

Reassessing the Fair Use Doctrine in the Age of AI: Evaluating Bad Faith and Market Harm through Bartz v. Anthropic and Kadrey et al. v. Meta Platforms, Inc.

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Summary: *This paper examines how the fair use doctrine applies to large language model (LLM) training by analyzing Bartz v. Anthropic and Kadrey v. Meta Platforms, Inc. LLMs such as “Claude” and “Llama”, generate text from large datasets, raising novel copyright questions. In Bartz, lawfully acquired works were used fairly, while pirated copies weighed against fair use. In Kadrey v. Meta Platforms, Inc., Meta’s use of unauthorized sources was deemed transformative and fair, highlighting inconsistent treatment of bad faith. Regarding market harm, courts focused on direct substitution but largely ignored broader effects such as market dilution or long-term impacts on creative markets. The paper agrees that fair use doctrine must evolve with technology, proposing a fifth factor focused on the legality of AI training sources and greater attention to market dilution and long-term economic harm to creators.*

Key words: *Large language models, artificial intelligence, bad faith, fair use, market substitution, market dilution.*

Santrauka: Šiame darbe nagrinėjama, kaip sąžiningo naudojimo (fair use) doktrina taikoma didžiųjų kalbos modelių (LLM) mokymui, analizuojant bylas *Bartz v. Anthropic* ir *Kadrey v. Meta Platforms, Inc.* Tokie LLM kaip „Claude“ ir „Llama“ generuoja tekstą iš didelių duomenų rinkinių, todėl kyla naujų autorių teisių klausimų. Byloje *Bartz* teisėtai įgyti kūriniai buvo laikomi naudojamais sąžiningai, o piratinės kopijos vertintos neigiamai sąžiningo naudojimo požiūriu. Tuo tarpu byloje *Kadrey v. Meta Platforms, Inc.* Meta naudojimasis neleistiniais šaltiniais buvo pripažintas transformuojančiu ir sąžiningu, atskleidžiant nenuoseklų blogos valios vertinimą. Vertinant poveikį rinkai, teismai daugiausia dėmesio skyrė tiesioginiam pakeičiamumui, tačiau iš esmės ignoravo platesnius padarinius, tokius kaip rinkos praskiedimas ar ilgalaikis poveikis kūrybinėms rinkoms. Darbe teigiama, kad sąžiningo naudojimo doktrina turi vystytis kartu su technologijomis, siūlant penktąjį veiksnį, orientuotą į DI mokymo šaltinių teisėtumą, ir didesnę dėmesį rinkos praskiedimui bei ilgalaikiai ekonominei žalai kūrėjams.

Pagrindiniai žodžiai: dideli kalbos modeliai, dirbtinis intelektas, nesąžiningumas, sąžiningas naudojimas, rinkos pakeitimas, rinkos silpninimas.

Introduction

Large language models (LLMs) are pre-trained artificial intelligence (AI) systems capable of advanced natural language processing. These models can answer questions, generate text, and perform complex tasks. Since the emergence of OpenAI's GPT-3, their rapid development has raised the need for legal analysis due to their growing impact on technology and law.¹

The relevance of this topic stems from the rapid development of AI, particularly generative AI and large language models (LLMs), which pose significant challenges to traditional copyright doctrines. One of the debated issues is the fair use doctrine, which in the United States has long served as a flexible mechanism for balancing copyright protection with public access to creative works. In recent years, a growing number of disputes have emerged at the intersection of copyright law and AI, most commonly alleging that AI developers infringe copyright by copying protected works for use as training data for foundational models. The questions examined in this paper are currently highly debated among legal professionals, including law firms, courts, and scholars. They are particularly important, as some court decisions have left many losing plaintiffs feeling significantly aggrieved.

The fair use doctrine was codified in the United States in 1976. In incorporating this doctrine into the Copyright Act, Congress expressly emphasized that it did not

¹ KALYAN, K. S. (2024). A survey of GPT-3 family large language models including ChatGPT and GPT-4. *Natural Language Processing Journal*, 6, 1 [online]. <https://www.sciencedirect.com/science/article/pii/S2949719123000456>

intend to establish a static rule: “However, Congress incorporated the fair use defense into the statute to make copyright law more flexible.”² Instead, “The open-ended nature of fair use enables copyright law to remain flexible and adaptable to changing circumstances. At the same time, however, flexibility creates a high level of uncertainty regarding permissible uses, which may lead to a detrimental chilling effect.”³

Under U.S. law: “Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.”⁴ Courts evaluate fair use through four interrelated factors: the purpose and character of the use, the nature of the copyrighted work, the amount used, and the effect on the market. The first factor focuses on whether the secondary use is transformative - adding new meaning or purpose rather than merely replacing the original - while considerations like commerciality or good faith may be relevant but are not decisive. The second factor recognizes that highly creative works receive stronger protection than more functional ones, such as computer code. The second factor, however, has rarely played a significant role in the determination of a fair use dispute and it applies “with less force” when the copied works have already been published and the secondary user therefore cannot interfere with the creator’s right to control the first public appearance of their work. The third factor asks whether the quantity and significance of what was copied are reasonable considering the use’s purpose. The relevant consideration is not the amount of copyrighted material used by the copier, but the amount of copyrighted material made available to the public. Finally, the fourth factor - often regarded as the most important - examines whether the use causes market harm or would do so if widely adopted, with only economic substitution, not criticism or commentary, counting against fair use.

The purpose of this paper is to propose changes to the fair use doctrine and to analyze and compare two significant United States cases *Bartz v. Anthropic*⁵ and *Kadrey et al. v. Meta Platforms, Inc.*⁶ Addressing the interaction between copyright law and the training of LLMs.

The tasks necessary to achieve this objective include analyzing two U.S. court cases, identifying the points at which their reasoning converges and diverges, and pro-

² PEDEN, A. (2023a). The good, the bad, and the ugly: Incorporating the good or bad faith consideration into the fair use analysis. *University of the Pacific Law Review*, 54(1), 22-23 [online]. <https://scholarlycommons.pacific.edu/uoplawreview/vol54/iss1/14/>

³ ELKIN-KOREN, N., & Fischman-Afori, O. (2016). Rulifying fair use. *Arizona Law Review*, 59(1), 1 [online]. <https://arizonalawreview.org/rulifying-fair-use/>

⁴ U.S. COPYRIGHT OFFICE (2025). U.S. Copyright Office Fair Use Index. [online] <https://www.copyright.gov/fair-use/>

⁵ *Kadrey et al. v. Meta Platforms, Inc.*, [United States District Court for the Northern District of California], No. 23-cv-03417-VC, [2025-06-25].

⁶ *Bartz v. Anthropic PBC*, [United States District Court for the Northern District of California], No. C 24-05417 WHA, [2025-06-23].

posing recommendations on how copyright protection can be effectively reconciled with the continued development of emerging technologies based on other U.S. cases and legal doctrine.

The object of this study consists of two U.S. court cases that demonstrate the intersection of the relevant legal issues.

This paper addresses two main research questions: first, what role does bad faith play in the fair use doctrine and how might its assessment be improved; second, how should market harm be evaluated under the fourth fair use factor?

This work is original in that, during the analysis of the cases, questions arise concerning differences in their interpretation, which are examined in this study. This paper examines a variety of sources, including case law and different strands of legal doctrine. The methods employed include systematic and analytical approaches, which are used to examine case law and legal doctrines.

1. Bartz v. Anthropic

1.1. Facts of the case

Anthropic PBC (hereinafter - Anthropic), an AI company, obtained millions of copyrighted books - both by downloading them from pirate websites and by purchasing physical copies, removing their covers, scanning every page, and storing them in digitized files - to build a comprehensive digital library. The company aimed to permanently preserve these works and use selected books to train its LLMs. One of Anthropic's large language models, known as "Claude", is designed to generate human-like written responses to user queries. Authors Andrea Bartz, Charles Graeber, and Kirk Wallace Johnson, through their companies, sued Anthropic in the U.S. District Court for the Northern District of California, alleging copyright infringement and disputing whether the use of their works for Anthropic's digital library and LLM training qualifies as fair use under Section 107.

1.2. Analysis under factor one: The purpose and character of the use

Plaintiffs objected only to the use of their works as LLM training inputs, claiming this gave them the right to forbid such use. The Court stressed that drawing inspiration from and learning or imitating prior texts has never been considered copyright infringement. It ruled that using copyrighted works to train an LLM is transformative, since the goal is not to copy or compete with the originals and instead to create new and different content, any necessary copies were used in a transformative way.

Anthropic bought millions of printed books for its central library and pirated millions of digital books for its central library. It used specific collections of books to

train specific LLMs. The company kept those copies for other uses. The court found that legally obtained copies were used fairly, even after digitizing them, since the books were lawfully acquired, they were entitled to use them as they saw fit. However, downloading and keeping pirated copies without paying was a separate, non-transformative use.

Thus, the first fair use factor favors the training copies and digitized purchased books, while weighing against the pirated library copies, which cannot be justified by later purchases.

1.3. Analysis under factor two: The nature of copyrighted work

The Court found that published works are afforded less protection than unpublished ones, but that this does not mean such protection does not exist. Since the works were expressive and intentionally selected for training, the Court concluded this factor weighs against fair use for all copies.

1.4. Analysis under factor three: The amount and substantiality of the portion used

Regarding the copies used to create the central library, the court found that the copies of lawfully acquired books were not excessive, since Anthropic, by purchasing the books, obtained the right to keep them in its library, whereas it had no right to retain pirated copies.

For copies used to train LLMs, the court held that the key issue is not how much was copied, whether any part was publicly disclosed as a substitute. Since no link was shown between “Claude’s” outputs and the authors’ works, the court found the copying reasonable.

The third factor favors fair use for the training copies and for the purchased library copies converted from print to digital but weighs against fair use for the pirated library copies.

1.5. Analysis under factor four: The effect of the use upon the market for or value of the copyrighted work

The court noted that LLM training does not make infringing copies available to the public. It rejected the claim that such training creates unlawful competition, likening it to teaching students to write. Although a potential licensing market was affected, the court held this is not a market the plaintiffs can control under copyright law. This factor favors fair use.

Copies used to create a central library reduced new purchases of digital copies that Anthropic would have bought directly from the plaintiffs if they had not been able to

get used copies. However, for the reasons given under the first factor, these losses are not related to the rights the Copyright Act gives to plaintiffs. This was just a change in format.

The fourth fair use factor favors fair use for the training copies, is neutral for the purchased library copies converted from print to digital and weighs against fair use for the pirated library copies.

1.6. Interim Conclusion

The Court stated that the copies used to train specific LLMs were justified as a fair use. Every factor but the nature of the copyrighted work favors this result. “The technology at issue was among the most transformative many of us will see in our lifetimes.”⁷ Copies converted from print to digital - fair use. Pirated copies - not fair use. Each of the factors confirmed this.

2. Kadrey et al. v. Meta Platforms, Inc.

2.1. Facts of the case

Kadrey v. Meta Platforms, Inc. involves thirteen plaintiffs suing Meta over the use of their copyrighted books to train its LLM Llama. Meta allegedly downloaded hundreds of the plaintiffs’ works - at least 666 copies - from online “shadow libraries” such as Anna’s Archive, Library Genesis, Z-Library, and the Books3 dataset, without permission or payment. To amass data, Meta used BitTorrent, downloading via peer-to-peer sharing that may have reuploaded portions of copyrighted material through “leeching.” Meta denied intentional redistribution.

The key legal issue was whether using copyrighted works for AI training is copyright infringement or protected as fair use. The plaintiffs called Meta’s actions piracy, while Meta claimed its use was transformative.

2.2. Analysis under factor one: The purpose and character of use

This factor weighed in Meta’s favor. Meta copied the books to train its large language model, Llama, an innovative tool capable of generating diverse text and performing a wide range of functions. There was no evidence that Meta designed Llama to generate books that would compete with or directly copy the plaintiffs’ works. At most, the evidence showed an intent to generate text in certain styles, which copyright law does not protect.

⁷ *Bartz v. Anthropic PBC*, [United States District Court for the Northern District of California], No. C 24-05417 WHA, [2025-06-23].

The court also considered the commercial character of Meta's use and concluded that Meta's profit motive, though relevant, did not outweigh the strongly transformative character of the use and therefore did not shift the first factor in the plaintiffs' favor.

2.3. Analysis under factor two: The nature of the copyrighted work

This factor favors the plaintiffs, as their expressive works - novels, memoirs, and plays - are protected by copyright law. Meta recognizes that LLMs learn through statistical relationships involving word order, choice, grammar, and syntax, which are essential for individual expression.

2.4. Analysis under factor three: The amount and substantiality of the portion used

Given that Meta's LLMs won't output any meaningful amount of the plaintiffs' books, it's not clear how or why Meta's copying would be less likely to lead to the creation of direct substitutes for the books if Meta had copied less of them. This factor favored Meta, even though it copied the plaintiffs' books in their entirety. The amount that Meta copied was reasonable given its relationship to Meta's transformative purpose.

2.5. Analysis under factor four: The effect of the use upon the potential market for or value of the copyrighted work

The court rejected the claim that Meta's Llama model substitutes for plaintiffs' books by enabling users to generate meaningful excerpts, finding no evidence that Llama can reproduce significant portions of the works. It also dismissed alleged harm to a market for licensing books for LLM training, reasoning that plaintiffs cannot monopolize licensing for transformative uses and that recognizing such harm would make the analysis circular.

Instead, the court identified market dilution as the more plausible theory of harm. Even without copying, LLMs may enable the rapid generation of large volumes of competing text with minimal time or creativity, potentially flooding the market and displacing demand for human-authored works. Evidence showed AI-generated books already appearing in online marketplaces, with works emphasizing functional content being especially vulnerable.

The court also considered whether Meta's use of shadow libraries materially benefited those libraries or facilitated unauthorized access to copyrighted works. Although such conduct could weigh against fair use, the plaintiffs offered no evidence that Meta promoted, supported, or incentivized piracy. By contrast, the public benefits of Meta's technology modestly favored the finding of fair use.

2.6. Interim Conclusion

Fair use is a fact-specific doctrine that must be applied on a case-by-case basis, particularly as courts confront new technologies and their potential consequences. No prior case has involved a use that is both as transformative and as capable of diluting the market for original works as LLM training. As a result, existing precedent does not directly answer whether Meta’s copying constitutes fair use.

However, no matter how transformative LLM training may be, it is difficult to argue that it constitutes fair use to use copyrighted books to develop a tool to make billions or trillions of dollars while enabling the creation of a potentially endless stream of competing works that could significantly harm the market for those books.

Because Meta’s use of the thirteen plaintiffs’ works was highly transformative, the plaintiffs needed to make a decisive showing on the fourth factor to defeat the fair use defence. Given the central role of market dilution in this context, even some evidence supporting that theory would have required the issue to go to a jury, and a stronger showing might have allowed the plaintiffs to prevail at summary judgment. But the plaintiffs offered no evidence of market harm, while Meta submitted evidence to the contrary. Accordingly, copying the plaintiffs’ books for LLM training does not amount to copyright infringement.

Table 1. Comparative Overview of the Cases

Fair Use Doctrine factors	Bartz v. Anthropic	Kadrey el al. v. Meta Platforms, Inc.
1. The purpose and character of the use	Copies used to train specific LLMs: transformative use Copies used to build a central library: not a transformative use	Transformative, commercial use favors fair
2. The nature of copyrighted work	Factor weighed against fair use	Factor weighed against fair use
3. The amount and substantiality of the portion used	Copies used to train specific LLMs: The copying used for training the models was reasonable Copies used to build a central library: Anthropic had no right to keep pirated materials	Copying was necessary for Meta’s transformative AI, and outputs do not substitute the original works, favoring Meta
4. The effect of the use upon the market for or value of the copyrighted work	Copies used to train specific LLMs: Does not substitute market, favors fair use Pirated copies used to build a central library: reduced demand for the plaintiffs’ books	The court found no market substitution and rejected dilution claims due to lack of evidence of actual sales harm
Overall outcome	Fair use	Fair use

3. Divergent Approaches to Bad Faith in Fair Use: Anthropic and Kadrey Cases

Courts use the term “bad faith” to denote behavior weighing against fair use, including unauthorized copying, failure to seek permission, or not crediting the original author.⁸

Bartz v. Anthropic is a notable case, because the court evaluated both the permissibility of LLM training and the legality of how works were collected. In Bartz v. Anthropic, the court held that LLM training with lawfully obtained works constituted fair use, while the use of pirated copies did not.

No comparable analysis was done in Kadrey v. Meta Platforms, Inc. We raise the question of why Bartz v. Anthropic treated pirated copies as significant. In Kadrey v. Meta Platforms, Inc., the court emphasized that fair use exists to allow new forms of expression that do not substitute for original works, and that the user’s good or bad faith does not materially affect market substitution. Even if bad faith was relevant, the court concluded it would not change the outcome. Meta trained its LLM, “Llama”, using datasets from various online sources, including shadow libraries, however the court held that Meta’s use qualified as fair use, even for works from pirated sites. While downloading from shadow libraries could matter if it materially benefited the operators, the plaintiffs provided no evidence, so the court did not consider Meta’s use to reflect bad faith.

The classical legal process in a copyright infringement case begins when plaintiffs file a lawsuit. The court first determines whether copyrights have been violated, then whether the use qualifies as fair use. If the use is unfair, bad faith may be found, potentially leading to compensation (see Picture 1). However, in practice, as shown in Bartz v. Anthropic, bad faith often has little impact on the final ruling, highlighting the need to revisit and reevaluate its regulation.

The issue of bad faith is widely discussed, and legal scholars hold differing views on it.⁹ Hence, we state that the question of whether bad faith should be considered in the assessment of fair use cannot be definitively answered, as many related questions remain unresolved.

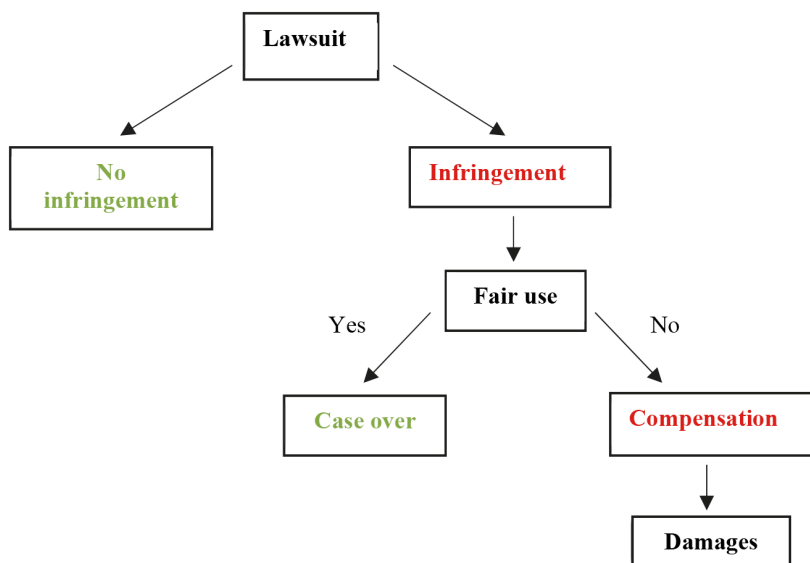
One of these questions concerns shadow libraries. A recent decision by U.S. District Judge Michael H. Watson in Ohio¹⁰, which ordered Anna’s Archive to delete scraped WorldCat data, raises the issue of why such shadow libraries were not dis-

⁸ SAMUELSON, P. (2025). Does Using In-Copyright Works as Training Data Infringe? *Communications of the ACM*, 68 (11), p. 28-30 [online]. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5342516

⁹ SAN MARTIN, M. (2004). Copyright law: The relevance of bad faith to a fair use analysis. *Journal of Technology Law & Policy*, 9(2). [online] <https://scholarship.law.ufl.edu/jtlp/vol9/iss2/5/>

¹⁰ *OCLC Online Computer Library Center, Inc. v. Anna’s Archive*, [United States District Court for the Southern District of Ohio Eastern Division], No. 2:24-cv-144, [2024-03-22].

mantled earlier. We consider that although these repositories had existed for a long time, they attracted little scrutiny due to their limited economic impact. Enforcement intensified only once AI companies began relying on them at scale and generating significant commercial value, prompting rightsholders to act. There is currently no clear regulation defining to what extent the use of pirated sources may be justified, or when such use becomes impermissible.



Picture 1. Flowchart illustrating the classical legal process in a copyright infringement case.

We argue that the application of bad faith in fair use analysis is both doctrinally inconsistent and insufficiently justified. In the cases examined, bad faith was either not considered at all or, if mentioned, ultimately set aside and had no impact on the final decision. This raises the question of whether such an approach is truly correct.

In their scholarly article “Bad Faith and Fair Use,” Simon J. Frankel and Matt Kellogg¹¹ argue that fair use should not be assessed on the basis of bad faith, because the doctrine focuses on the use itself rather than on the user. They maintain that a defendant’s conduct or subjective intent should not influence the fair use analysis.

¹¹ FRANKEL, S. & KELLOGG, M. (2012). Bad faith and fair use. *Journal of the Copyright Society of the USA*, 60, 1, 2, 4 [online]. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165468

According to the plaintiffs, there is no historical, logical, or legal foundation for considering bad faith in this context. Likewise, an infringer's state of mind is irrelevant to determining infringement, regardless of how innocent the infringing act may be. Incorporating bad faith into the analysis unnecessarily conflates fair use with other areas of law, increases the cost and unpredictability of copyright litigation, and undermines the First Amendment safeguards embedded in copyright law. With few exceptions, the Copyright Act seeks to promote the creation of new works, deliberately setting aside considerations of intent, morality, or equity, all of which risk distracting from the statute's fundamental purpose.

We submit that as technology continues to advance, a user's intention or knowledge of wrongdoing (*mens rea*) must increasingly be taken into account in fair use analysis. Traditionally, *actus reus* (action or conduct of the accused) is the final consideration in fair use analysis, yet these cases increasingly raise ethical questions about what is right or wrong, and fair or unfair. As a result, considerations resembling *mens rea* can easily creep into the analysis.

We observe that this tendency is driven in part by the significant harm authors perceive from AI company conduct - an emotional charge that, while understandable, risks distorting what should remain an objective doctrinal inquiry. The plaintiffs felt particularly affected by Anthropic's actions. In their complaint, they described Anthropic's conduct as follows: "Anthropic styles itself as a public benefit company, designed to improve humanity. For holders of copyrighted works, however, Anthropic already has wrought mass destruction," and "It is no exaggeration to say that Anthropic's model seeks to profit from strip-mining the human expression and ingenuity behind each one of those works."¹² Author whose works were copied by Anthropic, stated in an interview: "I just remember typing in my name and my heart rate was picking up. Then when my books came up, I felt incredibly violated."¹³ The plaintiffs in the *Kadrey v. Meta Platforms, Inc.* case also expressed significant dissatisfaction, which they articulated in their complaint: "Meta wanted books for their expressive content - the very subject matter copyright law protects," the plaintiffs said. "But instead of paying rightsholders, Meta systematically took and fed entire copies of pirated works into its LLMs to extract that expressive content without having to pay."¹⁴

¹² REUTERS (2024). Authors sue Anthropic for copyright infringement over AI training. *The Guardian*. [online]. <https://www.theguardian.com/technology/article/2024/aug/20/anthropic-ai-lawsuit-author>

¹³ TAGEN-DYE, C. (2024). After their books were pirated to train AI, three authors went to court - and won. Their fight is just beginning (exclusive). *AOL*. [online]. <https://www.aol.com/articles/books-were-pirated-train-ai-200000218.html>

¹⁴ BRITAIN, B. (2025). Meta says copying books was 'fair use' in authors' AI lawsuit. *Reuters*. [online]. <https://www.reuters.com/legal/litigation/meta-says-copying-books-was-fair-use-authors-ai-law-suit-2025-03-25/>

By contrast, Pierre N. Leval has cautioned that an emphasis on good or bad faith risks shifting the inquiry toward moral judgments about the user rather than the societal value of the use – an objective copyright law is not designed to prioritize.¹⁵ However, Alec Peden observes that courts take inconsistent positions on the relevance of bad faith. In *Harper & Row v. Nation Enterprises*, the Supreme Court emphasized that fair use “presupposes good faith,” finding bad faith where The Nation unlawfully obtained and published an unpublished manuscript, while in *Google LLC v. Oracle America, Inc.*, the Court declined to reprimand Google based solely on its motives, expressing skepticism toward limiting protection to “well-behaved” actors. To account for this tension, Peden identifies three dimensions of good faith - lawful acquisition, the user’s subjective belief in the fairness of the use, and the user’s overall conduct - and argues that because fair use operates as a flexible standard, bad faith should be considered in every fair use analysis, particularly in complex technological contexts where the statutory factors offer limited guidance.¹⁶ In our opinion, such an outlook is highly debatable.

It is important to note that there are additional questions beyond those discussed above, particularly concerning data use and economic considerations. If it were possible to answer all of these questions, or if courts could develop a clear, broadly applicable doctrine concerning these questions, then a workable answer might be reached. For now, however, neither is possible. This raises the question of how we can move forward.

We believe that the assessment of the Fair Use Doctrine in the context of bad faith could be improved in the following way: since fair use is assessed on the basis of objective criteria, we do not think that bad faith can be introduced as an additional element. Instead, the concern often framed as bad faith could be addressed through this inquiry into the legality of how the training materials were obtained.

17 U.S. Code, § 107 states that: “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include ...”¹⁷ meaning that the four-factor system is not exhaustive. Therefore, we propose introducing a fifth factor into the fair use analysis in cases involving LLMs and AI training: namely, whether the sources used for training were acquired lawfully or unlawfully.

It is our firm belief that a user should not benefit from fair use protections when the copyrighted work was acquired through unlawful conduct. This outlook closely aligns with the Fairness Theory as it proposes that copyright is meant to prevent un-

¹⁵ LEVAL, P. N. (1990). Toward a fair use standard. *Harvard Law Review*, 103, 1105–1136.

¹⁶ PEDEN, A. (2023b). The Good, the Bad, and the Ugly: Incorporating the Good or Bad Faith Consideration into the Fair Use Analysis. *University of the Pacific Law Review*, 54 (14), p. 9-10, 12-19, 23–24 [online]. <https://scholarlycommons.pacific.edu/uoplawreview/vol54/iss1/14/>

¹⁷ 17 U.S.C § 107

just appropriation of another's labor and legitimate interests. Since some courts already indirectly consider "bad faith" when analyzing the character of the use, introducing such a factor would help solve the problematic questions mentioned above.

Such a proposal is also supported by Welfare Theory, as from this perspective unlawful acquisition may undermine incentives for creation and distribution. If users are allowed to rely on fair use after obtaining works unlawfully, creators may face increased piracy and reduced economic returns, which could ultimately weaken incentives to create and disseminate new works. Introducing a fifth factor could therefore help preserve efficient copyright markets while still allowing socially beneficial and transformative uses.

In his work „The Five-Factor Framework: A New Approach to Analyzing Public Benefits in Fair Use Cases” Joshua Berlowitz proposes adding a fifth factor to the Fair Use doctrine, that analyses the challenged use's public benefits. He states: “The five-factor framework acknowledges a challenged use may be justifiable for its contributions to public welfare even where it substantially harms authorial incentives.”¹⁸ This approach shifts the focus of fair use analysis toward the societal value created by transformative uses, rather than limiting the assessment primarily to the interests and incentives of the original author. Although we agree that the fair use doctrine should not hinder the development of new technologies, incorporating such an interpretation of the Welfare Theory risks abuse of the doctrine's protections, particularly given that the existing fair use framework already tends to favour transformative technologies and their societal utility, as demonstrated by the cases analysed above. We therefore maintain that unlawful acquisition of training materials should weigh against a fair use finding, unless the public interest in the use substantially outweighs the impropriety of that acquisition.

In sum, our proposed fifth factor would prove decisive alongside the first and fourth factors in determining the outcome of the fair use analysis, while simultaneously addressing the regulatory ambiguities surrounding shadow libraries. At present, cases such as *Bartz v. Anthropic* and *Kadrey et al. v. Meta Platforms, Inc.* risk leading to an overly permissive approach to the use of unlawful sources. Under the analysis of our proposed fifth factor, a doctrine regarding the use of pirated sources would naturally form.

We propose introducing a fifth factor into the fair use analysis in cases involving LLMs and AI training: namely, whether the sources used for training were acquired lawfully or unlawfully. Thus, satisfying the first and fourth factors - and additionally the proposed fifth factor - would be decisive in determining the outcome of the fair

¹⁸ JOSHUA BERLOWITZ, *The Five-Factor Framework: A New Approach to Analyzing Public Benefits in Fair Use Cases*, 77 Colum. J.L. & Arts (2023). [online].<https://journals.library.columbia.edu/index.php/lawandarts/article/view/11016/5501>

use analysis. This proposal would also address the regulatory ambiguities surrounding shadow libraries. At present, cases such as *Bartz v. Anthropic* or *Kadrey et al. v. Meta Platforms, Inc.* risk leading to an overly permissive approach to the use of unlawful sources. Under the analysis of our proposed fifth factor, a doctrine regarding the use of pirated sources would naturally form.

4. Market Harm under the Fourth Fair Use Factor: Doctrinal Concepts and Judicial Approaches

To understand the reasoning underlying the courts' judgments in *Kadrey v. Meta Platforms, Inc.* and *Bartz v. Anthropic*, it is necessary to examine existing judicial approaches to the fourth fair use factor and the different conceptions of harm developed in U.S. case law. In assessing why the courts reached divergent conclusions, we consider four U.S. court decisions.

We begin with *Google LLC v. Oracle America, Inc.*,¹⁹ which adopted a narrower view of market harm in the fair use analysis. The Court rejected Oracle's argument that the existence of a possible licensing market automatically shows market harm. Instead, the Court explained that a copyright owner cannot define the market so broadly that nearly all fair uses would count as harmful - especially when licensing requirements would limit innovation or give excessive control over functional works.

A similar concern for protecting technological development appears in the *Bartz v. Anthropic* case, where the court focused on the risk that broad findings of market harm could slow down new technologies. By contrast, the court in *Kadrey v. Meta Platforms, Inc.*, explicitly rejected the notion that adverse copyright rulings would "stop technology in its tracks," characterizing such claims as exaggerated. Consequently, the *Kadrey v. Meta Platforms, Inc.*, court adopted a less permissive approach toward the interests of AI companies.

The second important case is *Sony Corp. of America v. Universal City Studios, Inc.*²⁰ The most important point in this case is the Court's creation of a presumption that non-commercial use is unlikely to cause market harm. This decision established the principle that speculative or hypothetical market harm is not sufficient to defeat fair use, especially when the use is non-commercial and aimed at consumers. The Court made clear that market harm must be real, likely, and concrete, not merely assumed or predicted. This requirement remains central to the analysis of the fourth fair use factor.

¹⁹ *Google LLC v. Oracle Am., Inc.*, [SCOTUS], No. 18–956, [2021-04-05].

²⁰ *Sony Corp. of America v. Universal City Studios, Inc.*, [SCOTUS], No. 81-1687, [1984-01-17].

A similar approach was adopted in *Campbell v. Acuff-Rose Music, Inc.*,²¹ where the Court held that market harm arises primarily when the secondary use functions as a substitute for the original work. The Court emphasized that copyright owners may not rely on presumptions or speculative claims of harm, particularly where the challenged use is transformative. In this context, the Court characterized parody as a paradigmatic form of transformative use, as it does not merely supersede the original work, instead it adds new expression, meaning, or message by offering social value through commentary or ridicule. Importantly, the Court further clarified that the commercial nature of a parody does not render it presumptively unfair; rather, the more transformative the use, the less weight its commercial character carries in the fair use analysis. A case often used as a point of contrast is *Harper & Row v. Nation Enterprises*, in which the Court articulated the principle that the market inquiry must encompass not only potential harm to the market for the original work, but also harm to the market for derivative works, thus forming the concept that harm to some derivative markets can be recognised as cognizable.

We note that all of these cases share a consistent doctrinal approach to defining cognizable market harm. The courts emphasized that market harm cannot be based on speculative or hypothetical markets and must instead involve real and likely forms of harm grounded in concrete market effects. We contend that in a fast-paced and evolving world, new forms of market harm may emerge. Accordingly, several additional concepts, illustrated in Table 2, are relevant to understanding how market harm should and could be assessed today.

The *Kadrey v. Meta Platforms, Inc.*, court recognized the relevance of market dilution, defined as a reduction in the value or distinctiveness of a work due to over-use, flooding, or association with lower-quality copies. While it is often discussed in trademark law, copyright courts sometimes consider similar effects under the fourth fair use factor. Unlike substitution, dilution does not necessarily replace the original work; instead, it weakens its perceived value or exclusivity. Consequently, market dilution overlaps with “market saturation” or price depression because both involve a general lowering of economic or cultural value, but courts treat it cautiously: if the use is transformative, dilution alone usually does not count as cognizable harm, whereas uses that directly replace sales are better classified as substitution harm.

Kadrey v. Meta Platforms, Inc., is not the only case to reference these effects; some of the earliest discussions can be traced to *Harper & Row v. Nation Enterprises*.²² In that case, the Supreme Court emphasized that the Nation’s unauthorized publication of excerpts from President Ford’s unpublished memoir caused real and concrete harm

²¹ *Campbell v. Acuff-Rose Music, Inc.*, [SCOTUS], No. 92-1292, [1994-03-07].

²² *Harper & Row v. Nation Enterprises*, [SCOTUS], No. 83-1632, [1985-11-06].

to established markets. The Court found that the excerpts usurped Harper & Row's exclusive right of first publication, effectively saturating the market and reducing the value of the work for its intended licensees. By preempting Time magazine's exclusive serialization rights, the Nation's use depressed the price Harper & Row could command, demonstrating that unauthorized copying can dilute market demand and exhaust commercial opportunities. Importantly, the Court stressed that these harms were tied to actual, functioning markets, distinguishing them from speculative or hypothetical licensing claims, and thus constituted a cognizable factor against fair use under the fourth factor.

In his work *Develop-Fair Use for Artificial Intelligence: Ultraman*, Bartz, and Kadrey, Chanhou Lou proposes a new Fair Use evaluation system incorporating market dilution as one of the criteria, as it reveals a dynamic perspective that goes beyond traditional copyright boundaries and takes real market conditions into account: „meanwhile, the divergence between Bartz and Kadrey, especially with Kadrey's “market dilution theory,” expands judicial review from directly substitutive copyright markets to the broader plane of industrial competition, together revealing a dynamic approach that moves beyond traditional copyright frames and faces market realities.”²³

Building on these legal precedents, Andrew Jin, in his article *Market Dilution: Extending Fair Use for Artificial Intelligence*,²⁴ argues that courts should adopt a market dilution framework when assessing fair use in the context of large language models. The article notes that the *Kadrey v. Meta Platforms, Inc.*, market dilution approach best accounts for the unprecedented nature of LLM outputs and their potential market harms. Jin explains that the rationale adopted in *Bartz v. Anthropic* abstracts away from the algorithmic and industrial scale of LLM training and output generation, mistakenly treating these processes as artificial analogues of human learning rather than as fundamentally distinct technological mechanisms. As fair use disputes involving AI continue to reach the courts, Jin cautions that this abstraction risks undermining creative incentives in the long term. He therefore emphasizes that recognizing market dilution is essential for adapting fair use doctrine to emerging technologies such as LLMs.

²³ LOU, C. (2025). *Develop-fair use for artificial intelligence: A Sino-U.S. copyright law comparison based on the Ultraman, Bartz v. Anthropic, and Kadrey v. Meta cases*. SSRN, 8 [online]. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5458615

²⁴ JIN, A. (2025). *Market dilution: Extending fair use for artificial intelligence*. *Harvard Undergraduate Law Review* [online]. <https://hulr.org/fall-2025/ennleb3xofsg1en5dttox3578xh8vc>

Table 2. Market harm concepts

Interpretations of market harm	Definition	Related cases
1. Substitution Harm/Direct Economic Harm	Defendant's use directly competes with the plaintiff's work, acting as a substitute and reducing already existing or potential sales.	Harper & Row, Publishers, Inc. v. Nation Enterprises, (p. 540-541, 551)
2. Harm from Market Saturation or Price Depression (market dilution)	Market harm can also arise when use depresses prices or floods the market, making continued sales unviable for the copyright holder	Kadrey, et al. v. Meta Platforms, Inc. (p. 28, 32) Bartz v. Anthropic PBC. (p. 7, 28-30)
3. Harm to Derivative Markets/Potential Market Harm	Harm covers original and derivative markets, but inability to charge for transformative uses isn't licensing market harm	Sony Corp. v. Universal City Studios, Inc. (p. 453) Bartz v. Anthropic PBC. (p. 28) Harper & Row, Publishers, Inc. v. Nation Enterprise. (p. 532, 539)
4. Suppression or Chilling Effect on Speech Markets	Broadens market harm to include chilling effects on commentary, parody, or critique, highlighting consumer perception impact	Campbell v. Acuff-Rose Music, Inc. (p. 579) Bartz v. Anthropic PBC. (p. 13-14)
5. Legally Cognizable Market	Market harm doesn't count if the use involves rights the copyright owner cannot license	Campbell v. Acuff-Rose Music, Inc. (p. 570, 592)

The Kadrey v. Meta Platforms, Inc., and Bartz v. Anthropic cases venture into a new and rapidly developing area of case law involving LLMs and other AI tools. Because this area remains unsettled, many commentators argue that both courts erred in their analysis. To assess this claim, it is necessary to examine how the doctrines of market harm and fair use, as developed in the doctrinal cases discussed above, may be misapplied today, and whether such misapplication occurred specifically in Kadrey v. Meta Platforms, Inc., and Bartz v. Anthropic.

In Harper & Row, Publishers, Inc. v. Nation Enterprises the focus shifts more toward actual or likely-to-develop markets, rather than the existing or traditional markets discussed in Campbell v. Acuff-Rose Music, Inc. We believe that this shift makes it easier for courts, plaintiffs, or defendants to mistakenly treat speculative or

potential markets as cognizable market harms. Misapplications also include ignoring whether copying was transformative and overvaluing the harm caused by small portions of a work, thereby exaggerating the impact on the overall market. For instance, excerpts or digital summaries are sometimes treated as market substitutes, even when no real market replacement occurs. This issue is evident in *Bartz v. Anthropic* and *Kadrey v. Meta Platforms, Inc.*, where plaintiffs claimed that LLMs infringed copyright because they were trained on the plaintiffs' works. In both cases, the courts found that the defendants' LLMs could not reproduce any substantial or meaningful portion of the original texts and was highly transformative, therefore did not meaningfully affect the authors' markets.

In both *Kadrey v. Meta Platforms, Inc.*, and *Bartz v. Anthropic*, the courts rejected the plaintiffs' argument that, by using their works without permission, the AI companies had effectively destroyed a new and emerging market for licensing copyrighted content specifically for AI training. The courts noted that this is not a market to which the authors are entitled, nor is it protected by the Copyright Act. Here, we can see that the courts took inspiration from *Campbell v. Acuff-Rose Music, Inc.*, where the court clarified that factor four should consider only harm to markets the copyright owner can legally exploit, and losses of the plaintiff arising from inability to charge the defendant for the right to make transformative uses doesn't create cognizable market harm. Nevertheless, as evidenced by the claims in *Kadrey v. Meta Platforms, Inc.*, and *Bartz v. Anthropic*, this doctrine does not prevent parties from frequently counting all lost licensing revenue, overvaluing hypothetical markets that are not legally actionable, and thereby undermining Campbell's careful distinction between genuine market harm and theoretical licensing opportunities.

Despite this, early trials showed a tendency to over-credit speculative derivative or licensing markets and underweight transformative or public-benefit aspects, such as innovation in software. Additionally, some courts treated commercial success as an automatic indicator of market harm, downplaying functional differences between the original and new product. However, whilst in the case of *Bartz v. Anthropic* the court did not stray from this doctrinal idea, *Kadrey v. Meta Platforms, Inc.*, emphasized something important, and that is that we cannot ignore AI companies' large revenues over their transformative purpose. Yes, LLM's are accessible and often times at least partially free, but to think that these companies started the creation of their product for non-commercial reasons is folly.²⁵ Commercial success, however, is not an automatic indicator of market harm. These misapplications illustrate the challenge of balancing traditional copyright doctrines against rapidly evolving technology markets.

²⁵ *Kadrey et al. v. Meta Platforms, Inc.*, [United States District Court for the Northern District of California], No. 23-cv-03417-VC, [2025-06-25].

This argument is further strengthened by the Court's holding in *Sony Corp. of America v. Universal City Studios, Inc.*, which rejected speculative or indirect theories of market harm and required a showing of actual or likely significant market impact. In a more modern context parties, particularly in AI and digital contexts, sometimes assume that any new technology automatically depresses market value, ignoring the need for evidence and conflating potential adoption with actual substitution. Such an example can be seen in the *Kadrey v. Meta Platforms, Inc.*, and *Bartz v. Anthropic* cases where plaintiffs fail to show tangible market harm before liability is imposed.

To conclude such differing and yet intertwined outlooks it is important to note the important role the U.S. law systems play in these matters. The U.S. system is called the adversary system, as the roles of the judge and the attorney differ significantly from the European system familiar to us, where the judge's role is much larger and more active. "In an adversarial system, the judge acts as an impartial monitor who ensures the facts of a case are presented within established laws and procedures, the jury decides whether the defendant is guilty (the judge acts in this capacity in a trial without a jury), and attorneys for the prosecution and defence act as interested parties that advocate for their respective clients". Their system is also characterized by the fact that attorneys must gather all information and present it to the court, and the court relies only on the evidence that has been submitted: "Central to this system is impassivity on the part of the decision makers; they must rely on defence attorneys and prosecutors to gather, present, and challenge evidence central to a case prior to rendering a decision."²⁶

It is our position that such a system has flaws, as attorneys may abuse their powers, and courts may not reach fully fair and just decisions: "The current American system is marked by an adversary process so compromised by imbalance between the parties – in terms of resources and access to evidence - that true adversary testing is virtually impossible. It is a system in which competing litigants, unequal as they are, control everything from the investigation to presentation of the evidence, and in which their motivation in that process is to win, more than to discover the truth. So motivated, litigants coach witnesses, suppress facts, employ tricks and surprises, distort the truth, and manipulate fact finders. The result is a system that we now know, through the growing record of wrongful convictions, is prone to an unacceptably high rate of false convictions, as well as failures to convict the guilty."²⁷

The shortcomings of this model are also evident in the cases we examined, where the decisions regarding the fourth factor could have been entirely different if market

²⁶ BENEFIEL, R. (2014). The adversary system, 1 [online] <https://doi.org/10.1002/9781118517383.wbecj369>

²⁷ GLOBAL COMPASSION COALITION (n.d.). The adversarial system and its limitations. *Global Compassion Coalition*, [online]. <https://www.globalcompassioncoalition.org/impact-sectors/law-and-justice/the-adversarial-system-and-its-limitations/>

dilution, rather than market substitution as argued by the attorneys, had been considered, in that case, the outcome would have been different. “And, as should now be clear, this ruling does not stand for the proposition that Meta’s use of copyrighted materials to train its language models is lawful. It stands only for the proposition that these plaintiffs made the wrong arguments and failed to develop a record in support of the right one.”²⁸

We conclude that as AI is slowly but surely rewriting the existing social contracts in the field of copyright, courts must adapt accordingly. The analysis of market harm doctrines across the cases discussed above demonstrates that cognizable market harm must be grounded in real, concrete, and likely effects – not speculative or hypothetical ones. Yet, as *Kadrey v. Meta Platforms, Inc.* rightly recognized, no existing technology is as capable of saturating the market with competing works as LLMs. Traditional substitution harm frameworks, as applied in *Bartz v. Anthropic*, evidently fail to capture this reality. It is therefore our view that market dilution offers the most appropriate and forward-looking framework for assessing the fourth fair use factor in AI-related cases – one that moves beyond traditional copyright boundaries and confronts the unprecedented scale and nature of LLM outputs. Courts and litigants alike must orient their analyses accordingly, lest the doctrine fall further behind the technology it seeks to govern.

Conclusions

This paper examined the application of the fair use doctrine to LLM training through *Bartz v. Anthropic* and *Kadrey v. Meta*, revealing doctrinal tensions regarding bad faith and market harm. Although both courts applied the four-factor test, their reasoning shows that key issues – particularly the role of bad faith, the treatment of unlawfully obtained data, and the assessment of market harm – were evaluated differently. We concluded that:

Case law shows that bad faith is applied inconsistently and rarely determines fair use outcomes. Instead of relying on subjective judgments of bad faith, courts should focus on whether AI training materials were obtained lawfully or unlawfully. Under the guidance of Welfare and Fairness Theories, we therefore propose a fifth fair use factor for LLM and AI cases, addressing the legality of source acquisition, which would also provide clearer guidance regarding the use of shadow libraries.

Courts should move beyond a narrow focus on direct substitution and give greater weight to market dilution and the long-term economic effects on creators, as AI-generated content increasingly competes with human-authored works.

²⁸ *Kadrey et al. v. Meta Platforms, Inc.*, [United States District Court for the Northern District of California], No. 23-cv-03417-VC, [2025-06-25].

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