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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION

17 RICHARD KADREY, *et al.*,  
18 Individual and Representative Plaintiffs,  
19 v.  
20 META PLATFORMS, INC., a Delaware  
corporation,  
21 Defendant.

Case No. 3:23-cv-03417-VC-TSH

**DEFENDANT META PLATFORMS, INC.’S  
OPPOSITION TO PLAINTIFFS’ MOTION TO  
CERTIFY PARTIAL SUMMARY JUDGMENT  
ORDER FOR INTERLOCUTORY APPEAL  
PURSUANT TO 28 U.S.C. § 1292(B)**

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1 **I. INTRODUCTION**

2 To obtain appellate certification under 28 U.S.C. § 1292(b), Plaintiffs must satisfy all three  
3 statutory requirements: a controlling question of law, a substantial ground for difference of opinion,  
4 and showing that an interlocutory appeal may materially advance the ultimate termination of the  
5 litigation. They satisfy none.

6 The question that Plaintiffs claim justifies interlocutory appellate review is whether  
7 downloading of “pirated” works is categorically ineligible for the fair use defense under copyright  
8 law. This issue does not warrant interlocutory certification under § 1292(b). The Court’s  
9 conclusion that fair use applies to Meta’s downloads was not the result of a novel legal  
10 determination, but the Court’s application of established copyright law to the specific and  
11 undisputed facts of this case—a case-specific inquiry that § 1292(b) does not reach.

12 The centerpiece of Plaintiffs’ motion is an alleged legal conflict with Judge Alsup’s decision  
13 in *Bartz v. Anthropic*—a conflict that is illusory and manufactured through selective quotation.  
14 Plaintiffs quote *Bartz* for a proposition that copying from shadow libraries is “inherently,  
15 irredeemably infringing even if the pirated copies are immediately used for the transformative use”  
16 (Dkt. 741, at 5), while omitting the very next sentence of the opinion: “This order need not decide  
17 this case on that rule.” *Bartz v. Anthropic PBC*, 787 F.Supp.3d 1007, 1026 (N.D. Cal. 2025). Judge  
18 Alsup instead denied Anthropic’s motion for summary judgment based on unique facts with no  
19 counterpart here—Anthropic had allegedly constructed a “general-purpose” central library of “all  
20 the books in the world,” and retained it for non-transformative uses beyond AI training. That two  
21 district courts reached different fair use outcomes on materially different facts is not a legal conflict  
22 evidencing a “controlling question of law,” but rather the result of the fair use doctrine operating  
23 as it should. And when a motion for § 1292(b) certification was later presented to Judge Alsup in  
24 *Bartz*, he denied it by emphasizing the specific factual record that led to that decision. *See Bartz v.*  
25 *Anthropic PBC*, No. 24-cv-05417 WHA, 2025 WL 2308091, at \*3 (N.D. Cal. Aug. 11, 2025)

26 *Bartz* thus never relied on the bright-line rule Plaintiffs attribute to it, *i.e.*, that copyrighted  
27 works downloaded from Internet repositories are *per se* ineligible for fair use even if later used for  
28 transformative purposes. And for good reason, as fair use “calls for case-by-case analysis” that “is

1 not to be simplified with bright-line rules.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577  
2 (1994). Whether copies downloaded from Internet repositories qualify as fair use is inherently  
3 case-dependent and not the type of controlling question of law § 1292(b) requires.

4 Nor would an immediate appeal of the summary judgment order materially advance the  
5 ultimate termination of this litigation. Plaintiffs waited nearly a full year to seek certification,  
6 which is itself a reason to deny the motion because “a district judge should not grant an inexcusably  
7 dilatory request,” *Spears v. Wash. Mut. Bank FA*, No. C 08-00868 RMW, 2010 WL 54755, at \*1  
8 (N.D. Cal. Jan. 8, 2010) (denying § 1292(b) motion as untimely based on two and a half month  
9 delay). Plaintiffs assert that circumstances have changed since the Court’s order, but in truth, they  
10 have changed in a way that makes § 1292(b) appeal less appropriate than it would have been a year  
11 ago. Plaintiffs have not requested a stay of the remaining claims in this case, which will (along  
12 with the claims in the four related cases filed after the Court’s order) press forward in this Court  
13 regardless of what happens before the Ninth Circuit, creating a risk of piecemeal, overlapping  
14 appeals—including a potential collision between any pending § 1292(b) proceeding and the  
15 comprehensive § 1291 appeal filed after entry of final judgment. Moreover, the § 1292(b) appeal  
16 envisioned by Plaintiffs would, at most, address a sliver of the summary judgment order on an issue  
17 that might have little to no relevance by the time of Ninth Circuit’s decision, in light of intervening  
18 developments such as class certification proceedings here and differences in the factual records  
19 developed in the related cases. As for Plaintiffs’ argument that appellate clarity may improve the  
20 prospects for settlement, courts have doubted whether this is even a valid § 1292(b) consideration  
21 because resolution of a disputed issue in any case could make settlement more probable. *See, e.g.*,  
22 *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07–5944 SC, 2013 WL 567281, at \*4 (N.D.  
23 Cal. Feb. 13, 2013). Even on its own terms, Plaintiffs’ settlement theory assumes a favorable  
24 outcome on appeal, ignores that settlement value in a class action turns primarily on certification  
25 prospects (as to which this Court has expressed doubts), and rests on a chain of speculation that §  
26 1292(b) does not permit.

27 Finally, Plaintiffs’ motion cannot be reconciled with the actual appeal the motion envisions.  
28 Plaintiffs invoke the historic significance of AI copyright issues and the urgent need for appellate

1 guidance on transformative legal questions. But the narrow question they propose to appeal about  
 2 downloading digital copies from Internet repositories is one of the more straightforward and  
 3 unremarkable issues resolved by the Court’s order. The genuinely novel issues in this case,  
 4 including this Court’s market dilution theory under the fourth fair use factor, are ones Plaintiffs  
 5 have expressly “reserved” only for a later appeal after final judgment. (Dkt. 741, at page v., n.1  
 6 (Notice of Motion)). Section 1292(b) does not exist to send easy questions from a court order to  
 7 the Ninth Circuit through a piecemeal appeal, while parking the harder and more significant ones  
 8 from that same order for a later day. Plaintiffs’ motion should be denied.

## 9 **II. ARGUMENT**

10 Appellate certification of the summary judgment order under § 1292(b) requires that  
 11 Plaintiffs show (1) the existence of “a controlling question of law,” (2) “as to which there is  
 12 substantial ground for difference of opinion,” and that (3) “an immediate appeal from the order may  
 13 materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). “Certification  
 14 under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b)  
 15 requirements are met.” *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Plaintiffs have  
 16 satisfied none of them.

### 17 **A. Plaintiffs Fail to Identify a “Controlling Question of Law”**

18 The Ninth Circuit has directed that § 1292(b) “be applied sparingly and only in exceptional  
 19 cases, and that the ‘controlling question of law’ requirement be interpreted in such a way to  
 20 implement this policy.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1027 (9th Cir. 1981). A  
 21 controlling question “must be a ‘pure question of law, not a mixed question of law and fact or an  
 22 application of law to a particular set of facts.’” *Keskinen v. Lush Handmade Cosmetics, LLC*, No.  
 23 2:24-cv-8860-HDV-SK, 2025 WL 2019931, at \*3 (C.D. Cal. June 24, 2025) (quoting *Bada Int’l,*  
 24 *Inc. v. ChungHo Nais, Co.*, No. 13-SA-CV-01110-JVS-ANx, 2014 WL 12965998 (C.D. Cal. Aug.  
 25 5, 2014)). This prong requires that the district court “examine to what extent the controlling law is  
 26 unclear.” *Couch*, 611 F.3d at 633.

27 Plaintiffs’ motion rests almost entirely on the order denying summary judgment in *Bartz*,  
 28 issued two days before this Court’s ruling. They argue that decision placed that court in direct legal

1 conflict with this Court by adopting a categorical rule that fair use can never apply to works  
2 downloaded from so-called “shadow libraries.” A closer look at *Bartz* exposes the falsity of this  
3 premise. The *Bartz* decision turned on facts specific to that case that are not present here. Most  
4 importantly, based on the summary judgment record and having drawn all ambiguities and  
5 inferences in favor of the plaintiffs, and having accepted the plaintiffs’ version of the facts, Judge  
6 Alsup concluded that Anthropic downloaded the plaintiffs’ books to create a “general-purpose”  
7 central library of “all books in the world,” which was intended for a broader range of uses beyond  
8 LLM training. *See Bartz*, 787 F.Supp.3d at 1014, 1025–26, 1034. Here, by contrast, Plaintiffs’  
9 books were downloaded and used solely in connection with the research, development, and training  
10 of Meta’s AI models. (Dkt. 598 (“MSJ Order”), at 21-22.)

11 The selective quotation of *Bartz* at the core of Plaintiffs’ argument illustrates the problem.  
12 Plaintiffs quote and lean heavily on Judge Alsup’s statement that “[s]uch piracy of otherwise  
13 available copies is inherently, irredeemably infringing even if the pirated copies are immediately  
14 used for the transformative use and immediately discarded.” (Dkt. 741, at 5 (quoting *Bartz*, 787  
15 F.Supp.3d at 1025)). They omit the very next sentence of Judge Alsup’s order: “[T]his order need  
16 not decide this case on that rule.” *Bartz*, 787 F.Supp.3d at 1026 (emphasis added). Judge Alsup  
17 then explained why: “Anthropic did not use these copies only for training its LLM. Indeed, it  
18 retained pirated copies even after deciding it would not use them or copies from them for training  
19 its LLMs ever again. They were acquired and retained, as a central library of all the books in the  
20 world.” *Id.* “Building a central library of works to be available for any number of further uses,”  
21 the court emphasized, “was itself the use for which Anthropic acquired these copies.” *Id.*

22 This central library was the key to Judge Alsup’s rejection of Anthropic’s motion for  
23 summary judgment of fair use for copies downloaded from Internet repositories. The *Bartz*  
24 decision discusses the central library dozens of times, including in every section in which it applies  
25 the fair use doctrine to the digital copies Anthropic downloaded from Internet repositories. *See*  
26 *Bartz*, 787 F.Supp.3d at 1014-15, 1019-22, 1025-27, 1029, 1033-34. The concluding summary in  
27 *Bartz* makes the point explicitly: “[W]e will have a trial on the pirated copies used to create  
28 Anthropic’s central library and the resulting damages, actual or statutory (including for

1 willfulness).” *Id.* at 1034.

2 This point was further amplified in Judge Alsup’s subsequent order denying Anthropic’s  
3 motion for appellate certification under § 1292(b), which clarified that factual issues – not  
4 resolution of discrete legal questions – drove the denial of summary judgment. *See Bartz*, 2025  
5 WL 2308091, at \*3. Judge Alsup explained that he denied Anthropic’s motion for summary  
6 judgment “because Anthropic had presented a one-sided and sanitized version of how the works  
7 were downloaded into its collection, further copied, and in fact used.” *Id.* The court observed that  
8 the evidentiary record of how Anthropic used the works was unclear, but that the summary  
9 judgment record nevertheless “supported that Anthropic had downloaded pirate libraries to build  
10 its own library for various further uses, only one being to make further copies for training LLMs.”  
11 *Id.* (internal citations omitted). The court made clear that “Anthropic w[ould] have every  
12 opportunity to perfect its affirmative defense at trial, presenting evidence for the jury to find the  
13 underlying facts needed for the judge to decide fair use in its favor (or not).” *Id.*

14 *Bartz* thus never adopted and applied the bright-line rule Plaintiffs attribute to it, *i.e.*, that  
15 copies downloaded from Internet repositories are *per se* ineligible for fair use as a matter of law  
16 even if later used for a transformative purpose. Any such rule would have been inconsistent with  
17 Supreme Court precedent eschewing such bright-line rules. *See, e.g., Campbell*, 510 U.S. at 577  
18 (“The [fair use] task is not to be simplified with bright-line rules, for the statute, like the doctrine it  
19 recognizes, calls for case-by-case analysis.”). This is perhaps why Judge Alsup expressly declined  
20 to “decide th[e] case” on any such rule, *Bartz*, 787 F.Supp.3d at 1026, and instead denied summary  
21 judgment based on the case-specific evidence that Anthropic retained and used the downloaded  
22 works for non-transformative purposes.

23 Importantly, that case-specific evidence is entirely absent here. There was no evidence (or  
24 allegation) that Meta created any “general-purpose central library” of books for uses unrelated to  
25 AI research and development. As the Court observed in its order, Meta offered un rebutted evidence  
26 that Plaintiffs’ books were downloaded and used solely in connection with the research,  
27 development, and training of Meta’s AI models. (MSJ Order, at 21-22.)

28

1           **B. Plaintiffs Also Fail to Show Substantial Ground for Difference of Opinion**

2           Even if Plaintiffs had identified a controlling question of law based on the *Bartz* decision  
3 (which they have not), they have not identified a substantial ground for difference of opinion. “A  
4 substantial ground for difference of opinion is not established by a party’s strong disagreement with  
5 the court’s ruling; the party seeking an appeal must make some greater showing.” *Getz v. Boeing*  
6 *Co.*, No. C 07–06396 CW, 2009 WL 3765506, at \*2 (N.D. Cal. June 16, 2009). Courts in this  
7 district have repeatedly explained that “it would not warrant a § 1292(b) appeal simply because  
8 another district court reached a different decision in a broadly similar case.” *Tsyn v. Wells Fargo*  
9 *Advisors, LLC*, No.14-cv-02552-LB, 2016 WL 1718139, at \*4 (N.D. Cal. Apr. 29, 2016); *see also*,  
10 *e.g.*, *Wang v. Zymergen Inc.*, 759 F.Supp.3d 1002, 1011 (N.D. Cal. 2024) (“A split on an issue  
11 among district courts is rarely substantial enough on its own to justify interlocutory appeal.”);  
12 *Spears*, 2010 WL 54755, at \*3 (“[T]hat one district court came to a different conclusion on the  
13 same issue is insufficient to establish a substantial ground for difference of opinion.”); *Getz*, 2009  
14 WL 3765506, at \*3 (same). “That settled law might be applied differently does not establish a  
15 substantial ground for difference of opinion.” *Couch*, 611 F.3d at 633.

16           Plaintiffs’ inability to show a substantial ground for difference of opinion flows directly  
17 from their mischaracterization of *Bartz*. Because *Bartz* did not adopt the bright-line rule Plaintiffs  
18 attribute to it, there is no genuine conflict for the Ninth Circuit to address, let alone resolve. What  
19 Plaintiffs mischaracterize as a legal difference between *Bartz* and the ruling here was actually just  
20 a difference in the underlying material facts: Anthropic created and retained a general-purpose  
21 library for multiple non-transformative uses; Meta did not. Different facts produce different fair  
22 use outcomes. That is not a conflict worthy of immediate circuit-level attention—it is the fair use  
23 doctrine operating in the way it is supposed to. This Court’s holding that “[b]ecause Meta’s  
24 ultimate use of the plaintiffs’ books was transformative, so too was Meta’s downloading of those  
25 books,” (MSJ Order at 21), was not only consistent with established copyright law, but on the  
26 particular facts of this case, not a close question.

27           The only other judicial authority Plaintiffs cite to attempt to show a substantial ground for  
28 difference of opinion is *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir.

1 1992), which they invoke in a footnote for what they call the “long-established general principle”  
2 that “[t]o invoke the fair use exception, an individual must possess an authorized copy of a literary  
3 work.” (Dkt. 741, at 9 n.5.) *Atari* was the same authority Plaintiffs relied upon in their summary  
4 judgment motion, and this Court correctly rejected it because *Atari* “overread the cases on which it  
5 relied for its statement about the need to start with an authorized copy.” (MSJ Order, at 19 (citing  
6 *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231, 1244 n.14 (N.D.  
7 Cal. 1995)). The “authorized copy” statement cited by Plaintiffs has not been adopted by the Ninth  
8 Circuit or any other circuit in the more than three decades since *Atari* was decided.

9 Plaintiffs also cite a *pre*-publication Copyright Office report from May 2025 on AI training,  
10 but that report undercuts their position and is hardly precedential. The section Plaintiffs cite states  
11 only that knowing use of a pirated dataset “should weigh against fair use without being  
12 determinative,” a statement immediately followed by a footnote citing cases, including some in  
13 which courts found fair use notwithstanding defendants’ use of unauthorized initial copies.  
14 (*Copyright and Artificial Intelligence, Part 3: Generative AI Training*, U.S. Copyright Office Pre-  
15 Publication Report, p.52 <[https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-  
16 Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf](https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf)>) (emphasis added).) The  
17 report thus does not support Plaintiffs’ argument that use of a “pirated dataset” is categorically  
18 ineligible for fair use even when those works are used for a transformative purpose. The report  
19 further confirms that fair use of a “pirated dataset” is not the type of determinative legal issue for  
20 which § 1292(b) certification may be appropriate.

21 Plaintiffs also quote a portion of a sentence from Edward Lee, *Fair Use and the Origin of*  
22 *AI Training*, 63 Hou. L. Rev. 104 (2025),<sup>1</sup> that “Judge Alsup took a categorical approach, treating  
23 the acquisition of pirated books as virtually *per se* infringing.” (Dkt. 741, at 10 (quoting Lee, at  
24 222).) But the full sentence from Professor Lee’s article actually says: “In short, in denying fair  
25 use as to this library-building, Judge Alsup took a categorical approach, treating the acquisition of  
26

27 <sup>1</sup> A copy of Professor Lee’s article is available at <[https://houstonlawreview.org/article/147422-  
28 fair-use-and-the-origin-of-ai-training](https://houstonlawreview.org/article/147422-fair-use-and-the-origin-of-ai-training)> (last visited June 16, 2026). Although other commentators  
and scholars have written about *Bartz* and *Kadrey* (see Dkt. 741, at 10), their observations do not  
change the underlying facts in the two cases or provide any support for Plaintiffs’ motion.

1 pirated books as virtually *per se* infringing.” (Lee, at 222 (emphasis added).) The sentence  
2 immediately before that explains that Judge Alsup had “suggested, without deciding,” that  
3 Anthropic’s fair use defense would have failed “even if Anthropic had downloaded the pirated  
4 books without storing them in a permanent library.” (*Id.* (emphasis added).) In fact, another section  
5 of Professor Lee’s article not cited by Plaintiffs correctly characterizes this categorical approach as  
6 “dicta.” (*Id.* at 178 (“Judge Alsup even suggested in dicta that such use is categorically infringing,  
7 no matter if immediately used to train AI models without establishing a permanent library.”).)  
8 Professor Lee’s article underscores how Plaintiffs have misinterpreted *Bartz*, and further  
9 undermines Plaintiffs’ argument that a substantial ground for difference of opinion exists with how  
10 this Court applied fair use to downloaded copies.

11 **C. Plaintiffs Also Fail to Show that Immediate Appeal Would Materially Advance**  
12 **the Ultimate Termination of the Litigation.**

13 Plaintiffs’ failure to satisfy the third factor under § 1292(b) is independently dispositive.  
14 As this Court has observed, “[w]hen litigation will be conducted in substantially the same manner  
15 regardless of [the appellate court’s] decision, the appeal cannot be said to materially advance the  
16 ultimate termination of the litigation.” *Gitson v. Trader Joe’s Co.*, 63 F.Supp.3d 1114, 1117 (N.D.  
17 Cal. 2014) (Chhabria, J.) (citation omitted). “The ‘materially advance’ inquiry asks whether  
18 appellate resolution would meaningfully shorten the path to final judgment, consistent with §  
19 1292(b)’s purpose of avoiding ‘protracted and expensive litigation.’” *In re Powerschool Holdings,*  
20 *Inc.*, No. MDL No. 3149, 2026 WL 1507833, at \*5 (S.D. Cal. May 29, 2026) (quoting *In re Cement*  
21 *Antitrust Litig.*, 673 F.2d at 1026). An immediate appeal here would not shorten the path to final  
22 judgment.

23 Ninth Circuit interlocutory appeals can take years to resolve, and an extended delay is even  
24 more likely if, assuming Plaintiffs are to be believed, their appeal would present “a pivotal question  
25 of law that no court of appeals has addressed,” in which “[t]he practical stakes for both rightsholders  
26 and AI companies are enormous.” (Dkt. 741, at 1.) This delay is exacerbated by the fact that  
27 Plaintiffs inexplicably waited almost a full year before requesting certification of the summary  
28 judgment order under § 1292(b), and they have not asked for a stay of the remaining claims in this

1 case (or the related cases) pending any interlocutory appeal.<sup>2</sup> Plaintiffs' delay is reason alone to  
 2 deny their motion because a district court "should not grant an inexcusably dilatory request" for  
 3 certification under § 1292(b). *Spears*, 2010 WL 54755, at \*1-2 (denying certification under  
 4 § 1292(b) as untimely where moving party waited two and a half months before seeking  
 5 certification); *see also Wallis v. Centennial Ins. Co.*, No. CIV-08-02558-WBS GGH, 2012 WL  
 6 1552766, at \*2 (E.D. Cal. May 1, 2012) (denying certification under § 1292(b) where defendants  
 7 "provided no reason for their three month delay in seeking certification").

8 The remaining claims in this case and in the related cases will advance regardless of what  
 9 happens before the Ninth Circuit. Plaintiffs' inexcusable delay in seeking certification makes it  
 10 more likely that the district court cases could reach trial, final judgment, and even the early stages  
 11 of Ninth Circuit review under § 1291 while Plaintiffs' proposed piecemeal § 1292(b) appeal is still  
 12 pending. And even if the § 1292(b) appeal is resolved before trial in this or the other related cases,  
 13 the Ninth Circuit will at best have issued a ruling on a narrow slice of the summary judgment order.  
 14 That ruling may, by that time, have marginal relevance given intervening developments on class  
 15 certification in this case, and differences in the factual records developed in the related cases.

16 Plaintiffs assert that certification would advance termination of the litigation by increasing  
 17 the prospects of settlement, and that this suffices under the third factor. (Dkt. 741, at 11.) But as  
 18 one court observed, "it is unclear whether this is a proper consideration in the § 1292(b) context."  
 19 *Dunn v. Chattanooga Pub. Co.*, No. 1:12-cv-252, 2013 WL 587493, at \*2 (E.D. Tenn. Feb. 14,  
 20 2013) (citing cases). After all, in virtually any case involving a disputed question, a losing party  
 21 could argue that an appellate ruling in its favor could clarify the legal landscape and thereby

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22  
 23 <sup>2</sup> Prior to the July 2025 Case Management Conference, Plaintiffs had initially taken the position  
 24 that they wanted an interlocutory appeal of the summary judgment and a stay of the remainder of  
 25 the case pending that appeal. (Dkt. 605, at 5.) At that time, *Kadrey* was the only matter pending  
 26 before this Court alleging copyright infringement based on Meta's Llama models, so even though  
 27 Plaintiffs later retreated from their initial position (*id.*), Meta argued that an interlocutory appeal  
 28 made sense so long as the remaining claims were stayed to avoid duplicative and potentially  
 conflicting class certification and trial proceedings and under the single statutory damages rule.  
 (*Id.* at 5-7.) But there are now four related cases before this Court alleging similar copyright  
 infringement claims, and Plaintiffs have abandoned their previous position that the remaining  
 claims in this litigation should be stayed pending an interlocutory appeal. An interlocutory appeal  
 today would thus introduce new complexities and inefficiencies to this case, and would make even  
 less sense given the other related cases pending before this Court.

1 improve the odds of a negotiated resolution. *See Cathode*, 2013 WL 567281, at \*4 (“Defendants’  
 2 argument that an altered settlement posture counsels granting the appeal is unconvincing, since  
 3 appeal would almost always modify parties’ settlement postures in any given case.”); *Ashmore v.*  
 4 *N.E. Petroleum Div. of Cargill, Inc.*, 855 F. Supp. 438, 440 n.3 (D. Me. 1994) (“Resolution of  
 5 nearly any disputed issue of law will to a greater or lesser extent, make settlement more probable.”).  
 6 If this were sufficient to satisfy the “materially advance” prong, it would contravene the Ninth  
 7 Circuit’s directive “that section 1292(b) is to be applied sparingly and only in exceptional cases.”  
 8 *In re Cement Antitrust Litig.*, 673 F.2d at 1027.

9 And even accepting that settlement promotion is a cognizable consideration under §  
 10 1292(b)—which it is not—Plaintiffs’ theory depends on a speculative chain of events that their  
 11 arguments do not support. Plaintiffs’ argument requires that (1) the Ninth Circuit rule in their favor,  
 12 (2) that such a ruling clarify the law in a way that meaningfully shifts both sides’ assessments of  
 13 the litigation, and (3) that this shift materialize before the remaining claims press forward to trial  
 14 and final judgment on their own. And if the Ninth Circuit affirms this Court’s ruling—which in  
 15 Meta’s view is the far more likely outcome—the interlocutory appeal would have consumed years  
 16 of party and judicial resources while providing no countervailing benefit. This waste of resources  
 17 is further exacerbated by the exceptionally narrow and piecemeal nature of the § 1292(b) appeal  
 18 that Plaintiffs envision, as discussed further below.

19 The class action context makes Plaintiffs’ settlement theory even harder to sustain.  
 20 Settlement value in a putative class action turns primarily on certification prospects, not on the  
 21 resolution of a narrow merits question. This Court has not certified a class on any of Plaintiffs’  
 22 claims and has signaled potential doubts that it will. (Dkt. 680 (02/05/2026 Hearing Tr.), at 19:2-  
 23 5, 23:13-24:9, 27:5-9, 28:4-29:7.) An immediate appeal of the summary judgment order could thus  
 24 provide a detour from—rather than a path toward—the ultimate termination of this litigation.<sup>3</sup>

25 <sup>3</sup> Even if there was a basis for eventual class certification, it is also unclear if this action would be  
 26 the appropriate vehicle for it, as this Court has questioned whether it would be preferable for  
 27 certification to await the filing of another class action asserting copyright infringement claims based  
 28 on LLM training. (Dkt. 680 (02/05/2026 Hearing Tr.) at 19:2-5.) As Plaintiffs acknowledge, there  
 are two other pending putative class actions against Meta, *Elsevier, Inc., v. Meta Platforms, Inc.*,  
 No. 1:26-cv-3689 (S.D.N.Y.) and *Hobbs v. Meta Platforms, Inc.*, No. 1:26-cv-4314 (S.D.N.Y.),  
 which Plaintiffs state “rais[e] many of the same claims as the *Kadrey* plaintiffs and similar class

1 Plaintiffs’ motion is laden with rhetoric about the historic significance of the AI copyright  
2 questions this case presents and the need for appellate guidance on these transformative legal issues.  
3 But the actual appeal they have proposed is something else entirely. The question Plaintiffs seek  
4 to bring to the Ninth Circuit—whether downloading works from Internet repositories can be fair  
5 use if the works are used for an ultimately transformative purpose—is among the more  
6 straightforward questions this litigation has generated. It turns on the application of settled fair use  
7 principles to a specific set of facts, and does not implicate the novel and genuinely consequential  
8 legal questions that Plaintiffs themselves suggest make this case so important.

9 In a footnote, Plaintiffs announce that they “reserve the right to appeal, after final judgment,  
10 the Court’s other summary judgment holdings,” including the Court’s market dilution theory under  
11 the fourth fair use factor. (Dkt. 741, at page v n.1 (Notice of Motion) (emphasis added).) That  
12 theory—articulated by this Court and now being pursued in related cases before this Court as well  
13 as in numerous other generative AI copyright actions pending against other companies—is the kind  
14 of novel legal development that could warrant attention on appeal. But Plaintiffs are *not* seeking  
15 to discuss it in their proposed appeal, presumably because they offered no evidence whatsoever to  
16 support it at summary judgment. Plaintiffs want to park that issue (and every other issue in the  
17 summary judgment order) for a later day, while asking this Court to send to the Ninth Circuit the  
18 more pedestrian question relating to how a particular category of digital copies was obtained.  
19 Section 1292(b) was intended to “avoid protracted and expensive litigation,” *In re Cement Antitrust*  
20 *Litig.*, 673 F.2d at 1026, not to convert a single summary judgment order into serial appellate  
21 proceedings, with the most significant issues being postponed until later appeals following final  
22 judgment.

### 23 III. CONCLUSION

24 Plaintiffs’ motion satisfies none of § 1292(b)’s three requirements. Plaintiffs’ purported  
25 “controlling question of law” is a fact-specific application of a fair use doctrine. Plaintiffs have not

26 \_\_\_\_\_  
27 definitions.” (Dkt. 741, at 12.) Meta has told the New York court in the *Elsevier* case that it intends  
28 to seek transfer to the Northern District of California under the first-to-file rule and 28 U.S.C. §  
1404(a), and that court has set a briefing schedule for Meta to file a motion seeking that relief. The  
*Hobbs* case was more recently-filed and Meta has not yet made an appearance.

1 demonstrated a substantial ground for difference of opinion, only two district courts reaching  
2 different fair use outcomes on materially different facts. And an immediate appeal would not  
3 materially advance termination of this litigation, as it would produce the piecemeal, overlapping  
4 proceedings § 1292(b) was designed to prevent, compounded by Plaintiffs' unexplained year-long  
5 delay and their decision not to seek any stay of the remaining claims.

6 The Ninth Circuit has directed that § 1292(b) be applied sparingly and only in exceptional  
7 cases. This is not one of them. The motion should be denied.

8  
9 Dated: June 22, 2026

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10  
11 By: /s/ Phillip E. Morton

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