To: Interested Parties
From: Brandon Butler, Executive Director, Re:Create
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Re: Amici in Support of OpenAI, In Re: OpenAI, Inc. Copyright Infringement Litigation

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Introduction

Re:Create members and allies filed amicus briefs in *In Re: OpenAI, Inc. Copyright Infringement Litigation,* urging the court to reaffirm fair use, the principle that allows libraries, researchers, journalists, startups and creators to build on existing works. This memo outlines where the case stands, the core arguments our members are making, and a summary of key briefs.

Executive Summary

In Re: OpenAI, Inc. Copyright Infringement Litigation is the single trial in the Southern District of New York that consolidates multiple copyright suits brought against OpenAI and Microsoft by news publishers and book publishers. The publishers argue that OpenAI and Microsoft needed their permission to train AI models using books and news articles. The real question before Judge Sidney H. Stein is bigger: should copyright be expanded to include ownership and control not only of individual books and news articles, but also of the facts, ideas, and other information we can learn from those works. Judge Stein's answer will help decide whether Americans can keep building, learning, and reporting with AI tools without first getting permission from the largest copyright holders.

Two federal judges in California have already ruled that training AI is a fair use, but this is the first case to be decided in New York, the first involving OpenAI, and the first involving consolidated claims from both news and book publishers and authors. Thus this is one of the most closely watched AI copyright cases in the country. The U.S. Department of Justice has also weighed in, arguing that AI training is fair use, the first time the federal government has taken a side in any of the AI copyright lawsuits. However, that doesn't make fair use a partisan cause. Courts and advocates across the political spectrum have defended it for decades, and Re:Create's own members reflect that range.

Our members come at this case from multiple starting points, but they arrive at the same place:

- **AI training is a transformative innovation.** Consistent with Second Circuit precedents like the Google Books case, fair use protects AI training because it derives new information from existing works to power new discovery and creativity.
- **This case will have impacts far beyond OpenAI.** Startups and small businesses, medical researchers and patients, teachers and students, people with disabilities, farmers, libraries, and countless others will all be harmed if copyright is expanded to give legacy content businesses control over AI training.
- **Competition is *good*, not a "market harm."** Training AI enables the discovery of new knowledge, the creation of new original works, and the success of new businesses. That's not piracy; it's fair use-powered competition that gives consumers more choices at more affordable prices. Punishing new creations and discoveries turns copyright on its head.

- **Expanding copyright control hurts new authors and local news.** Licensing mandates would enrich legacy conglomerates like the New York Times and the Big Five publishers while shutting out new voices and local outlets who benefit from AI and fair use.
- **Mandatory data licensing would either kill AI or create a permanent AI oligopoly.** The transaction and licensing costs would potentially reach trillions of dollars and establish insurmountable barriers to entry, entrenching dominant tech incumbents while locking out startups, open-source developers, academic researchers, and libraries.
- **AI powers equal access to information.** It helps people with disabilities and non-English speakers find and use knowledge that would otherwise be inaccessible.
- **Fair use protects free expression and inquiry**. It safeguards the freedom to learn from and build on existing works.

Amici Briefs: What People Are Saying

Brief Amicus Curiae Of Consumer Technology Association, American Council Of The Blind, American Library Association, Association Of Research Libraries, And Business Software Alliance In Support Of Defendants' Motions For Summary Judgment
Summary: This brief outlines how fair use for AI training matters to researchers, educators, libraries, people with disabilities, agricultural producers, independent creators, and businesses small and large.

Key Quote: "This case concerns more than companies that develop large language models (LLMs). It affects medical researchers and patients, educators serving students with different learning needs, people with disabilities seeking greater independence, farmers applying agricultural knowledge, independent creators developing new forms of expression, and industry sectors from software to the law. These communities share an interest in the ability to study and learn from broad and diverse sources of knowledge, and in access to the tools that make that learning useful. Many depend on systems developed by others, including open source AI systems, rather than training models themselves. Fair use supports their ability to learn, discover, communicate, and create."

Brief Of Public Knowledge As Amicus Curiae In Support Of Defendants' Motions For Summary Judgment In Part
Summary: This brief argues that courts should evaluate AI training separately from data acquisition and outputs, and that training is fair use because it extracts unprotectable facts about language rather than substituting for the original works. It emphasizes that a contrary ruling would favor the largest technology and media companies at the expense of independent researchers, open-source developers, libraries, and internet users.

Key Quote: "But copyright is not a general remedy for technological disruption or a means for reallocating the gains from a new technology. Preserving a robust understanding of fair use is itself part of protecting the public's ability to benefit from new technology and ensuring a healthy

information ecosystem. A finding that model training is not fair use, by contrast, could favor the largest technology and media companies."

Brief Of Amicus Curiae Authors Alliance In Support Of Defendants' Motions For Summary Judgment

Summary: This brief explains why the market dilution theory threatens authors themselves, including scholars, biographers, critics, translators, and open-textbook writers who rely on fair use to build on, challenge, and update earlier works. It argues that copyright protects authors against substitution for their protected expression, not against competition from new works, and warns that a rule aimed at AI would fall hardest on new authors and small publishers who lack the resources to litigate diffuse market-harm claims.

Key Quotes: "Market dilution is just a fancy term for competition, and copyright law supports competition."

"Authors are both copyright holders and users. A rule broad enough to protect an incumbent author from noninfringing AI-generated competition is broad enough in principle to protect an incumbent author from noninfringing human competition that fair use helped enable."

Brief Of Engine Advocacy, Et Al. As Amici Curiae In Support Of Defendants

Summary: Engine Advocacy, joined by Developers Alliance and the startup Lazy Moose Co., argues that AI training is fair use and that a contrary ruling would shut startups out of the AI ecosystem. It estimates that licensing the training data for a single model would cost about $10 trillion, or roughly $1.4 million per commercial user if passed downstream, which is more than most startups raise in their first funding round. The brief also contends that licensing billions of works is impossible in practice, and that the risk of statutory damages would end the open-source models startups depend on and scare off investors.

Key Quotes: "Although this copyright dispute focuses on the use of potentially copyrighted material by some of the largest AI technology companies, the AI ecosystem is much larger and more diverse than its largest players, and the outcome of this case will have far-reaching implications for much smaller businesses."

"Startups are not using AI foundation models to create copies of the original, copyrighted works to compete with those works in the market. They are creating tools that generate completely new outputs that in no way substitute for the original works."

Brief of Electronic Frontier Foundation in Support of Defendant's Motions for Summary Judgement

Summary: The Electronic Frontier Foundation (EFF) argues that AI training constitutes fair use and urges the court to reject plaintiffs' efforts to impose an non-statutory "lawful acquisition" requirement and an overbroad "market dilution" theory. EFF asserts that conditioning fair use on data provenance or good faith ignores decades of established precedent focusing on transformative purpose rather than intermediate downloading. Furthermore, it contends that

copyright law protects against infringing reproduction, not competition from new, non-infringing creative works, warning that accepting plaintiffs' theories would imperil ubiquitous web-scraping practices, open-source training datasets like Common Crawl, and pro-social AI applications across medicine, investigative journalism, accessibility, and scientific research.

Key Quotes: "The Supreme Court has cautioned that where copyright law has not kept up with technological developments, courts should be careful not to expand copyright protections on their own…. Plaintiffs are asking the Court to throw that caution to the winds and rewrite copyright law…."

"In the 21st century, pegging fair use to a demonstration of lawful provenance would cast legal doubt on the billions of copies we collectively make every day through routine online activities like opening emails, clicking on an embedded link, visiting websites, sharing pictures,streaming music, and watching videos. All of this activity requires intermediate copying. Fairuse, in conjunction with other sensible limits on copyright's reach, allows users to enjoy the internet without worrying about the provenance of every copyrighted work they open or share."

"Accepting this theory [of 'market dilution'] would amount to more than a slight doctrinal shift; it would refocus the fair use analysis toward maximizing profit and control for rightsholders, and away from copyright's true purpose: stimulating creativity in service of the general public good.**"**

Brief of Amici Curiae CCIA, NetChoice, and TechNet in Support of OpenAI
Summary: TechNet, the Computer & Communications Industry Association (CCIA), and NetChoice argue that training generative AI models qualifies as transformative fair use and urge the court to reject plaintiffs' attempts to expand copyright protection through novel market dilution and licensing theories. The coalition asserts that copyright law protects an author's specific expression rather than the underlying facts, ideas, or knowledge, emphasizing that AI training analyzes existing works to learn patterns and produce novel outcomes rather than distributing unauthorized copies. Furthermore, the brief contends that copyright does not shield rights holders from market competition by independently produced works, warning that overturning this longstanding legal balance would grant copyright owners unwarranted control over new technologies and restrict access to basic facts.

Key Quotes: "Developers engage in intermediate, non-expressive copying of works—not to enjoy, display, or distribute them, but to build a fundamentally new kind of tool: one that analyzes statistical relationships among words and word fragments to enable human users not only to create new expression, but also to answer factual research questions, detect fraud, classify and organize information, assist people with disabilities, and achieve many other goals."

"Generative AI models are mere tools—built by human developers and deployed by human users who supply the initiative, intent, judgment, and editorial selection that drive the creative process.... Generative AI, like many tools before it, is a tool for computer-assisted human expression, not the computer's own expression."

"The fourth fair use factor—harm to the market for the copyrighted work—has never been understood to reach competitive pressure from works that are not substantially similar to the copyrighted work and therefore do not substitute for it.... [F]air use exists to prevent incumbent rightsholders from strangling the technologies that others will use to add to the store of human creativity and expression."