subcomm. on Intellectual Property*, 109th Cong. (2005) (statement of Marybeth Peters, Register of Copyrights).
- 29 *Sony Corp. of Am. V. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
- 30 *Sony Corp.*, 464 U.S. 417 (1984) at 442.
- 31 *A&M Records, Inc. v. Napster, Inc.*, [114 F.Supp.2d 896](#) (N.D.Cal.2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).
- 32 [239 F.3d at 1027](#).
- 33 [545 U.S. 913](#) (2005).
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- 35 [784 F.Supp.2d 337](#) (S.D.N.Y. 2011, Batts, J.).
- 36 *Cariou v. Prince*, [714 F.3d 694](#), 712 (2d Cir. 2013).
- 37 *Warhol*, 578 U.S. at 517.
- 38 *Id.* at 518.
- 39 *Id.* at 519–20.
- 40 *Id.* at 520.
- 41 *Id.* at 522.
- 42 *Id.* at 534.
- 43 *Id.* at 533.
- 44 *Id.* at 544–45.
- 45 *Id.* at 525.
- 46 *Id.* at 526.
- 47 *Id.* at 529.
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- 54 *Perlmutter v. Blanche*, No. 1:25-cv-01659 (D.D.C. May 22, 2025).
- 55 U.S. Copyright Office, Copyright and Artificial Intelligence, Part 3: Generative AI Training (Pre-publication version), May 9, 2025 at 45-46, <https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf> (“Copyright Office Report Part 3”).
- 56 *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 1026, 1049 (N.D. Cal. 2025).
- 57 Copyright Office Report Part 3 at 67.
- 58 Artificial Intelligence and Copyright, 88 Fed. Reg. 59942 (Aug. 30, 2023) at Questions 6.2,9-9.1, 10-10.14.
- 59 *Id.*, at 86-89. See also, *id.*, at 103 (“a number of voluntary direct and collective licensing agreements for using copyrighted works in AI training have emerged over the past several years, with others in development. Some AI systems have now been trained exclusively on licensed or public domain works. These developments demonstrate that voluntary licensing may be workable, at least in certain contexts...”).
- 60 *Thomson Reuters Enterprise Centre GMBH v. ROSS Intelligence Inc.*, 765 F.Supp.3d 382 (D. Del. 2025).
- 61 *Bartz et al. v. Anthropic PBC*, 787 F.Supp.3d 1007 (N.D. Cal. 2025).
- 62 *Id.*, at 1020.
- 63 *Id.*, at 1025.
- 64 *Id.*
- 65 *Id.*, at 1027-28.
- 66 *Id.*, at 1032.
- 67 *Kadrey v. Meta Platforms, Inc.*, 788 F.Supp.3d 1026, 1044 (N.D. Cal. 2025) (“There is no serious question that Meta’s use of the plaintiffs’ books had a ‘further purpose’ and ‘different character’ than the books—that it was highly transformative. The purpose of Meta’s copying was to train its LLMs, which are innovative tools that can be used to generate diverse text and perform a wide range of functions.”).
- 68 *Id.*, at 1045.
- 69 *Id.*, at 1046.
- 70 *Id.*, at 1051.
- 71 *Id.*, at 1052 (citing *Tresóna Multimedia, LLC v. Burbank High School Vocal Music Association*, 953 F.3d 638, 652 (9th Cir. 2020) (emphasis omitted) (quoting 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05 (2019))).
- 72 *Id.* (citing *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006); see also *Oracle*, 593 U.S. at 38 (“cautioning against the ‘danger of circularity’” (quoting 4 Nimmer § 13.05))).
- 73 *Id.*
- 74 *Id.*, at 1055.