Responses for the Record from Dr. Bhamati Viswanathan to Representative Darrell Issa (R-CA)
A Midlife Crisis? Intellectual Property and the Internet After 40
Monday, August 3, 2026

1. **Why should a distinction be drawn between ingestion of copyright protected works to train models from piracy sites versus ingestion of copyrighted works from the broader internet?**

U.S. courts have long recognized that online piracy platforms are not merely users of copyrighted works but enterprises built around wholesale infringement.[1] Courts have condemned the use of pirated copies of copyrighted works as an unauthorized substitute for lawful acquisition, and have refused to allow defendants to invoke downstream purposes to justify the initial act of piracy.[2] The ingestion of copyright protected works sourced from piracy sites to train large language models (LLMs) follows in this lineage. Technology companies are trying to argue that their recourse to pirated materials is protectable because LLM training constitutes fair use – in other words, that the means justifies the ends. It does not. Piracy sites infringe copyright holders' fundamental rights, a harm that is exacerbated by distributing copyrighted works for further illicit uses. Ingesting materials derived from those piracy sites perpetuates the infringement of copyright holders' rights, and it supports the operation of piracy sites by incentivizing them to continue to amass and distribute stolen works. Such infringement cannot be excused or deemed permissible after the fact; nor can it be justified by the purported purpose of LLM training. "Fair use" is not, and was never intended, to serve such ends.

Further, there are no uses that categorically qualify as fair use, and AI training is no exception. The ingestion of copyright protected works to train large language models (LLMs) arguably infringes at least two rights that belong to the copyright holder of such works: the right to reproduce (§106(1) of the U.S. Copyright Act of 1976) and the right to make derivative works (§106(2) of the Copyright Act). Courts are still grappling with the question of whether, and under what circumstances, such infringement may fall under the fair use affirmative defense. Two district courts thus far have indicated that they consider the ingestion of copyrighted materials for training to constitute a "transformative use."[3] However, as Judge Chabbria recognized in *Kadrey v. Meta*, "[t]here is certainly no rule that when your use of a protected work is 'transformative,' this automatically inoculates you from a claim of copyright infringement."[4] That case is proceeding on the question of whether Meta distributed massive amounts of pirated material while simultaneously downloading them, and over 100 other cases are still pending.

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[1] See, e.g., *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1024, 1030 (9th Cir. 2013) (describing torrent sites dedicated to facilitating exchange of infringing copies); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011–13 (9th Cir. 2001) (holding that Napster users engaged in unauthorized downloading and distribution of copyrighted works).

[2] See *Bartz v. Anthropic PBC*, No. 3:24-cv-05417-AMO, Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, at ___ (N.D. Cal. June 23, 2025); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005).

[3] See*, Bartz v. Anthropic PBC*, No. 3:24-cv-05417-AMO, Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, at ___ (N.D. Cal. June 23, 2025); *Kadrey v. Meta Platforms, Inc.*, No. 3:23-cv-03417-VC, Dkt. No. 598 (N.D. Cal. June 25, 2025)..

[4] *Kadrey v. Meta Platforms, Inc.,* No. 23-cv-03417-VC, slip op. at 3 (N.D. Cal. June 25, 2025).

No case, however, has held that fair use categorically permits training on pirated materials. Significantly, Judge Alsup in *Bartz v. Anthropic* expressly condemns obtaining and maintaining a library of pirated materials.[5] He trenchantly observes: "**the person who copies the textbook from a pirate site *has infringed already*, full stop**" (emphasis added). Judge Alsup adds that then using the materials to train LLMs does not excuse the infringing use of pirated works as "fair use." He opines: "pirating copies to build a research library without paying for it, and to retain copies should they prove useful for one thing or another, was its own use — and not a transformative one" (citations omitted).

Pirate sites engage in wholesale infringement. That in itself is an inexcusable violation of copyright. Piracy deprives creators of the incentives and the rewards that copyright promises and makes possible. The ingestion of materials from piracy sites compounds the original sin by taking works that are already infringed and using them to build new repositories of materials that make an end-run around copyright. Training LLMs on copyrighted materials without the permission of copyright holders is violation enough. But training on pirated materials is more egregious still. In simple and stark of terms, it is tantamount to a crime compounding a crime.

2. **What is the policy justification for treating terrestrial broadcast performances of sound recordings differently from digital audio transmissions?**
a. Follow up: In your view, is this still a good policy?

I believe that the main policy justification for treating terrestrial broadcast performances of sound recordings differently from digital audio transmissions is primarily historical. At an earlier time, Congress concluded that traditional radio broadcasting helped promote the sale and distribution of sound recordings, while digital transmissions (especially subscription and interactive services) could substitute for purchases of recordings or compete directly with record markets.[6] This reasoning, when determined, may have made some sense. Markets were initially differentiated, and traditional and digital markets were varied and robust.

Times and technologies, however, have changed dramatically, rendering these distinctions obsolete and, in my view, requiring that we change the law. **The original policy rationale for excluding terrestrial radio has become obsolete.** In 1995, Section 106 of the Copyright Act reflected a common understanding: terrestrial radio was effectively considered a marketing service that helped consumers discover new music and purchase recordings accordingly. By driving music consumption, terrestrial radio was seen as adding value to the market – and it was perceived as a service that ought not be "double-counted" or "taxed." But that premise has been completely overturned by present-day realities.[7]

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[5] See *Bartz v. Anthropic*, *Bartz v. Anthropic PBC*, No. 3:24-cv-05417-AMO, Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, at ___ (N.D. Cal. June 23, 2025).
[6] See, for e.g., *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999).
[7] Congress declined to extend the newly created digital performance right in sound recordings to terrestrial broadcasting because it viewed traditional radio as promotional rather than substitutive, while recognizing that digital transmissions could serve as substitutes for purchases of sound recordings. See S. Rep. No. 104-128, at 14 (1995); H.R. Rep. No. 104-274, at 14 (1995).

The distinction between terrestrial broadcasting and digital audio transmission may have made sense in 1995, but the market realities of music consumption have changed dramatically. Today, recorded music sales are no longer the dominant revenue streams. Music discovery happens through many competing channels. Moreover, streaming platforms, social media, playlists, and algorithmic recommendations have replaced radio as primary discovery mechanisms. The question that confronts us now is: "Why should one category of commercial music distributor receive a free license that every comparable digital competitor must pay for?"

Even more troubling perhaps is the fact that music creators now stand on unequal footing. At present, the owner of a musical composition (songwriter/publisher) receives performance royalties when a song is played on terrestrial radio. But the performers and sound recording owners—that is, the people who created the actual recording being broadcast—receive nothing. In other words, under current law, the songwriter gets paid; the publisher gets paid; and the radio station earns advertising revenue. But at the same time, the singer, musical artist, producer, and label receive no performance royalty. Yet copyright law recognizes that the recording itself has independent creative value. If a broadcaster exploits that value commercially, surely the creators of that recording should receive compensation as well.

Changes in the market and a fundamental imbalance among the rights and rewards of creators together create an urgent situation that mandates change. The American Fairness In Music Act (AMFA) would amend § 106 to give sound recording owners a public performance right for terrestrial radio broadcasts, subject to a statutory licensing regime administered through the Copyright Royalty Board, with special protections for small broadcasters.[8] AMFA offers an excellent solution with several key qualities: it establishes a collective licensing mechanism for equal payment across technologies and platforms; it protects small broadcasters; and it brings the U.S. into alignment with over 40 countries that already recognize a related right for performers and sound recording owners ("neighboring rights").

The American Music Fairness Act appropriately modernizes copyright law by extending a limited public performance right to terrestrial broadcasts while preserving the promotional benefits of radio through a compulsory license and protections for small broadcasters. In my view, it aligns with market realities and appropriately compensates participants in the music ecosystem.

[8] See https://www.congress.gov/bill/119th-congress/senate-bill/326/text