Exhibit A

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CONCORD MUSIC GROUP, INC. et al,

Plaintiffs,

v.

ANTHROPIC PBC,

Defendant.

Case No.: 5:24-cv-03811-EKL

BRIEF OF *AMICUS CURIAE* CHAMBER OF PROGRESS AND NETCHOICE, LLC IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Before: Hon. Eumi K. Lee

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INTRODUCTION AND INTERESTS OF AMICI CURIAE[1]

Generative artificial intelligence ("AI") holds immense promise. Though still in its infancy, it has captured the public imagination because it has the potential to fundamentally enhance the way we learn and work and live. We are just beginning to see all the ways generative AI can foster creativity, boost productivity, help businesses and governments provide better services, advance scientific research, and make information and education more accessible.

Plaintiffs' motion for a preliminary injunction presents correspondingly immense risk. By asking the Court to prejudge, at the outset of this case, novel and complex legal and factual issues central to the development and use of generative AI, Plaintiffs' motion seeks relief that would stifle the promise and potential of this new technology on a barren evidentiary record. Plaintiffs ask the Court to issue a preliminary ruling carrying sweeping implications: seeking first-of-their-kind legal determinations that the use of material to train an AI model infringes any copyright in that material, that the fair use doctrine does not protect the AI training process, and that providers of AI tools directly infringe copyrights based on output automatically generated in response to user prompts. These weighty and unresolved issues are also presented in a host of other cases around the country that are making their way through fact and expert discovery and toward summary judgment or trial. They are best resolved in that posture: on a complete record, with the benefit of full factual development and expert testimony. Deciding them prematurely in an expedited summary proceeding, without factual and expert discovery into how generative AI models are made and used, would be a disservice to the Court, the parties, and the public.

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps. Chamber of Progress seeks to protect Internet freedom and free speech, to promote innovation and economic growth, and to empower

[1] No counsel for a party in this lawsuit authored this brief in whole or in part, and no party or counsel for a party or any person other than *Amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. Defendant is not a member or partner of *Amici*.

consumers. Many of Chamber of Progress' partners currently use, develop, and provide generative AI products and services.

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise online. NetChoice's members rank among the world's most innovative companies, including Meta, Amazon, Etsy, Google, Pinterest, Netflix, Nextdoor, Snap, and X (formerly known as Twitter). NetChoice advocates for free speech and a competitive online ecosystem by challenging laws that subject online businesses to disfavored treatment, and by filing *amicus curiae* briefs in cases that, like this one, could shape the way businesses operate and innovate on the internet.

Chamber of Progress and NetChoice ("*Amici*") recognize the unprecedented promise and potential of generative AI.[2] Large language models, in particular, help *Amici*'s member companies solve some of the greatest challenges in online content moderation today, including context analysis and identifying novel toxic language patterns in user-generated posts—like creatively worded personal attacks and threats.[3] AI systems also enable more rapid detection of child sexual abuse material on large social media services.[4] Continued innovation in generative AI technology will play a critical role in creating a safer, more inclusive online environment.

Amici advocate for a careful, balanced, and fully informed approach to the legal issues raised by generative AI tools. Striking the proper balance among stakeholders on these important issues requires a developed record. As one of *Amici* explained in comments submitted to the US Copyright Office, many of these legal issues "are nuanced, fact-driven arguments that might be ill-suited for quick judicial resolutions." *Comments of Chamber of Progress in the Matter of Artificial Intelligence and Copyright*, U.S. Copyright Office Dkt. No. 2023-6 (Oct. 30, 2023),

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[2] *See* Colby Hawker & Emmanouil Koukoumidis, *Improving Trust in AI and Online Communities with PaLM-based Moderation*, Google Cloud Blog (Sept. 7, 2023), https://cloud.google.com/blog/products/ai-machine-learning/google-cloud-text-moderation; *Our New AI System to Help Tackle Harmful Content*, Meta (Dec. 8, 2021), https://about.fb.com/news/2021/12/metas-new-ai-system-tackles-harmful-content/.

[3] *See* Deepak Kumar et al., *Watch Your Language: Large Language Models and Content Moderation*, arXiv - Social and Information Networks, arXiv:2309.14517v1 [cs.HC] (Sept. 25, 2023), https://arxiv.org/pdf/2309.14517.pdf.

[4] Susan Jasper, *How we detect, remove and report child sexual abuse material*, Google Blog (Oct. 28, 2022), https://blog.google/technology/safety-security/how-we-detect-remove-and-report-child-sexual-abuse-material/.

https://downloads.regulations.gov/COLC-2023-0006-8583/attachment_1.pdf. *Amici* submit this brief to highlight the public interest in the continued development of generative AI tools and to urge the Court not to impede that development by issuing a preliminary injunction on a limited record ill-suited for such novel, complex, and important issues. Plaintiffs' motion for a preliminary injunction should be denied, and the merits issues addressed on a complete record.

ARGUMENT

I. Generative AI Is Delivering Immense Public Benefits and Promises to Deliver More.

Generative AI holds extraordinary potential to transform the daily lives of Americans in remarkable ways. This technology is set to unlock new perspectives and modes of expression, improve business efficiency and productivity, foster new opportunities for advancement and collaboration in science, healthcare and education, reduce inequality, and help tackle societal challenges like climate change and disaster relief. The open-source traditions and the collaborative nature of the field also promise to unleash a new era of innovation and competition.

While generative AI is still in its infancy, the technology is already seeing wide adoption by consumers and businesses. For example, ChatGPT, the first consumer-facing generative AI chatbot, was the fastest-growing consumer application in history, accumulating over 100 million monthly users within two months, and is now being used by over 100 million people every week.[5] And Google's consumer-facing generative AI chatbot, now known as Gemini, attracted over 100 million monthly users within a month of its general release.[6] The vast majority of Fortune 500 companies are developing applications based on generative AI tools.[7] Close to half of Americans have used generative AI.[8] The industry has created hundreds of billions in revenue, and that number is poised to grow exponentially in the years to come.[9] The various uses of generative AI

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[5] Jon Porter, *ChatGPT continues to be one of the fastest-growing services ever*, The Verge (Nov. 6, 2023), https://www.theverge.com/2023/11/6/23948386/chatgpt-active-user-count-openai-developer-conference.

[6] David F. Carr, *As ChatGPT Growth Flattened in May, Google Bard Rose 187%*, SimilarWeb Blog (June 14, 2023), https://www.similarweb.com/blog/insights/ai-news/chatgpt-bard/.

[7] *See supra* n.5.

[8] *What's next with AI?*, The Verge (Apr. 26, 2024), https://www.theverge.com/press-room/2024/4/26/24139468/artificial-intelligence-survey-data.

[9] *Generative AI races toward $1.3 trillion in revenue by 2032*, Bloomberg (March 8, 2024), https://www.bloomberg.com/professional/insights/data/generative-ai-races-toward-1-3-trillion-in-revenue-by-2032/.

below illustrate how this groundbreaking technology is already creating progress and causing real-world impact, and will continue to do so. And because teaching AI models to respond to user prompts requires access to vast amounts of high-quality, diverse data, a ruling that forbids training models on swaths of data without the benefit of a full evidentiary record could jeopardize the development of AI models across a variety of use cases.

Unlocking creativity. Generative AI is enabling existing artists to explore new forms of expression in novel media,[10] while also lowering the barriers to entry to allow new artists, including those with disabilities who may not otherwise be able to participate in art creation, to enter the field and compete.[11] Artists have lauded generative AI's ability to help them "create different kinds of art that [they could] never [create] before" and "expedite[] and streamline[] every one of [their] creative processes." Steven Vargas, *How AI-generated art is changing the concept of art itself*, L.A. Times (Sept. 21, 2022), https://www.latimes.com/projects/artificial-intelligence-generated-art-ownership-bias-dall-e-midjourney/. Generative AI is also significantly reducing the cost and effort needed to restore old works or produce new creative works, such as modernizing and remastering old games without the otherwise necessary expense and drudgery involved in traditional methods.[12] In these respects, generative AI will massively enhance creativity, enabling new creators, new forms of expression, new audiences, and new markets.

Fostering innovation and competition. The Department of Justice and the Federal Trade Commission, along with their counterparts in Europe, have recognized that generative AI represents a "[t]echnological inflection point" that will introduce "new means of competing, catalyzing opportunity, innovation, and growth." *Joint Statement on Competition in Generative AI Foundation Models and AI Products*, Federal Trade Commission (July 23, 2024), https://www.ftc.gov/legal-library/browse/joint-statement-competition-generative-ai-foundation-

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[10] *Hand in Hand: AI Art and Creativity*, Whitney Museum of American Art (Apr. 10, 2024), https://whitney.org/media/58663.

[11] Dale J. Rappaneau, *Art-generating AI as an accessibility tool for disabled artists*, The Techtualist (Jan. 25, 2023), https://techtualist.substack.com/p/art-generating-ai-as-an-accessibility.

[12] Oli Welsh, *Broken Sword dev 'simply couldn't afford' to remake it without using AI*, Polygon (Aug 23, 2023), https://www.polygon.com/23842925/broken-sword-6-bs1-remaster-charles-cecil.

models-ai-products. Independent AI startups are among the most important pioneers of generative AI and have significantly contributed to the development of the technology. And thanks to intense competitive pressure, companies are releasing open-source models that allow individual developers and unaffiliated companies to iterate on top of existing models to tailor the models for themselves and their users.[13] The competitive benefits unleashed by generative AI are not limited to the technology sector; adoption of generative AI is helping small businesses level the playing field in a variety of other industries.[14]

Enhancing productivity. Generative AI is profoundly influencing economic development and productivity across diverse sectors. In software development, generative AI technologies that help programmers code have been shown to improve efficiency by over 50% for existing engineers and turn millions of users with non-technical backgrounds into "effective developers."[15] Indeed, Amazon CEO Andy Jassy recently confirmed that its generative AI coding assistant has saved his company "the equivalent of 4,500 developer-years of work" in software development, with an estimated $260M in annualized efficiency gains.[16] In transportation, companies like Waymo are using sensor data they gathered from real-world testing to generate extensive 3D models and scenarios for vehicle testing, releasing these datasets to the public to promote the development of autonomous driving.[17] In the e-commerce domain, generative AI is powering image-based shopping experiences and virtual try-on tools for customers, including those with accessibility

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[13] Lauren Goode, *Open Source AI Has Founders—and the FTC—Buzzing*, Wired (July 26, 2024), https://www.wired.com/story/open-source-ai-y-combinator/.

[14] Graham Kenny, et al., *GenAI Is Leveling the Playing Field for Smaller Businesses*, Harvard Business Review (June 6, 2024), https://hbr.org/2024/06/genai-is-leveling-the-playing-field-for-smaller-businesses.

[15] Thomas Dohmke, et al., *Sea Change in Software Development: Economic and Productivity Analysis of the AI-Powered Developer Lifecycle*, arXiv (June 26, 2023), https://arxiv.org/abs/2306.15033.

[16] Andy Jassy (@ajassy), X (Aug. 22, 2024, 6:14 AM), https://x.com/ajassy/status/1826608791741493281.

[17] *See, e.g.*, Bokui Shen, et al., *GINA-3D: Learning to Generate Implicit Neural Assets in the Wild*, 2023 IEEE/CVF Conference on Computer Vision and Pattern Recognition (CVPR), Vancouver, BC, Canada, 2023 pp. 4913-4926, https://openaccess.thecvf.com/content/CVPR2023/papers/Shen_GINA-3D_Learning_To_Generate_Implicit_Neural_Assets_in_the_Wild_CVPR_2023_paper.pdf.

needs, so that they can see while shopping at home how clothing items look on them.[18] In government services, the Department of Homeland Security is rolling out pilot initiatives to leverage generative AI to streamline disaster mitigation planning and investigate child exploitation, human trafficking, and drug smuggling.[19] And in journalism, news organizations such as the New York Times are actively exploring ways to use generative AI to help with reporting and presentation to readers.[20] The widespread adoption of generative AI across industries is not only a reflection of the technology's significant potential for sparking economic growth, but also signals a shift towards more efficient, inclusive, and innovative business practices.

Advancing scientific and medical research. Government agencies have recognized that AI is playing an increasingly important role in scientific and medical research,[21] and some projects in the area have already seen success. For example, AlphaFold, an AI program developed by Google DeepMind that predicts protein structure, has revolutionized the field of structural biology by reducing a process that could take years of lab work to one that can be achieved within minutes.[22] The resulting predictions that have been shared online, covering nearly every known protein, are unleashing a wave of scientific breakthroughs from drug discovery to gene therapy. *Id.* Patients who lost their ability to speak from disease are using generative AI to find their own voices again, allowing them to perform daily tasks, tell their families how much they love them,[23]

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[18] Lilian Rincon, *Virtually try on clothes with a new AI shopping feature*, Google Blog (June 14, 2023), https://blog.google/products/shopping/ai-virtual-try-on-google-shopping/.

[19] Cecilia Kang, *The Department of Homeland Security Is Embracing A.I.*, N.Y. Times (Mar. 18, 2024), https://www.nytimes.com/2024/03/18/business/homeland-security-artificial-intelligence.html.

[20] Emilia David, *The New York Times is building a team to explore AI in the newsroom*, The Verge (Jan. 30, 2024), https://www.theverge.com/2024/1/30/24055718/new-york-times-generative-ai-machine-learning.

[21] Patrizia Cavazzoni, *FDA Releases Two Discussion Papers to Spur Conversation about Artificial Intelligence and Machine Learning in Drug Development and Manufacturing*, U.S. Food & Drug Administration (May 10, 2023), https://www.fda.gov/news-events/fda-voices/fda-releases-two-discussion-papers-spur-conversation-about-artificial-intelligence-and-machine.

[22] Ian Sample, *Team behind AI program AlphaFold win Lasker science prize*, Guardian (Sept. 21, 2023), https://www.theguardian.com/science/2023/sep/21/team-behind-ai-program-alphafold-win-lasker-science-prize.

[23] Benjamin Mueller, *A.L.S. Stole His Voice. A.I. Retrieved It.*, N.Y. Times (Aug. 14, 2024), https://www.nytimes.com/2024/08/14/health/als-ai-brain-implants.html.

or get back to the job they love—such as making arguments in court.[24] Doctors believe that the technology could help millions of people with debilitating strokes, throat cancer, or neurodegenerative diseases.[25] And generative AI's extraordinary ability to extract and summarize patterns from vast amounts of data is already providing valuable insights for sepsis prediction[26] and Parkinson's disease detection,[27] allowing early treatment that could save many lives.

Reducing inequality and expanding access to information. Tech companies have released AI translation and transcription models that can work across numerous languages, including many unsupported by currently available commercial tools.[28] These models promise to break down communication barriers and expand access to information for speakers worldwide, while also improving the speed and accuracy of content moderation, by helping content reviewers understand context. Schools are testing AI tutors that provide tailored learning experiences; those personalized tutors allow students to learn at their own pace and teachers to devote extra time to those who need more guidance.[29] And millions of students, including those from under-resourced groups, are learning how to write computer code through AI-powered tools that provide real-time feedback and error correction, enabling students to learn from mistakes immediately and to better understand complex coding principles.[30] Developers are building AI tools capable of generating

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[24] Stephanie Wilkins, *'Not Going Away': A Star Greenberg Traurig Litigator Lost Her Voice. AI Brought It Back*, Law.com (Jan. 24, 2024), https://www.law.com/legaltechnews/2024/01/24/not-going-away-a-star-greenberg-traurig-litigator-lost-her-voice-ai-brought-it-back/.

[25] Matt O'Brien, *Illness took away her voice. AI created a replica she carries in her phone*, Associated Press (May 13, 2024), https://apnews.com/article/ai-recreating-lost-voice-illness-a6512c33481072c22182c116d2cbe419.

[26] Daniel Gilbert & Rachel Roubein, *In a first, FDA authorizes AI-driven test to predict sepsis in hospitals*, Wash. Post (Apr. 3, 2024), https://www.washingtonpost.com/business/2024/04/03/fda-artificial-intelligence-sepsis/.

[27] Christian Thorsberg, *New Blood Test for Predicting Parkinson's Disease With A.I. Shows Promise, Study Suggests*, Smithsonian Mag. (June 28, 2024), https://www.smithsonianmag.com/smart-news/new-blood-test-for-predicting-parkinsons-disease-with-ai-shows-promise-study-suggests-180984574/.

[28] Emilia David, *Meta releases multilingual speech translation model*, The Verge (Aug. 22, 2023), https://www.theverge.com/2023/8/22/23840571/meta-multilingual-speech-translation-model-ai.

[29] Natasha Singer, *New A.I. Chatbot Tutors Could Upend Student Learning*, N.Y. Times (June 8, 2023), https://www.nytimes.com/2023/06/08/business/khan-ai-gpt-tutoring-bot.html.

[30] Chris Perry & Shrestha Basu Mallick, *AI-powered coding, free of charge with Colab*, Google Blog (May 17, 2023), https://blog.google/technology/developers/google-colab-ai-coding-features/.

accurate and photorealistic sign language translations for the deaf and hard of hearing.[31] Such experiments and experiences are boosted by promising research showing that generative AI could play a critical role in reducing inequality and the digital divide, thanks to its ability to disproportionately increase the performance of disadvantaged students and workers.[32]

Addressing social issues and boosting sustainable development. In the past year, AI has begun to demonstrate its ability to provide solutions to societal challenges. Specifically highlighting generative AI's ability to process and analyze vast amounts of information, the United Nations is incorporating AI to achieve its Sustainable Development Goals,[33] and significant investment and progress is already taking place.[34] For instance, researchers and companies are using AI to interpret large quantities of satellite imagery in order to track global greenhouse gas emissions and verify corporate emission reports.[35] AI is also being introduced to prevent and detect wildfires, to forecast extreme weather events, to increase agricultural productivity, to enhance preparedness for new disease outbreaks, and to build a cleaner energy infrastructure.[36] Indeed, researchers have warned that halting generative AI development may hinder the progress

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[31] *See, e.g.*, Calum Medlock, *Signapse's Sign Language Translation using Generative AI: Achieving Photo-Realism and Accuracy*, Signapse (May 10, 2023), https://www.signapse.ai/post/signapse-ai-sign-language-translation-photo-realism-accuracy.

[32] Alan Murray & Nicholas Gordon, *A.I. will reduce inequality by leveling the tech playing field, studies suggest*, Fortune (Sept. 10, 2023), https://fortune.com/2023/09/10/ai-reduce-inequality/.

[33] *Harnessing Artificial Intelligence for Sustainable Development Goals (SDGs): Remarks by the UN Deputy Secretary-General at the Opening of the ECOSOC Special Meeting*, U.N. Sustainable Dev. Grp. (May 8, 2024), https://unsdg.un.org/latest/announcements/harnessing-artificial-intelligence-sustainable-development-goals-sdgs.

[34] *See, e.g.*, Medha Bankhwal et al., *AI for social good: Improving lives and protecting the planet*, McKinsey & Co. (May 10, 2024), https://www.mckinsey.com/capabilities/quantumblack/our-insights/ai-for-social-good; Brigitte Hoyer Gosselink et al., *AI in Action: Accelerating Progress Towards the Sustainable Development Goals*, arXiv (July 2, 2024), https://arxiv.org/abs/2407.02711.

[35] Julia Simon, *4 ways AI can help with climate change, from detecting methane to preventing fires*, NPR (Jan. 2, 2024), https://www.npr.org/2024/01/02/1218677963/ai-climate-change-solutions-fires-lithium-methane.

[36] *See id.*; *see also Secretary Antony J. Blinken at the AI for Accelerating Progress on Sustainable Development Goals Event*, U.S. Dept. of State (Sept. 18, 2023), https://www.state.gov/secretary-antony-j-blinken-at-the-ai-for-accelerating-progress-on-sustainable-development-goals-event/.

of climate research, and any regulation of generative AI should be carefully designed to support overall progress.[37]

Closing the gap on access to justice. While also recognizing the risks that AI poses, Chief Justice Roberts noted that "AI obviously has great potential to dramatically increase access to key information for lawyers and non-lawyers alike."[38] For lawyers, "[l]egal research may soon be unimaginable without it." *Id.* And for non-lawyers "who cannot afford a lawyer, AI can help"; "[t]hese tools have the welcome potential to smooth out any mismatch between available resources and urgent needs in our court system." *Id.*

* * *

From supercharging creativity and productivity to mitigating the impact of climate change and spurring competition, generative AI is proving to be a powerful force for progress and improving the human condition, and we can expect its positive impact to grow exponentially in the future.

Putative *amici* for Plaintiffs argue that "compliance with copyright law" is no "obstacle to innovation." ECF No. 193-1, at 8. They are correct, but not in any way that helps Plaintiffs. In creating the fair use doctrine, Congress and the courts recognized that "rigid application of the copyright statute" should not "stifle the very creativity" copyright is meant to foster. *Stewart v. Abend*, 495 U.S. 207, 236 (1990). The flexible and fact-sensitive doctrine of fair use serves to "keep a copyright monopoly within its lawful bounds" as "'rapid technological change'" shapes which uses are infringing and which uses are fair. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 22 (2021) (quoting H. R. Rep. No. 94–1476, pp. 65-66 (1976)). Thus, innovators in generative AI may comply with copyright law by making fair use of copyrighted works in training models without undertaking the herculean task of seeking and obtaining costly licenses from innumerable rightsholders.

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[37] Francesca Larosa, et al., *Halting generative AI advancements may slow down progress in climate research*, Nature Climate Change 13, 497-99 (2023).

[38] John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary*, Supreme Court of the United States (Dec. 31, 2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

II. A Preliminary Injunction Is Not an Appropriate Vehicle for Deciding Important, Novel, and Complex Questions about Generative AI and Copyright Law.

Given the promise of generative AI, Plaintiffs' demand for a preliminary injunction presents questions of immense importance to the entire field and to the public. Many of these questions are novel, complex, fact-intensive, and hotly disputed in a multitude of ongoing lawsuits across the country. Plaintiffs urge the Court to get out ahead of this incrementally developing law, paint with a broad brush, and make sweeping findings at the outset of this case. But the equitable principles underlying the Court's power to issue injunctions counsel in favor of caution. According to these principles, a preliminary injunction should not be issued in a case like this one: where the issues are novel, the legal environment is rapidly changing, and the public interest would be undermined by prejudging the merits. Resolving these issues in the ordinary course, on a complete record, best serves the public interest.

"A preliminary injunction is an 'extraordinary and drastic remedy'" that is "never awarded as a matter of right." *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995)). Such injunctions are "a matter of equitable discretion." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). If the movant "demonstrate[s] that it meets all four of the elements"—"that an injunction would be in the public interest, that without an injunction irreparable harm is likely, that the balance of equities tips in its favor, and that it is likely to succeed on the merits," *see Dish Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011)—then the court "*may*" grant an injunction, 17 U.S.C. § 502(a) (emphasis added); *see also Sony Comp. Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 608 n.11 (9th Cir. 2000) ("The imposition of an injunction is discretionary." (citing 17 U.S.C. § 502(a)).

Courts should exercise "extreme caution" before issuing preliminary injunctions, given their "summary nature" and "liability to abuse." Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 959b, at 626 (Stephen and Haynes 1884). Because of exigent circumstances, preliminary injunctions are issued based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex.*

v. Camenisch, 451 U.S. 390, 395 (1981). A defendant may be enjoined based on hearsay evidence, without the opportunity for discovery, a complete record, or full legal briefing. Thus, as the Ninth Circuit has recognized, "'[t]he grant of a preliminary injunction is the exercise of a very far reaching power never to be indulged in except in a case clearly warranting it,'" and "'[o]n application for preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact.'" *Mayview Corp. v. Rodstein*, 480 F.2d 714, 719 (9th Cir. 1973) (quoting *Dymo Indus., Inc. v. TapePrinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964)). This applies with even greater force in copyright infringement cases because "of the difficulty of predicting the merits of a copyright claim at a preliminary injunction hearing"—"a difficulty [that] is compounded significantly when a defendant raises a colorable fair use defense." *Salinger v. Colting*, 607 F.3d 68, 80-81 (2d Cir. 2010).

To be sure, courts have issued preliminary injunctions in copyright infringement cases, *see* Pls.' PI Mem. at 10, n.6 (collecting cases), but they have also denied them, *see, e.g.*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1177 (9th Cir. 2007) (vacating grant of preliminary injunction because defendant's use was likely a fair use); *Sony Comp. Ent., Inc.*, 203 F.3d at 608 (same); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1992) (same); *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1073 (9th Cir. 2014) (affirming denial of preliminary injunction in a copyright infringement case). None of the copyright cases cited by Plaintiffs in which courts have granted preliminary injunctions presented the same kind of risk present here: that of stifling an entire field with the potential to fundamentally, beneficially transform people's daily lives. *See Disney Enters., Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 974 (C.D. Cal. 2016), *aff'd*, 869 F.3d 848 (9th Cir. 2017) (enjoining defendant from copying movies and television shows that defendant used to provide censored, family-friendly versions for private home viewing); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1141 (C.D. Cal. 2012) (enjoining defendants from streaming broadcast television over the internet for private viewing); *A&M Recs., Inc. v. Napster, Inc.*, 2001 WL 227083, at *1 (N.D. Cal. Mar. 5, 2001) (enjoining defendant to prevent use of its file-sharing system to copy sound recordings). There are good reasons for caution here.

First, Plaintiffs' demand for a preliminary injunction depends upon cutting-edge legal questions about the application of copyright law to generative AI. But as an extraordinary exercise of a court's equitable powers, preliminary injunctions should not issue "in doubtful cases, or new ones, not coming within well established principles." *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, Int'l Typographical Union*, 471 F.2d 872, 876 (6th Cir. 1972) (quoting 3 Barron & Holtzoff, Federal Practice and Procedure (Wright Ed.) § 1431); *accord Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 464 (C.D. Cal. 1979) (quoting *Detroit Newspaper Publishers Ass'n*, 471 F.2d at 876). Thus, courts may properly deny preliminary relief where the law is "not well-established," *Bonnell v. Lorenzo*, 241 F.3d 800, 826 (6th Cir. 2001), or the "issue is one of first impression," *Am. Fed'n of State, Cnty., Mun. Emps. Loc. 1733 v. City of Memphis*, 2012 WL 4602374, at *8 (W.D. Tenn. Sept. 28, 2012).

The questions Plaintiffs urge this Court to answer are concededly "'novel.'" ECF No. 179 ("Pls.' PI Mem.") at 10 n.6 (quoting *BGC, Inc. v. Bryant*, 2022 WL 6250772, *3 (N.D. Cal. Sept. 23, 2022)). Whether the use of copyrighted works in generative AI training and output constitutes infringement and whether it is nonetheless protected as fair use are cutting-edge legal questions that have yet to be clearly answered by any court. And the complex factual issues that will inform the answers to these questions have yet to be clarified by discovery. *See, e.g.*, ECF No. 203 at 20 (Plaintiffs stating that "fact discovery in this case will require review and analysis of source code and other technical documents"). These issues, such as "whether a fair use defense applies" to generative AI training, "must be tested on an evidentiary basis" after discovery. *Andersen v. Stability AI Ltd.*, 2024 WL 3823234, at *19 (N.D. Cal. Aug. 12, 2024) (denying motion to dismiss). Plaintiffs' assertion that "the legal and factual issues before this Court are straightforward," Pltfs' PI Mem. at 1, is at odds with their proposal for an extended discovery period, *see* ECF No. 203-1 at 2 (proposing a discovery period three months longer than Defendant's proposal). The "need for discovery to clarify" key issues counsels against an injunction. *In re Meta Pixel Healthcare Litig.*, 647 F. Supp. 3d 778, 790 (N.D. Cal. 2022) (denying motion for preliminary injunction).

Relatedly, caution is warranted because the application of copyright law to generative AI training and output is hotly disputed and fast-developing. Courts may decline to issue a

preliminary injunction in a "fluctuating legal environment." *Benisek v. Lamone*, 585 U.S. 155, 161 (2018) (affirming denial of a preliminary injunction); *see also Rand Int'l, Inc. v. LucasFilm Ltd.*, 2008 WL 3987079, at *2 (N.D. Cal. Aug. 27, 2008) (explaining that preliminary injunctions may issue "only in cases where the issues are clear and well defined"). For example, in *Benisek*, the district court refused to enter a preliminary injunction in part because other pending litigation "had the potential to 'shed light on critical questions in th[e] case.'" 585 U.S. at 160 (quoting *Benisek v. Lamone*, 266 F. Supp. 3d 799, 815 (D. Md. 2017)). It concluded that it would be "a mistake" to "'charg[e] ahead' and adjudicat[e] the plaintiffs' claims in that fluctuating legal environment." *Id.* (quoting *Benisek*, 266 F. Supp. 3d at 816). The Supreme Court subsequently affirmed that exercise of caution as being within the district court's "sound discretion." *Id.*

The "fluctuating legal environment" involving copyright and generative AI justifies denying Plaintiffs' request for an unprecedented preliminary injunction. *Benisek*, 585 U.S. at 161. "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017). The same questions presented by Plaintiffs' lawsuit have been raised in a host of other copyright lawsuits against providers of AI tools.[39] Some of the cases are far advanced—one has yielded a summary judgment order, *see Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.*, 694 F. Supp. 3d 467 (D. Del. 2023) (finding genuine disputes of material

[39] *See, e.g.*, *Thomson Reuters Enter. Centre GmbH v. ROSS Intel. Inc.*, No. 1:20-cv-00613-SB (D. Del. filed May 6, 2020); *Doe 1 v. GitHub, Inc.*, No. 4:22-cv-06823 (N.D. Cal. filed Nov. 3, 2022); *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201 (N.D. Cal. filed Jan. 13, 2023); *Getty Images (US), Inc. v. Stability AI, Inc.*, No. 1:23-cv-00135 (D. Del. filed Feb. 3, 2023); *In re OpenAI ChatGPT Litig.*, No. 4:23-cv-03223 (N.D. Cal. filed June 28, 2023); *Kadrey v. Meta Platforms Inc.*, No. 3:23-cv-03417 (N.D. Cal. filed July 7, 2023); *Leovy v. Google LLC*, No. 5:23-cv-03440 (N.D. Cal. filed July 11, 2023); *Authors Guild v. OpenAI, Inc.*, No. 1:23-cv-08292 (S.D.N.Y. filed Sept. 19, 2023); *Sancton v. OpenAI Inc.*, No. 1:23-cv-10211 (S.D.N.Y. filed Nov. 21, 2023); *New York Times Co. v. Microsoft Corp.*, No. 1:23-cv-11195 (S.D.N.Y. filed Dec. 27, 2023); *Raw Story Media, Inc. v. OpenAI, Inc.*, No. 1:24-cv-01514 (S.D.N.Y. filed Feb. 28, 2024); *Intercept Media, Inc. v. OpenAI, Inc.*, No. 1:24-cv-01515 (S.D.N.Y. filed Feb. 28, 2024); *Zhang v. Google LLC*, 5:24-cv-02531 (N.D. Cal. filed Apr. 26, 2024); *Daily News, LP v. Microsoft Corp.*, No. 1:24-cv-03285 (S.D.N.Y filed Apr. 30, 2024); *UMG Recordings, Inc. v. Uncharted Labs, Inc.*, No. 1:24-cv-04777 (S.D.N.Y. filed June 24, 2024); *UMG Recordings, Inc. v. Suno, Inc.*, No. 1:24-cv-11611 (D. Mass. filed June 24, 2024); *Center for Investigative Reporting, Inc. v. OpenAI, Inc.*, No. 1:24-cv-04872 (S.D.N.Y. filed June 27, 2024); *Bartz v. Anthropic PBC*, No. 3:24-cv-05417 (N.D. Cal. filed Aug. 19, 2024).

fact as to infringement and fair use), and may soon yield more, *see Thomson Reuters*, No. 1:20-cv-00613-SB (D. Del. Aug. 22, 2024), ECF No. 663 (ordering additional summary judgment briefing). Many others are in discovery, where full factual records are being developed and expert testimony will be brought to bear. Rulings in these other pending cases, with the benefit of those fully developed records, will shed light on the critical issues in this case, to the benefit of the parties and the Court.

Second, prejudging the merits of Plaintiffs' theories would disserve the public interest. Particularly where a preliminary injunction "will adversely affect a public interest," courts "may in the public interest withhold relief until a final determination of the rights of the parties." *Yakus v. United States*, 321 U.S. 414, 440 (1944); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) ("'the court may in the public interest withhold [preliminary injunctive] relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff'" (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982)).

Here, before any injunction may issue, the Court would need to assess Plaintiffs' likelihood of prevailing on many debatable legal and factual points. These preliminary assessments may have broad implications for the development of generative AI, including what material can be used to train AI models, what output can be generated, and who is liable for that output if it is infringing. If the emergency posture and limited record here cause a mistaken prejudgment of the merits, the ruling could inappropriately chill development of generative AI, risk derailing a nascent but critical industry, and deprive the public of generative AI's substantial benefits, including those that have yet to be discovered. Those harms to the public interest counsel against issuance of a preliminary injunction. *See Perry v. Schwarzenegger*, 2009 WL 10695876, at *2 (N.D. Cal. June 30, 2009) (declining to issue "preliminary injunctive relief on an incomplete record [because it] may inject still further uncertainty in an important area of concern and interest to the state and its citizens").

Summary proceedings are especially concerning in light of Plaintiffs' sweeping demands for relief. Plaintiffs seek relief for "millions" of copyrighted works, based on 500 "illustrative" works, five "distinct" infringement theories, and an unknown number of supposedly infringing outputs. *See* Pltfs' PI Mem. at 3, 14. Even assuming Plaintiffs can establish a prima facie case for

copyright infringement, Plaintiffs must still overcome a substantial fair use defense. That defense is intensely fact-specific and "requires an analysis of [each] specific 'use' of a copyrighted work that is alleged to be 'an infringement.'" *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 533 (2023) (quoting 17 U.S.C. § 107). It would be difficult to give so many claims and issues full and fair consideration in this preliminary posture. What is more, Plaintiffs' requested injunction would sweep far beyond permissible bounds by precluding the use of millions of works and enjoining related speech without even a preliminary adjudication of whether use of the vast majority of those works was infringing. Such an overbroad injunction would be "an abuse of discretion in th[is] highly fact-specific area." *See E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1298 (9th Cir. 1992) (narrowing overbroad injunction involving trademark claims); *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 538 (5th Cir. 1994) (narrowing overbroad copyright injunction); *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 937 n.3 (N.D. Cal. 2009) (denying motion for preliminary injunction and explaining that injunction "narrowly tailored to enjoin only those allegedly infringing uses of [the plaintiff's] copyrighted content"). And it would run afoul of the First Amendment. *Cf. Garcia v. Google, Inc.*, 786 F.3d 733, 747 (9th Cir. 2015) (holding preliminary injunction to remove an allegedly infringing online video violated First Amendment).

Even assuming Plaintiffs were to ultimately prevail based on a complete record, injunctions do not "automatically" follow even from final judgments of infringement, much less preliminary findings based on a limited record. *See, e.g., eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006) ("[T]his Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed."); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (the "goals of the copyright law … are not always best served by automatically granting injunctive relief"); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505 (2001) (citing *Campbell*, 510 U.S. at 578 n.10); *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (holding that irreparable harm cannot be presumed for copyright infringement claims). Copyright does not trump the public's interest in access to information. *See, e.g., ABKCO Music, Inc. v. Sagan*, 50

F.4th 309, 323 (2d Cir. 2022) (reversing permanent injunction in a music copyright case in part "because the public has an interest in accessing 'iconic' recordings of historical importance").

The most prudent course is to deny Plaintiffs' motion without passing on the merits. The Court has discretion to do so: a plaintiff "must demonstrate that it meets all four of the elements of the preliminary injunction test," and if the plaintiff "has failed to satisfy its burden" on one element, the court "need not consider the remaining three." *Dish Network Corp.*, 653 F.3d at 776-77. Before seeking an injunction on a novel legal issue with far-reaching consequences, Plaintiffs should prepare "a complete record" for the Court to assess "whether injunctive relief may be appropriate." *Perry*, 2009 WL 10695876, at *2.

CONCLUSION

For these reasons, *Amici* respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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