

24-12345

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

OVO,
Plaintiff-Appellant

vs.

INTERSCAPE,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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TABLE OF CONTENTS

I. BACKGROUND 1

 A. Questions Presented..... 1

 B. Parties 1

 C. Procedural Background..... 3

 D. Legal Standard 4

 1. Choice of Forum 4

 2. Statute of Limitations 5

 3. Fair Use Factors 1 & 4..... 6

II. ARGUMENT BY DEFENDANT INTERSCAPE 7

 A. 28 U.S.C. § 1404(a) Permits Venue Transfer to California..... 7

 1. This Action “Might Have Been Brought” in the Northern District of California..... 8

 2. The Factors Under the Venue Transfer Test Favor Transfer. 8

 B. The Lawsuit Is Time Barred Since It Accrued in 2019..... 11

 1. Ovo Was Put on Inquiry Notice By Interscape’s Public Announcement and Web-Scraping..... 11

 2. Ovo is a Sophisticated Copyright Plaintiff Who Failed to Discover Potential Infringement with Due Diligence..... 13

 C. Fair Use Factor One Favors Interscape..... 14

 1. The Purpose of Interscape’s GOOD Kid Is Not Commercial in Nature..... 14

 2. Good Kid Is Transformative in Character and Purpose..... 16

 D. GOOD Kid Does Not Decrease the Market for or Value of the Copyrighted Work. 18

 1. GOOD Kid Could Never Substitute For Ovo’s Product in the Marketplace. 19

 2. Ovo Has Not Suffered Any Economic Loss Because of GOOD Kid..... 20

III. ARGUMENT BY PLAINTIFF OVO..... 22

 A. Venue Should Remain in New York on Remand. 22

 1. Venue in the Southern District of New York Is Proper..... 22

 2. Transfer to the Northern District of California Is Not Appropriate. 22

 B. The District Court Erred in Finding Ovo’s Claims Time-Barred. 26

 1. Ovo’s Extensive Efforts to Discover Infringement Satisfy the Due Diligence Requirement. 26

 2. Despite These Efforts, Ovo Did Not Have the Means to Detect Interscape’s Alleged Infringement in 2019..... 27

 C. Fair Use Factor One Favors Plaintiff Ovo. 29

 1. Interscape’s Use Is Not Transformative Under Factor One..... 29

 2. Interscape’s Commercial Nature Weighs Against Fair Use Under Factor One. 31

3.	Copying Ovo’s Materials Does Not Actually Benefit The Public.....	32
D.	Fair Use Factor Four Favors Plaintiff Ovo.	33
1.	Interscape Is Usurping The Market Of Ovo's Original Works.	33
2.	Interscape Is Also Impairing A Derivative Market For AI Models.	33
3.	Ovo’s Loss Of Royalties Weighs Against Fair Use.	35
4.	The Infringing Use Does Not Benefit The Public Enough To Outweigh The Damage To Ovo..	35

I. BACKGROUND

A. Questions Presented

1. Should Interscape's § 1404 motion be granted even though both parties have consented to jurisdiction in the Southern District of New York?
2. Did Interscape's 2019 announcement and interaction with Ovo's websites place Ovo on inquiry notice of Interscape's alleged infringement, rendering Ovo's suit time-barred?
3. Does Fair Use factor 1 ("[T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes") favor Interscape or Ovo?
4. Does Fair Use factor 4 ("[T]he effect of the use upon the potential market for or value of the copyrighted work") favor Interscape or Ovo?

B. Parties

Appellant Ovo Publishing ("Ovo") is a scientific publishing company incorporated in New York City. Ovo's Chief Executive and several officers relocated to California during the Covid-19 pandemic. Ovo publishes various life-sciences research journals and largely earns its profits by licensing access to their publications to researchers. Ovo licensed 180,000 publications to a non-profit LLM developer with a similar mission to Interscape in 2021. In this licensing deal, Ovo received a small lump-sum payment and substantially discounted access to its model once it is available to the public. To date, this product has not yet been launched. Provided Ovo's large publication portfolio, it constantly faces risks of misappropriation and copyright infringement. Ovo is a sophisticated copyright plaintiff who has filed fifty lawsuits protecting its copyrights in the past five years. To discount those risks, Ovo employed software from 2017–2022 for copyright protection and cyber-security purposes from Coles J. & Co. ("CJC"), a third-party vendor. This business relationship dissolved after Ovo sued CJC for fraud, false advertising, and associated damages, alleging that CJC's software "did not work at all." CJC admitted to no wrongdoing and settled the suit for a substantial sum of money, reporting to its investors that it would no longer conduct business in the copyright protection and cybersecurity fields. Ovo also employed a dedicated team of nine employees who monitored the internet for potential instances of copyright

infringement from 2017–2022, and told its investors that its cyber security protections were top-notch. Appellee Interscape is an LLM developer who created GOOD Kid (“GK”), an AI model. Ken Dot (“Dot”) is Chief Executive of Interscape. He resides in California and will not fly due to his deathly fear of flying. The majority of Interscape’s engineers and all of its servers are based in California. Some of these engineers were located in New York City when training GK but they have all since relocated or left Interscape’s employ. In 2019, Interscape publicly announced the launch of GK’s training phase. At that announcement, Dot said that he hoped many scientific publishers would contribute materials to GK’s training data set and mentioned Ovo by name. This announcement was widely reported and several publishers voluntarily contributed materials to GK’s training data. GK’s training data comprises of images and text. Neither Ovo nor Interscape expressly contacted one another following this announcement. Interscape trained GK using the voluntarily submitted materials and by employing a “scraper,” a program which crawls the internet to access and copy materials.

In 2023, Interscape publicly launched GK. Shortly thereafter, Ovo determined that its data had been used while training GK. Ovo expeditiously filed suit to protect its copyrights. Interscape does not currently and never has possessed any license to copy any Ovo published material. The record indicates that many materials related to the scraper’s design and function were deleted after GK’s launch. The remaining information strongly suggests that the scraper’s configuration evaded paywalls and detection by cyber-security software. Both parties stipulate that the only copying Ovo alleges violates its copyrights occurred in 2019, shortly after Interscape’s announcement. Ovo and Interscape stipulate that Interscape created digital copies of 201,000 copyrighted documents published by Ovo, including 120,000 of the 180,000 publications licensed to another LLM. Ovo and Interscape also agree that Ovo discovered this copying within days of GK’s public launch. Interscape has raised a fair use defense on the merits. However, both parties stipulate that fair use

factors two and three (nature of copyrighted work; amount and substantiality of portion used) favor Ovo. Interscape's terms of service state that disputes with Interscape are to be resolved in the state or Federal courts of the State of California, under California law except as to California's conflict of law principles.

GK is a new AI model created to support researchers studying rare diseases that is publicly accessible and free of charge, although Interscape sells related user data. After the announcement, several scientific and academic publishers voluntarily contributed materials to the training dataset of GK. GK trains off of images and textual data. The model works by producing non-textual outputs, including structures of small molecules and biological molecules in response to the user's query input. Some queries return images containing Ovo's distinctive digital watermark or return images formatted in the distinctive line drawing style used by some Ovo publications, including publications that make up 55% (110,550) of the publications Ovo alleges were infringed. Parties stipulate that it is not possible for any query to cause GK to return an image that is identical to any image previously published in an Ovo publication.

C. Procedural Background

Though both parties consented to personal jurisdiction in the Southern District of New York, Interscape moved to transfer the case to the Northern District of California under § 1404. Although the court found that fair use factors one and four (purpose and character of use; effect on market) strongly favored Interscape, it determined that the statute of limitations precluded Ovo's claims. The district court held that Ovo's claim accrued in 2019 because Interscape's 2019 announcement and subsequent scraper usage placed Ovo on inquiry notice. Accordingly, the district court denied Interscape's motion to transfer as moot.

Both parties appealed. Interscape conditionally cross-appeals the district court's § 1404 denial if this court finds that Interscape fails to prevail on the issues of fair use and the statute of

limitations. Both parties agree that a remand order should direct them to the appropriate forum for this case. The parties have stipulated that the nature of the copyrighted work (fair use factor two) and the amount and substantiality of the portion used in relation to the copyrighted work as a whole (fair use factor three) weakly favor Ovo.

D. Legal Standard

Pursuant to 28 U.S.C. § 1291, the Court of Appeals for the Second Circuit has jurisdiction to hear this appeal from the District Court's final decision.

1. Choice of Forum

Courts within the Second Circuit utilize a two-pronged test when deciding whether to grant a motion to transfer venue under 28 U.S.C. § 1404(a). *Fuji Photo Film Co., Ltd v. Lexar Media, Inc.*, 415 F. Supp. 2d 370, 373 (S.D.N.Y. 2006). The first prong considers “whether the action to be transferred ‘might have been brought’ in the transferee court.” *Id.* (quoting *Berman v. Informix Corp.*, 30 F. Supp. 2d 653, 656 (S.D.N.Y. 1998)). This prong is satisfied if: (1) the district court could properly exercise personal jurisdiction and venue over the defendant; or (2) both parties consent to personal jurisdiction and venue in that district. *In re Rolls Royce Corp.*, 775 F.3d 671, 680 n.42 (5th Cir. 2014) (explaining that revised § 1404 also considers consent).

The second prong considers whether transfer is warranted “[f]or the convenience of parties and witnesses, in the interest of justice.” *Corley v. United States*, 11 F.4th 79, 89 (2d Cir. 2021).

Courts weighing conveniences should consider, among other things,

(1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, [and] (7) the relative means of the parties.

D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 106–7 (2d Cir. 2006) (quoting *Albert Fadem Trust v. Duke Energy Corp.*, 214 F. Supp. 2d 341, 343 (S.D.N.Y. 2002). Under § 1404, district

courts have broad discretion when weighing the convenience factors. *Corley*, 11 F.4th at 89. Such district court decisions are reviewed for abuse of discretion. *Id.* (citing *New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 112 (2d Cir. 2010)).

2. Statute of Limitations

The Copyright Act of 1976 provides that copyright infringement actions must be “commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). The Second Circuit follows the discovery rule for determining when a claim accrues, holding that “copyright infringement claims do not accrue until actual or constructive discovery of the relevant infringement.” *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 125 (2d Cir. 2014). Constructive discovery is imputed to a plaintiff at the time when the plaintiff “with reasonable diligence should have discovered the critical facts of both his injury and its cause.” *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998) (quoting *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir. 1982)).

When determining when constructive discovery has occurred, “terms such as ‘inquiry notice’ and ‘storm warnings’ may be useful to the extent that they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating.” *Merck & Co. v. Reynolds*, 559 U.S. 633, 653 (2010). “[T]he limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered the facts constituting the violation.” *Id.* A plaintiff is given inquiry notice when the circumstances would suggest to a person of ordinary intelligence the probability of infringement. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 168 (2d Cir. 2005); *Plazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537, 548 (S.D.N.Y. 2018) (quoting *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 27 n.14 (2d Cir. 2002)). This reasonable diligence requirement is “an objective standard,” and “a totality-of-the-circumstances analysis applies.” *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 427 (2d Cir. 2008).

3. Fair Use Factors 1 & 4

Section 106 of the Copyright Act confers exclusive rights to the owner of the copyright to publish, copy, and distribute the author's work. Exercising any of these exclusive rights without the copyright owner's permission is infringement. 17 U.S.C. § 501. Section 107 provides a limited affirmative defense for "fair use" of the author's work. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985). Fair use is not governed by any bright-line rule, and it requires a case-by-case analysis of the following factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. These factors are not "treated in isolation" but are "weighed together, in light of the purpose of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994). As an affirmative defense, fair use must be proven by the accused infringer. *Harper & Row*, 471 U.S. at 561.

The first fair use factor considers whether the use of a copyrighted work has a further purpose or a different character, and the degree of difference is balanced against the commercial nature of the use. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 533 (2023).

The fourth fair use factor is "the effect of the use on the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). The Supreme Court has held that factor four is "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. It is also necessarily intertwined with the first fair use factor, because where the use at issue is similar to the use of the

original, the use is more likely to cause market harm. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d. Cir. 2015).

In assessing factor four, courts consider the market harm caused by the particular use and specifically assess “if the challenged use becomes widespread, [whether] it will adversely affect the potential market for the copyrighted work.” *Bill Graham Archives v. Dorling Kindersely Ltd.*, 448 F.3d 605, 614 (2d. Cir. 2006); *Harper & Row*, 471 U.S. at 568. Courts consider not just the primary market for the work, but also derivative, or “secondary” markets that exist and markets that the author might reasonably license others to develop (*Salinger v. Colting*, 607 F.3d 68, 74 (2d. Cir. 2010)), particularly where there exists a “traditional, reasonable, or likely to be developed market” for the secondary use. *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 930 (2d. Cir. 1994); *On Davis v. The Gap, Inc.*, 246 F.3d 152, 176 (2d. Cir. 2001) (“Davis suffered market harm through his loss of the royalty revenue to which he was reasonably entitled in the circumstances.”). The court also considers “the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.” *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d. Cir. 1981); see *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 36 (2021).

II. ARGUMENT BY DEFENDANT INTERSCAPE

A. 28 U.S.C. § 1404(a) Permits Venue Transfer to California.

Courts have the authority to “transfer any civil action to any other district or division where [the action] might have been brought” if it is “for the convenience of parties and witnesses, in the interest of justice.” 28 U.S.C. § 1404(a). While courts have “broad discretion” over motions to transfer, a clear two-pronged test applies. See *Corley*, 11 F.4th at 89; *Fuji Photo Film Co., Ltd*, 415 F. Supp. 2d at 373. An analysis of the facts here under the venue transfer test shows that: (1) the Northern District of California has personal jurisdiction over both parties and (2) the Northern District of California is the most convenient venue for the parties.

1. This Action “Might Have Been Brought” in the Northern District of California.

Under the first prong in the venue transfer test, courts must determine if the action “might have been brought” in the proposed transferee court. *In re Nematron Corp. Sec. Litig.*, 30 F. Supp. 2d 397, 399 (S.D.N.Y. 1998). An action “might have been brought” in the transferee court if it has personal jurisdiction and proper venue. For copyright cases, “a federal court applies the forum state’s personal jurisdiction rules.” *Fort Knox Music Inc. v. Baptiste*, 203 F.3d 193, 196 (2d Cir. 2000). The Northern District of California may exercise personal jurisdiction over Interscope if Interscope has sufficient “minimum contacts” with the forum. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Here, Interscope has purposely availed itself via specific jurisdiction under the personal jurisdiction standard because the company is headquartered in the Northern District of California and can foresee “being hauled into court” there. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). The burden of venue is met because “[c]ivil actions, suits, or proceedings arising under any Act of Congress relating to copyrights . . . may be instituted in the district in which the defendant or his agent resides or may be found.” *See Brackett v. Hilton Hotels Corp.*, 619 F. Supp. 2d 810, 815 (N.D. Cal. 2008) (applying 28 U.S.C. § 1400(a) to determine whether the Northern District of California was a proper venue for plaintiff’s copyright claim). Under § 1400(a), venue is proper in the Northern District of California because Interscope is headquartered there and Interscope’s CEO lives there. As such, Interscope has met its burden and established by “clear and convincing showing that [venue] transfer” is proper because the action “might have been brought” in the Northern District of California at the time of the original filing. *Casey* 338 F. Supp. 3d at 292; 28 U.S.C. § 1404(a).

2. The Factors Under the Venue Transfer Test Favor Transfer.

Courts in this Circuit consider several factors to determine whether a venue transfer is warranted for the convenience of parties and witnesses, and is in the interest of justice. *Corley*, 11

F.4th at 89. The factors include (1) plaintiff’s choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, and (7) the relative means of the parties. *D.H. Blair & Co., Inc.*, 462 F.3d at 106–7 (quoting *Albert Fadem Trust v. Duke Energy Corp.*, 214 F. Supp. 2d 341, 343 (S.D.N.Y. 2002)). Here, these factors weigh in favor of transfer to the Northern District of California.

First, the “convenience of witnesses and parties” factors favor transfer because both parties’ Chief Executive Officers, Interscape’s headquarters, several of Ovo’s officers, and the majority of Interscape’s engineers reside in California. Additionally, Interscape’s default terms of service state that all disputes are to be resolved in California, thereby demonstrating that Interscape generally considers California to be the forum most convenient to it.¹ The convenience of witnesses is typically the most important factor in considering a motion to transfer. *AGCS Marine Inc. Co. v. Associated Gas & Oil Co.*, 775 F. Supp. 640, 647-48 (S.D.N.Y. 2011). Similar to the witnesses at issue in *AGCS Marine*, key witnesses are likely company employees and principals who likely have extensive knowledge of the technology at issue. *See id.* at 647. Although some of Interscape’s engineers were located in New York City during the “training” phase of building Interscape’s model, they have since moved to other locations or left the employment of Interscape. Furthermore, Interscape’s Chief Executive Officer, Mr. Dot, would face unnecessary hardship should he be forced to travel to New York: he has a deathly fear of flying and is unable to travel by airplane. Traveling from California to New York would therefore impose a major and

¹ It is unclear whether Ovo consented to Interscape’s terms. But if it did, the clause should be given controlling weight according to the Supreme Court. *Atl. Marine Constr. Co. v. United States Dist. Court.*, 571 U.S. 49, 62 (2013).

unnecessary inconvenience. For at least those reasons, the convenience of the witnesses heavily favors transfer to the Northern District of California.

Second, the location of relevant documents and relative ease of access to sources of proof favor transfer. Not only is Interscape's headquarters located in California, but all its servers are located there as well. Should this case remain in New York, all evidence sourced from Interscape's and Ovo's personnel, headquarters, and servers in California, including any relevant paper records and back-up storage media, must be delivered across the country.

Third, the relative means of the parties weighs in favor of transfer to the Northern District of California. There are no facts to suggest that Ovo lacks the resources to litigate this case in California. Ovo is a sophisticated plaintiff and has filed fifty lawsuits protecting its copyrights in just the last five years alone.

Fourth, the locus of operative facts weighs in favor of transfer to the Northern District of California. Apart from the "training" activity, there is no evidence that any alleged infringing acts took place in New York. The only alleged acts of infringement took place online, rather than in a particular geographic location, and cannot have been said to have "occurred" in New York. The court made clear in *Atlantic Recording Corp. v. Project Playlist, Inc.* that for alleged copyright infringement involving internet-related technologies, a locus of operative facts exists in venues where defendants' servers hosting the alleged infringing technology are located. 603 F. Supp. 2d 690, 697 (S.D.N.Y. 2009). Here, because the allegedly infringing AI, Good Kid, is hosted on servers in California, the locus of operative facts for the alleged infringement may be the Northern District of California. Thus this factor weighs in favor of transfer to the Northern District of California.

Fifth, the plaintiff's choice of forum does not weigh against transfer. The court in *AGCS Marine Ins. Co. v. Associated Gas & Oil Co.* found that where there is no meaningful connection

between the accused act and the plaintiff's chosen forum, the plaintiff's choice of forum should not receive the level of deference it is generally afforded. 775 F. Supp. at 649. In granting transfer to the Northern District of California, the court in *Fuji Photo Film Co.* found that, while a plaintiff was incorporated in New York, its choice of forum in the Southern District of New York was entitled to little deference because the locus of operative facts was not clearly connected to plaintiff's chosen forum. 415 F. Supp. 2d at 376. Similarly, here, the alleged acts of infringement cannot be said to have occurred in New York, therefore, Ovo's choice of forum and its incorporation in New York do not weigh against transfer.

Transfer to the Northern District of California is warranted in the interest of convenience and justice. The convenience of witnesses, convenience of parties, relative means of the parties, location of relevant documents, and relative ease of access to sources of proof weigh heavily in favor of transfer. There are no factors that weigh against transfer. Therefore, transfer to the Northern District of California should be granted.

B. The Lawsuit Is Time Barred Since It Accrued in 2019.

The district court's decision that Ovo's lawsuit against Interscape was time barred because Ovo's claim accrued in 2019 should be upheld. First, Ovo was put on inquiry notice in 2019 by Interscape's public announcement and subsequent scraping of Ovo's website. Second, Ovo is a sophisticated copyright plaintiff who should have known about the potential infringement with reasonable diligence.

1. Ovo Was Put on Inquiry Notice by Interscape's Public Announcement and Web-Scraping.

The standard for inquiry notice is an objective one and we use totality of the circumstances analysis. *Staehr v. Hartford Fin Servs. Group*, 547 F.3d 406, 427 (2d Cir. 2008). The court in *Salinger v. Projectavision, Inc.* found that alleged discrepancies between a company's SEC filings

and press releases were sufficient to put plaintiff on inquiry notice of fraud. 934 F. Supp. 1402, 1410, 1412 (S.D.N.Y. 1996).

As in *Salinger*, here, there was sufficient information for Ovo to be put on inquiry notice. First, there was Interscape's public announcement. Interscape's CEO stated that he hoped scientific publishers would contribute to the training drive, and even mentioned Ovo explicitly. This announcement was sufficiently public for other scientific publishers to reach out to Interscape and contribute material. Additionally, this announcement was widely publicized and mentioned Ovo by name, and Ovo is a sophisticated party with a long record of suing for copyright infringement. At a minimum, Interscape's activities are something that Ovo should have been aware of. The public announcement was sufficient to put Ovo on notice that Interscape was interested in Ovo's material.

Second, there was Interscape's "scraper," which prior to Good Kid's (GK) launch had many materials related to its design and function available online. Although many of those materials were deleted shortly after GK's launch, the fact that Interscape was using a "scraper" along with Interscape's public indication that they wanted materials from Ovo should have put Ovo on inquiry notice, similar to how the combination of SEC filings and press releases in *Salinger* was sufficient to put the plaintiff on inquiry notice. 934 F. Supp. at 1412. Moreover, both parties stipulate that the "scraper" copied Ovo's materials shortly after the announcement in 2019, and that Interscape obtained digital copies of 201,000 copyrighted documents published by Ovo. If Interscape had scraped all those documents at the same time, then Ovo should have noticed an entity accessing its website and downloading 201,000 documents at once. Even if Interscape had, for example, scraped all 201,000 documents over the course of a year, that would mean that Interscape was downloading roughly 550 documents every day during that year. Such unusual activity generated by Interscape's "scraper" is something that Ovo should have known about. Ovo

may argue that Interscape’s “scraper” was advanced and configured to evade paywalls and detection by cyber-security software, however that is all speculation and rumor. Other than information found online by unknown sources, Ovo has no evidence on how Interscape’s “scraper” works. Additionally, even if Interscape’s “scraper” was as advanced as Ovo claims, the alleged configuration would only enable the “scraper” to find and download Ovo’s publications, but it would not be able to hide the download activity. Ovo’s servers would still show the 201,000 downloads, and this unusual activity should have been caught, especially considering that Ovo has a reported nine employees dedicated to monitoring potential copyright infringement and cyber-security software. Thus, as the district court correctly found, Ovo was put on inquiry notice.

2. Ovo is a Sophisticated Copyright Plaintiff Who Failed to Discover Potential Infringement with Due Diligence.

Courts in this Circuit look to the relative sophistication of a party to determine if the copyright holder should have reasonably discovered infringement with due diligence. *Gaffney v. Muhammed Ali Enters. LLC*, 2021 U.S. Dist. LEXIS 151090 at *8 (S.D.N.Y. Aug. 10, 2021). For example, the court in *Minden Pictures, Inc. v. BuzzFeed, Inc.* held that the copyright owner was a sophisticated party that should have discovered the alleged infringement within the statute of limitations because it previously had filed thirty-six infringement lawsuits in the past seven years. 390 F. Supp. 3d 461, 467 (S.D.N.Y. 2019). Similarly, the court in *Lixenberg v. Complex Media, Inc.* found that a plaintiff who previously filed twenty infringement lawsuits should have discovered the alleged infringement with due diligence. 2023 U.S. Dist. LEXIS 4510, at *5-6 (S.D.N.Y. Jan. 10, 2023). Likewise, the court in *Michael Grecco Prods. v. RADesign, Inc.* held that a party who had previously filed 130 infringement lawsuits was a sophisticated party and therefore should have found the alleged infringement with due diligence. 678 F. Supp. 3d at 405 (S.D.N.Y. 2023).

Here, Ovo has filed fifty lawsuits protecting its copyrights in the last five years. In fact, Ovo filed more infringement lawsuits in a shorter amount of time compared to the “sophisticated party” in *Buzzfeed, Inc.* who filed thirty-six lawsuits in seven years. 390 F. Supp. 3d at 467. Additionally, Ovo has filed nearly triple the number of infringement lawsuits compared to the plaintiff in *Lixenberg* who the court found failed to reasonably discover infringement with due diligence. 2023 U.S. Dist. LEXIS 4510, at *5-6. Although Ovo may argue there was no reason for Ovo to know about Interscape’s unauthorized copying due to the alleged failure of its security software, the courts in *Buzzfeed, Inc.* and *Lixenberg* have rejected that reasoning. 390 F. Supp. 3d at 467; 2023 U.S. Dist. LEXIS 4510, at *6. Thus, Ovo is clearly an experienced and sophisticated copyright plaintiff who should have known about Interscape’s copying with reasonable diligence.

Ovo’s claim that the Coles J. & Co. (CJC) software “did not work” does not free Ovo from its duty to reasonably discover infringement with due diligence. Even though Ovo sued CJC, the parties quickly settled with no admission of wrongdoing or finding that the software was “fraudulent” or “did not work at all.” Moreover, at the same time that Ovo employed the software, Ovo repeatedly represented to its investors that it had a team of employees dedicated to monitoring potential infringement and that its cyber-security protections were “top notch.” The discovery standard for copyright infringement is an objective one. Thus, regardless of the specific issues Ovo may have had with the CJC security software, a reasonably diligent plaintiff in Ovo’s position would have discovered Interscape’s alleged infringement in 2019. Thus, Ovo’s claim accrued in 2019 and the statute of limitations for Ovo’s copyright infringement claim against Interscape expired in 2022.

C. Fair Use Factor One Favors Interscape.

1. The Purpose of Interscape’s GOOD Kid Is Not Commercial in Nature.

Interscape is a public benefit corporation with the mission to develop technologies that will

generate new medicines in areas of significant need. GOOD Kid was designed as a non-commercial platform that supports researchers in studying rare diseases. Research is expressly listed as a fair use in 17 U.S.C. § 107. (“[T]he fair use of a copyrighted work, . . . for purposes of . . . scholarship, or research, is not an infringement of copyright”). This non-commercial, research purpose is evidenced by the several scientific and academic publishers that voluntarily contributed to the training dataset and Interscape’s practice of providing GOOD Kid free of charge to users.

The Copyright Act “reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability.” *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151, 156 (1975). Fair use doctrine is one way Congress and the courts have sought to achieve this balance and prevent the Act from “stifl[ing] the very creativity . . . it was designed to foster.” *Google LLC*, 593 U.S. at 18 (citing *Stewart v. Abend*, 495 U. S. 207, 236, 110 (1990)). The four fair use factors, while not exhaustive, provide a general framework for when one work can use another without violating the core purposes of copyright.

Fair use factor one relates to “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107. Ovo alleges Interscape not only copied its works in the creation of GOOD Kid, but also that GOOD Kid competes with its licensing market. However, GOOD Kid serves a significantly different purpose than Ovo’s original works and does not supplant its licensing market.

The first fair use factor analyzes whether the purpose of the copied work could be substituted for the purpose of the original. *Andy Warhol*, 598 U.S. at 527-28 (writing substitution is “copyright’s bête noire”). A secondary work that has the same or similar purpose to “that of the original work” is more likely to be a substitute. *Id.* The more substantial the difference in purpose between the works, the more likely it is to be fair use. *Id.*

2. Good Kid Is Transformative in Character and Purpose.

GOOD Kid is an interactive tool that allows its users to *discover* new molecular structures. Ovo's primary purpose, on the other hand, is to serve as an information source for researchers and academics. Its journals are designed for readers to passively take in information and acquire knowledge of scientific methods across an array of subjects. While both are incredibly helpful for research, their purposes are distinct. GOOD Kid's implementation of Ovo's factual material transforms text and images (from Ovo and multiple other sources) into a dataset that provides researchers with the ability to utilize cumulative scientific knowledge that can produce findings a human mind could not come up with on its own.

It is also notable that Interscape's motivation in using Ovo's publications was for its factual material. Interscape's use is analogous to Google's use of books in *Authors Guild*, 804 F.3d at 202. In *Authors Guild*, the Second Circuit found that Google Library, a research tool that allowed for the searching of "snippets" of text, did not "substitute" for the plaintiff's licensing market in that "an author's derivative rights do not include an exclusive right to supply information... about her works." 804 F.3d at 207. Here, GOOD Kid is utilizing unprotected facts from Ovo's material to train from rather than Ovo's expression. *See Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980) ("[T]here cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection."). To the extent outputs show details from the original images, they reflect stylistic commonality rather than the substantial similarity that copyright protects against. This transformative purpose and character of GOOD Kid supports a finding of fair use.

Notably, Ovo's peer organizations have the same financial and licensing interests as Ovo, but still chose to contribute their materials to Interscape for the building of GOOD Kid. These peer organizations recognized that GOOD Kid serves a public interest purpose, rather than a

competitive one. Additionally, researchers' ability to use the platform free of charge serves "copyright's overall objective of contributing to public knowledge." *Authors Guild*, 804 F.3d at 214. In both *Google* and *Authors Guild*, a fair use finding was supported by the fact that a free of charge platform allowed users to expand public learning. *See Google*, 593 U.S. 1 at 32 (finding fair use in the copying of code that allows users to freely utilize their accrued skills); *Authors Guild*, 804 F.3d at 214 (finding fair use for the no-charge research platform, Google Library). This transformative character and purpose of GOOD Kid is indicative of a fair use finding.

Even if GOOD Kid is to some degree profitable, it does not prohibit a finding of fair use. The Supreme Court has clarified that "many common fair uses are indisputably profitable." *Google*, 593 U.S. 1 at 32. In fact, many—if not all—of the purposes in the preamble to the fair use statute are commonly for-profit. *Id.* (using the example of "News Reporting"). Further, the Courts in *Google* and *Authors Guild* found fair use for an undeniably commercial party. To the extent that GOOD Kid and Ovo's licensing partner have similar missions, it is of no consequence because a product's purpose, rather than its creator's stated mission, is the basis of a finding of fair use. *See Google*, 593 U.S. at 37-40 (finding fair use for Google's Android despite Oracle's desire to license into the smartphone market).

In conclusion, the first factor supports a finding of fair use as GOOD Kid is non-commercial in nature and transformative in character and purpose. The platform utilized unprotectable facts from Ovo's scholarly journals to create an interactive research tool that serves a distinct and non-competing purpose. Additionally, its public interest objective is in line with the works Congress explicitly sought to protect in the fair use statute. 17 U.S.C. § 107. For these reasons, the court should find that factor one favors the defendant, Interscape.

D. GOOD Kid Does Not Decrease the Market for or Value of the Copyrighted Work.

The fourth fair use factor favors Interscape, because Interscape used Ovo’s work in a limited and non-commercial way that did not decrease “the potential market for or value of the copyrighted work” under 17 U.S.C. § 107(4). Interscape’s GOOD Kid AI model cannot substitute for, and does not compete with, Ovo’s copyrighted materials. Further, Ovo has not suffered any economic loss or impact to the value of their copyrighted works. Thus, when considering the fourth fair use factor, Interscape’s use in this case is acceptable under the law.

The analysis of market impact is complex when applied to new technology, like computer systems and artificial intelligence models, because technology is historically very difficult to assess. It is hard to gauge how, and for what reasons, people will use new technology, as well as the price for which they will be willing to pay for it. These differences, when compared to typical copyrighted works like songs, books, and films, make “applying copyright law to computer programs like assembling a jigsaw puzzle whose pieces do not quite fit.” *Google*, 593 U.S. at 21 (citing *Lotus Development Corp. v. Borland Int’l*, 49 F.3d 807, 820 (1st Cir. 1995) (Boudin, J., concurring)). In the past, the Court has evaluated the potential for market substitution, demonstrated loss of revenue, and public benefit when deciding whether a new production has affected the market for or value of a copyrighted work. *Id.* at 35-36. And although these considerations are not exhaustive, the Court finds them relevant in analogous cases, specifically those dealing with computer-based systems and the reproduction of literary works. See *Google*, 593 U.S. at 35-36; *Authors Guild*, 804 F.3d at 223.

The Court in *Harper & Row*, 471 U.S. at 566 found that the fourth factor “is undoubtedly the single most important element of fair use.” (citing 3 Nimmer on Copyright § 13.05(a), at 13-76). This emphasis aligns with the commercial nature of copyright protection, as authors are incentivized to create new works by their “ability... to profit from the exclusive right to merchandise their own work.” *Authors Guild*, 804 F.3d at 214. Consequentially, the first and fourth fair use factors are

closely linked, with courts finding that as the purpose of a copy strays further from the purpose of the original work, the likelihood of competition as it relates to market substitution becomes increasingly low. *Id.* at 223.

1. GOOD Kid Could Never Substitute For Ovo’s Product in the Marketplace.

The evidence in the record supports that GOOD Kid is in no way a market substitute for the copyrighted publications. Most notably, Ovo’s copyrighted works and Interscape’s GOOD Kid model are dissimilar in substance. Interscape has used the copyrighted publications as a learning device for its AI model, GOOD Kid, but the model does not regurgitate that material to its users. It follows that GOOD Kid’s query output, which is non-textual, is incapable of returning any image or text that is identical to those published in an Ovo publication. When dealing with factual materials, like the visual representation of a molecular structure, it is necessary that the copying be identical to the original for an infringement to have taken place. *Google*, 593 U.S. at 20. Furthermore, when returning output from user queries, GOOD Kid produces something unique and distinct, with minute similarities, like in line drawing style. Even if GOOD Kid reproduces snippets of the published material, the Second Circuit has found that, facts that are “embedded in three lines of [an author’s] writing, which were superfluous to the searcher’s needs, would not change the taking of an unprotected fact into a copyright infringement.” *Authors Guild*, 804 F.3d at 224. These outputs also make up a very small portion of the publications as a whole and could not possibly substitute for licensing the entirety of even one literary work, no matter how similar the non-textual portions of the AI model outputs and publication are. *Id.* at 224-25.

It is also important to highlight that the parties here operate in different sectors of scientific research. Ovo generates revenue through its licensing of literary works to researchers in academia and the life-sciences industry, while GOOD Kid was created as a free tool to support researchers

studying rare diseases and to generate new medicines as a means of serving significant public-interest needs. The fields of academia and medical research and development serve different audiences, rather than competing for shares of the same market. GOOD Kid's audience is incredibly limited; it is comprised of researchers seeking to break ground on new medicines that will affect an entire population, like those that treat antibiotic-resistant bacterial infections. In contrast, Ovo serves a much broader audience and can license their publications to folks looking to solve problems that span far beyond that of GOOD Kid's interest group. Considering these facts, it follows that GOOD Kid's use of the copyrighted material does not act as a market substitute for Ovo's publications. *Id.* at 223.

2. Ovo Has Not Suffered Any Economic Loss Because of GOOD Kid.

OVO has not suffered any economic loss or impact to the value of their copyrighted works. Despite Interscape using the copyrighted material in 2019, three years later in 2021, Ovo licensed 180,000 publications, over 65% being the same publications used in the GOOD Kid training data, to an academic consortium looking to train its own large language model. The fact that they sold these licenses is material. GOOD Kid entered the market utilizing a subset of Ovo's copyrighted publications and Ovo was still able to license their materials to paying customers, like this academic institution. The consortium will have access to a much larger training dataset, the opportunity to learn from what is in the market to build a better product, and it is a resource that Ovo's audience will be willing to pay for. Ovo themselves accepted discounted access to the model once it becomes available to the public as adequate compensation for the licenses, in addition to a small lump-sum payment. These monetary benefits demonstrate that there has been no loss of value to Ovo as a licensor. To the extent Ovo argues that they have lost the opportunity to license their publications for future use in uncharted markets like developing medicines and medical research, this argument does not pass muster. The Supreme Court has warned against finding infringement where the

plaintiff claims an economic loss in a new, uncharted market, as there is a “‘danger of circularity posed’ by considering unrealized opportunities because ‘it is a given in every fair use case that plaintiff suffers a loss of a *potential* market if that potential is defined as the theoretical market for licensing the very use at bar.” *Google*, 593 U.S. at 38. The Court should also consider the fact that GOOD Kid will benefit the public by supporting the generation of new medicines in areas with significant public-interest need. See *Id.* at 35-36 (emphasizing that courts must balance the public benefits and losses of the copying and determine if they are “comparatively important” when weighed against “dollar amounts likely lost”). GOOD Kid’s potential to save lives must be weighed against Ovo’s hypothetical claims of economic loss.

Interscape’s GOOD Kid has little to no effect on “the potential market for or value of the copyrighted work” and their developments in the world of artificial intelligence do not violate the Copyright Act. 17 U.S.C. § 107(4); *Authors Guild*, 804 F.3d at 224 (explaining that the chance or certainty of lost sales does not make the copy an “effectively competing substitute” that would satisfy the “weighty” fourth factor in favor of the copyright holder. There must be a “meaningful or significant effect” upon the market for or value of the copyrighted work). Therefore, because GOOD Kid is not a market substitute for the copyrighted publications, there is no real economic loss to Ovo, and the AI model has a significant public benefit in the field of medicine, the Court should find that the fourth fair use factor favors Interscape.

III. ARGUMENT BY PLAINTIFF OVO

A. Venue Should Remain in New York on Remand.

1. Venue in the Southern District of New York Is Proper.

This action was correctly brought in the Southern District of New York. In copyright cases, venue is proper in the “district in which the defendant or his agent resides or may be found.” 28 U.S.C. § 1400(a). Courts in this Circuit have routinely held that a company may be found where it is subject to personal jurisdiction. *See Cavu Releasing, LLC. v. Fries*, 419 F. Supp. 2d 388, 394 (S.D.N.Y. 2005). Because Interscape consented to personal jurisdiction in the Southern District of New York, venue is proper there. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (stating that a party can consent to personal jurisdiction).

The forum selection clause contained in Interscape’s terms of service does not alter this analysis. To be effective, a forum selection clause must be reasonably communicated to the parties. *Gottdiener*, 462 F.3d at 103. Because there is no evidence in the record indicating that Ovo was aware of or consented to Interscape’s terms of service, the forum selection clause cannot be enforced against Ovo. Moreover, a forum selection clause will not be enforced if it is clearly shown that enforcement would be unjust and unreasonable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Here, it would be unjust and unreasonable to apply the forum selection clause because the only opportunity for Ovo to encounter the clause in Interscape’s terms of service would have occurred while trying to police Interspace’s unlawful copyright infringement. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1981) (forum-selection provisions must be “freely negotiated”) (quoting *Bremen*, 407 U.S. at 15). Accordingly, venue is proper in New York.

2. Transfer to the Northern District of California Is Not Appropriate.

Interscape cannot meet its burden to show by clear and convincing evidence that transfer is more convenient. *New York Marine and General Ins. Co.*, 599 F.3d 103, 114 (2d Cir. 2010) (“[T]he party requesting transfer carries the ‘burden of making out a strong case for transfer.’”) (quoting

Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 521 (2d Cir. 1989)); see also *Christina Canada, Inc. v. Wior Corp.*, 702 F. Supp. 461, 463 (S.D.N.Y. 1988) (“[A]bsent a clear and convincing showing that the balance of convenience favors the ultimate forum, discretionary transfers are not favored.”).

In deciding the convenience question, this Court uses a seven-factor balancing test. *Corley*, 11 F.4th at 89 (citing *Gottdeiner*, 462 F.3d at 106–107). Here, two of the factors—the plaintiff’s choice of forum and the locus of operative facts—strongly favor keeping this case in the Southern District of New York, while the other factors are neutral.

Ovo’s choice of forum weighs in favor of keeping this case in the Southern District of New York. *Gottdeiner*, 462 F.3d at 107. Courts in this Circuit consistently hold that the plaintiff’s choice of forum is entitled to substantial deference and should only be disturbed if the other factors clearly favor transfer. *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 698 (S.D.N.Y. 2009) (citing *Gross v. BBC*, 386 F.3d 224, 230 (2d Cir. 2004)); accord *In re Warrick*, 70 F.3d 73, 740–41 (2d Cir. 1995) (holding that a plaintiff’s choice of venue is entitled to substantial consideration when deciding § 1404(a) motions). The presumption in favor of the plaintiff’s chosen forum is even stronger when the chosen forum is also the plaintiff’s home. *Pollux Holding, Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 71 (2d Cir. 2003); *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000). The Southern District of New York is Ovo’s home forum, as it is headquartered in New York City. Accordingly, Ovo’s chosen forum is entitled to the utmost deference.

The locus of operative facts also strongly favors keeping this case in New York. *Gottdeiner*, 462 F.3d at 107. In an infringement action, one locus of operative facts is the place where the allegedly infringing product was designed and developed. *Bristol Meyers Squibb Co. v. Andrx Pharms., LLC*, No. 03 Civ. 2503, 2003 WL 22888804, at *3 (S.D.N.Y. Dec. 4, 2003). Here, the

engineers for Interscape lived in New York City when they were conducting the “training” phase of building Interscape’s infringing AI model, GK. Ovo alleges that its data was used in Interscape’s AI training set, making New York the location where the alleged infringement took place. There is no other locus of operative facts in this case because Interscape maintains a publicly accessible website with users from all over the United States and Ovo accepts publications from all over the world. This factor therefore favors maintaining the case in New York.

All other factors are neutral. For example, the convenience of the witnesses does not favor transferring this action to the Northern District of California. As an initial matter, Interscape does not identify any witness that it claims will actually testify at trial in this case. “A motion to transfer under § 1404(a) must be accompanied by an affidavit containing detailed factual statements identifying the potential principal witnesses expected to be called and a general statement of the substance of their testimony. Absent such a showing, the motion should be denied.” *Am. Eagle Outfitters, Inc. v. Tala Bros. Corp.*, 457 F. Supp. 2d 474, 478 (S.D.N.Y. 2006) (internal quotations and alterations omitted). The only individual Interscape identifies by name is its CEO, Ken Dot, but Interscape does not identify what testimony Mr. Dot will give or why it is necessary. Mr. Dot’s situation alone cannot compel transfer. *Id.*

The record does not contain the identity of any other witness located in the Northern District of California by name or by category. While many of Interscape’s engineers may reside in California, the record does not indicate where in California they reside, and others may live outside the state entirely. For example, the engineers who trained Interscape’s AI model have moved or left the employment of Interscape and therefore may reside anywhere. *See Atl. Recording Corp.*, 603 F. Supp. 2d at 690 (finding convenience of the witnesses neutral when half of the identified witnesses live in the transferee district, while others live elsewhere in California, requiring them to travel by plane, albeit a shorter distance). Accordingly, convenience of the witnesses is neutral.

Convenience of the parties also does not favor transfer. Where the movant has an extensive nationwide network, the convenience scale tilts slightly in favor of the nonmovant. *American S.S. Owners Mut. Protection. & Indem. Ass'n v. Lafarge N. Am., Inc.*, 474 F. Supp. 2d 474, 484 (S.D.N.Y. 2007). In this action, defendant Interscape maintains a public website allowing users to interact with its AI model from any location in the United States and has previously employed engineers in New York to train the model. Therefore, Interscape's nationwide presence tips this factor in favor of denying the motion to transfer. *Id.* Furthermore, Ovo is a New York City based company, so transferring the action to the Northern District of California would be substantially more inconvenient for Ovo. *Dealttime.com v. McNulty*, 123 F. Supp. 2d 750, 756 (S.D.N.Y. 2000) (holding that the convenience of the parties factor does not weigh in favor of transfer where such transfer would merely shift the inconvenience of litigating in a particular forum from one party to the other).

The availability of process to compel unwilling witnesses is neutral because no such unwilling witnesses have been identified in the record. While Interscape argues that Mr. Dot would be more willing to testify in his home state, that turns this factor on its head. Interscape does not need to compel Mr. Dot to testify. He is Interscape's CEO. *TM Claims Service v. KLM Royal Dutch Airlines*, 143 F. Supp. 2d 402, 406 (S.D.N.Y. 2001) (holding that the ability to compel witness testimony factor is generally only relevant with respect to third-party witnesses, since employees of the parties will as a practical matter be available in any venue by virtue of their employment relationship). Therefore, as there are no unwilling witnesses, this factor is neutral. *In re Global Cash Access Holdings, Inc. Sec. Litig.*, No. 08 Civ. 3516(SWK), 2008 WL 4344531, at *7 (S.D.N.Y. Sept. 18, 2008) ("As there are no allegations that any particular witnesses are unwilling to testify should this matter proceed to trial, this factor is neutral in the Court's analysis.").

The remaining factors do not favor one party over the other. The location of relevant documents and relative ease of access to sources of proof is generally considered neutral in today's

world since many documents are electronic or can be faxed/mailed. *American S.S.*, 474 F. Supp. 2d at 484. Finally, the relative financial means of the parties is also neutral because both parties to the case are corporations. *AEC One Stop Group, Inc. v. CD Listening Bar, Inc.*, 326 F. Supp. 2d 525, 531 (S.D.N.Y. 2004). (“When both parties are corporations, however, this factor is given little weight.”).

Because some of the factors weigh heavily against transferring the action and others are neutral, Interscape cannot meet its clear and convincing evidence burden, and this Court should remand to the district court with instructions to deny Interscape’s motion to transfer.

B. The District Court Erred in Finding Ovo’s Claims Time-Barred.

Because Ovo was not on notice of Interscape’s infringement before 2023, the district court erred in finding Ovo’s claims time-barred under the statute of limitations. Interscape, not Ovo, “bears the burden of proof when raising the statute of limitations as an affirmative defense.” *Parisienne v. Scripps Media, Inc.*, No. 19 Civ. 8612(ER), 2021 WL 3668084, at *5 (S.D.N.Y. Aug. 17, 2021); *Lefkowitz v. McGraw-Hill Glob. Educ. Holdings, LLC*, 23 F. Supp. 3d 344, 358 (S.D.N.Y. 2014) (citing *United States v. Livecchi*, 711 F.3d 345, 352 (2d Cir.2013)). Indeed, the district court may find inquiry notice “as a matter of law only when uncontroverted evidence clearly demonstrates when the plaintiff should have discovered the fraudulent conduct.” *Staehr*, 547 F.3d at 427. But far from such uncontroverted evidence of notice, the record instead demonstrates that despite Ovo’s affirmative steps to learn of Interscape’s potential infringement, identification of that infringement remained elusive until 2023, well after the date that would trigger a time bar.

1. Ovo’s Extensive Efforts to Discover Infringement Satisfy the Due Diligence Requirement.

Ovo utilized a variety of means to identify potential instances of infringement. For example, Ovo implemented software to monitor the internet for evidence of infringement of its copyrighted

materials. Ovo also purchased third-party software from CJC for copyright protection and cybersecurity purposes, further demonstrating Ovo's significant efforts to detect online infringement. Although some courts in this Circuit have pointed to the use of sophisticated software as evidence that a party was on inquiry notice, *Minden Pictures, Inc. v. Complex Media, Inc.*, No. 22-CV-4069(RA), 2023 WL 2648027, at *3 (S.D.N.Y. Mar. 27, 2023), here, the total failure of such software demonstrates just the opposite. Both Ovo's and CJC's actions indicate that CJC's software did not function and therefore did not detect the activities of Interscape's scraper. Ovo's suit against CJC, the large sum CJC paid Ovo in the settlement, and CJC's subsequent exit from the copyright protection and cybersecurity industries taken together strongly suggest that CJC's software did indeed "not work at all." Ovo's *actual* failure to detect infringement of its copyrights despite significant efforts satisfies the due diligence requirement and should preclude any finding that Ovo was on inquiry notice.

Dot's press announcement that he hoped many scientific publishers would contribute materials to GK and his mentioning Ovo by name were not sufficient to place Ovo on notice of copyright infringement. Ovo never received any direct communication from Interscape, and even a specific request to contribute to the dataset would not constitute "uncontroverted evidence" that "clearly demonstrate[d]" that Ovo "should have discovered the fraudulent conduct." *See Staehr*, 547 F.3d at 427. Indeed, Dot's announcement would lead a party in Ovo's position to conclude just the opposite: because Interscape felt the need to request voluntary contributions from publishers, it likely would not then proceed to impermissibly copy the same publications.

2. Despite These Efforts, Ovo Did Not Have the Means to Detect Interscape's Alleged Infringement in 2019.

Due to the failure of CJC's software and the cloaked nature of Interscape's alleged infringement, Ovo could not have discovered Interscape's activities until 2023. Moreover, there is

no “general duty to police the internet for infringements.” *Parisiennes*, 2021 WL 3668084, at *4; *see also Michael Grecco Prods., Inc. v. RADesign, Inc.*, 678 F. Supp. 3d 405, 411 (S.D.N.Y. 2023). While some district courts in this Circuit have considered the relative sophistication of a party when determining whether it exercised due diligence, *Minden Pictures, Inc. v. BuzzFeed, Inc.*, 390 F. Supp. 3d 461, 467 (S.D.N.Y. 2019) (concluding that “a seasoned litigator that has filed 36 lawsuits to protect its copyrights . . . should have discovered, with the exercise of due diligence, that its copyright was being infringed within the statutory time period.”), this Court has not imposed such a heightened standard. Nor would it make sense to do so in this case, because the rationale underlying a more stringent test does not apply. The court in *Buzzfeed*, when ruling that the suit was time-barred, found that the plaintiff provided “no explanation for its delayed filing . . . beyond its allegation that it had no reason to discover the alleged infringement” before the statute ran. *Id.* *Ovo*, on the other hand, has provided a clear and reasonable explanation for its inability to discover the infringement until 2023.

Indeed, when district courts have focused on a plaintiff’s use of “sophisticated methods to detect” online infringement, they have concluded that the sophistication rendered it “not plausible” that the plaintiff, “in exercising reasonable diligence, would not have discovered the alleged infringing use” for many years. *Complex Media, Inc.*, 2023 WL 2648027, at *3; *see also Michael Grecco Prods., Inc.*, 678 F. Supp. 3d at 411 (holding that since the plaintiff was “particularly sophisticated in regularly seeking out and discovering online infringing uses,” the plaintiff “should have discovered [the infringement] . . . within the three-year limitations period.”) Here, however, the record demonstrates that—despite sophisticated efforts—it was not possible to detect infringement within the limitations period.

Indeed, the infringement at issue in this case is unusually difficult to detect. The record evidence strongly suggests that Interscape’s “scraper” program was configured to evade paywalls

and detection by cyber-security software. While some software programs can detect such “scraper” programs, this type of infringement is much harder to detect than the simple online postings at issue in many of the cases where the court found that a party did not exercise reasonable diligence. *Buzzfeed, Inc.*, 390 F. Supp. 3d at 465; *see also Michael Grecco Prods., Inc.*, 678 F. Supp. 3d at 411. Ovo’s dedicated team of employees monitoring the internet for copyright infringement would almost certainly not be able to detect the presence of a “scraper” program without assistance from the type of software that CJC claimed to provide Ovo. Since CJC’s software was likely the only possible means by which Ovo could discover the presence of such a “scraper” program, the failure of this software should not be held against Ovo in a totality-of-the-circumstances analysis. *Staehr*, 547 F.3d at 427.

Because all reasonable objective criteria demonstrate that Ovo could not have discovered Interscape’s infringement in 2019, the district court erred in finding Ovo’s claim time barred. The Court should reverse and remand this case to the district court.

C. Fair Use Factor One Favors Plaintiff Ovo.

Fair use factor one favors plaintiff Ovo because Interscape’s work is not transformative due to the fact that copying Ovo’s materials is not reasonably necessary to achieve Interscape’s purpose. Furthermore, Interscape’s commercial nature weighs against finding fair use under factor one, and the illegal copying of Ovo’s materials is not actually in the public benefit.

1. Interscape’s Use Is Not Transformative Under Factor One.

The main inquiry in fair use factor one is to what extent the new work is “transformative.” *See Campbell*, 510 U.S. at 579 (“The central purpose of this investigation is to see...whether the new work merely ‘supersedes the objects’ of the original creation...or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . .”). Transformation is a matter of degree. *Andy Warhol*, 598 U.S. at 529.

The author’s purpose is a key inquiry in assessing whether a use is transformative; when copying is not reasonably necessary to achieve the author’s purpose, the justification for copying must be strong. *Andy Warhol*, 598 U.S. at 531-532 (“[A] use that has a distinct purpose is justified because it furthers the goals of copyright...a use may be justified because copying is reasonably necessary to achieve the author’s new purpose . . .”); *Authors Guild*, 804 F.3d at 215 (“Among the best recognized justifications for copying from another’s work is to provide comment on or criticism of it.”); *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522–23 (9th Cir. 1992) (“[N]o other method of studying those requirements was available to Accolade. On these facts we conclude that Accolade copied Sega’s code for a legitimate, essentially non-exploitative purpose...”).

Parody, quintessential fair use, illustrates this principle because parody *requires* copying; one cannot create a parody *of a work* without utilizing or mimicking the original work. *Campbell*, 510 U.S. at 569. Similarly, copying is necessary when there is no other way to obtain certain information. *See Sega Enterprises*, 977 F.2d at 1522-23 (holding that use of copyrighted computer work to gain understanding of unprotected functional elements was fair use because there was no other method available of learning the requirements); *see also Authors Guild*, 804 F.3d at 202 (holding that creating a full-text searchable database of books was fair use where the original works were inherently needed to create the database).

In contrast, Interscape’s digital copying of 210,000 copyrighted documents in the process of training the LLM used to build GOOD Kid was not transformative because Interscape *did not need to copy Ovo’s work* to fulfill the purpose of training GOOD Kid. Different resources could have sufficed to train GOOD Kid. Nor did Interscape have a purpose that was in any way related to the protected expression contained in Ovo’s publications. Indeed, GOOD Kid was partially trained using other material. GOOD Kid produces non-textual outputs, such as structures of

biological molecules. Ovo's specific scientific publications were not necessary to the project; Interscape could have gleaned information about the biological molecules from other sources. While the outputs of GOOD Kid are objectively transformed from the textual inputs of Ovo's publications, the use cannot be justified because Ovo's publications were not inherently necessary to fulfill Interscape's purpose.

2. Interscape's Commercial Nature Weighs Against Fair Use Under Factor One.

Interscape's commercial nature must be weighed heavily under factor one in light of the Supreme Court's guidance in *Andy Warhol* that factors like the commercial nature of the use loom larger when commentary has no critical bearing on the substance or style of the original composition. *Andy Warhol*, 598 U.S. at 508. While the commercial nature of a use is not dispositive of the inquiry, this fact is highly relevant. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). Furthermore, the Supreme Court has also stated that the "crux of the profit/nonprofit distinction is **not whether the sole motive of the user is monetary gain but whether the user stands to profit from exploitation** of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562. Therefore, the relevant inquiry is more than the for or non-profit nature of an organization; it is also whether that organization is profiting from exploitation of the copyrighted material. *Id.*

Interscape is a public benefit corporation that stands to profit from the exploitation of Ovo's materials. Furthermore, as established, Interscape's work has no critical bearing on the substance or style of the original composition, Ovo's publications. Therefore, Interscape's commercial aims weigh strongly against finding of fair use. *Andy Warhol*, 598 U.S. at 508. Despite Interscape's public benefit mission, it is a corporation that is actively profiting from the copying of Ovo's publications. Ovo has already licensed its publications to a nonprofit with a similar mission,

indicating that there is an established market for licensing Ovo’s copyrighted works. Therefore, Interscape has exploited Ovo’s materials in a way that a nonprofit academic consortium, which likely has less funding, did not. Instead of copying Ovo’s materials for true public benefit without a commercial aim, Interscape has done a run-around of the licensing process and profited in a way that cuts against a finding of fair use. This fact must be weighed heavily under factor one given the Supreme Court’s guidance that commercial nature is more important when work has no critical bearing on the substance or style of the original composition. *Andy Warhol*, 598 U.S. at 508.

3. Copying Ovo’s Materials Does Not Actually Benefit The Public.

Despite Interscape’s mission of finding treatments for rare diseases, the copying of Ovo’s materials in training its AI model was not in the public interest because Ovo has already licensed its materials for use to a nonprofit with a similar mission. When technological change renders the literal terms of the Copyright Act ambiguous, the act “must be construed in light of its basic purpose [of promoting progress in the science and arts].” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The inquiry here must not be whether Interscape’s mission is in furtherance of scientific progress in general—otherwise all organizations with an ostensible mission to do good would have *carte blanche* to take others’ copyrighted works for their own use. Instead, the relevant inquiry is whether or not *Interscape’s illegal copying benefited scientific progress*. Interscape did not attempt to come to a licensing or donation agreement with Ovo; its actions were just a run-around of the licensing process. The public will reap the scientific benefits of an LLM that uses Ovo’s works through the non-profit LLM to which Ovo licensed its publications. Moreover, the public will benefit from the continued incentive to authors to produce scientific publications in the first place, which would be chilled if for-profit companies are able to simply copy and digest copyrighted works that were available for purchase without any compensation.

D. Fair Use Factor Four Favors Plaintiff Ovo.

Fair use factor four, the effect of the infringing use on the market for the original work, favors plaintiff, which ultimately favors a finding of infringement and no fair use. Interscape's infringing use (1) usurps the market for Ovo's original works, (2) further impairs a derivative market for AI models, (3) caused Ovo to suffer a significant loss in royalties, and (4) causes damage to Ovo that is not outweighed by potential public benefit.

1. Interscape Is Usurping The Market Of Ovo's Original Works.

Here, factor four weighs against finding fair use because Interscape is usurping the market of the original works. *See Harper & Row*, 471 U.S. at 566. The market for both the original work, Ovo's articles and figures, and for the GOOD Kid outputs is the same: scientific research and development, which includes the figures used in the life-sciences research articles. *See Weissmann v. Freeman*, 868 F.2d 1313, 1326 (2d. Cir. 1989) (observing that the market of scientific research and publication works to encourage creation and dissemination of scientific papers).

The GOOD Kid outputs closely mimic the figures published in the Ovo articles. The outputs are structures of small and biological molecules that are formatted in the distinctive line drawing style used by some Ovo publications. In fact, the model has even returned images with Ovo's distinctive digital watermark used in figures in Ovo publications. These similarities indicate that Interscape is usurping the market for Ovo's figures in the scientific research market. *See Weissmann*, 868 F.2d at 1326. In addition, Interscape's use is minimally transformative, as Interscape has simply digitally copied 210,000 documents published by Ovo.

2. Interscape Is Also Impairing A Derivative Market For AI Models.

Finding no fair use is further warranted given that Interscape's infringing use impairs a secondary, or derivative market, for the original works: the licensing of AI models. *See Bill Graham Archives*, 448 F.3d at 614. As noted, the fair use analysis considers all reasonable derivative markets,

regardless of whether the copyright holder has expressed an interest in such a secondary market to date. *See Salinger*, 607 F.3d at 74 (holding that analysis of the fourth factor should include all derivative markets that the author might reasonably license to others, regardless of the author’s public disclaimer that he would not be writing sequels). Here, the licensing of AI models represents an actual, existing market for the original works, not just a mere hypothetical; Ovo has *already* entered this market by licensing 180,000 publications to an academic consortium to build its own AI model. This is clear, demonstrated interest in this market. For example, in *On Davis v. The Gap, Inc.*, this Court held that when The Gap used an unlicensed photograph of an individual wearing Davis’s copyrighted eyewear in an advertisement, Davis suffered market harm through the “diminution of his opportunity to license to others who might regard his design as preempted by The Gap’s ad.” 246 F.3d at 156, 176. Similarly, Interscape’s use diminishes Ovo’s opportunity to license to others in the AI model market. *See id.*

Defendants may argue that since no queries can return an image identical to any image previously published, the infringing use targets a different market than the original and is transformative. *See Bill Graham*, 448 F.3d at 614-15 (holding that a copyright owner cannot prevent others from entering fair use or transformative markets merely by developing or licensing a market). However, in *Bill Graham Archives v. Dorling Kindersely Ltd.*, the Court held that the infringing use of images was “transformatively different from their original expressive purpose,” such as purposes for parody, news reporting, or other transformative uses. *Id.* at 609. The images in *Bill Graham Archives* were used in a biography, but originally were created for artistic expression and promotion. *Id.* By contrast, here, Interscape’s infringement is used for almost the same purpose, to encourage scientific advancement, and not for a transformatively different use or purpose, such as parody or news reporting. *See id.*; *Twin Peaks Productions, Inc. v. Publications Intern. Ltd.*, 996 F.2d 1366, 1377 (2d. Cir. 1993) (“[I]n the cases where we have found the fourth factor to favor a defendant, the

defendant’s work filled a market niche that the plaintiff simply had no interest in occupying,” such as parodies or reviews).

3. Ovo’s Loss Of Royalties Weighs Against Fair Use.

Furthermore, Ovo’s loss in royalties weighs against fair use. *Am. Geophysical Union*, 60 F.3d at 930; *Bill Graham*, 448 F.3d at 614. Interscape never had a license to Ovo’s copyrighted work, and so Ovo never received the proper royalties it should have received for Interscape’s use had it taken a license. *See U.S. v. Am. Soc. Of Composers, Authors, and Publishers*, 599 F.Supp.2d 415, 431-32 (S.D.N.Y. 2009) (holding that ASCAP had established the existence of “traditional” and “reasonable” markets for licenses of the infringing use, as other businesses and companies paid ASCAP for similar uses and therefore, the infringing use was in a traditional and reasonable derivative market, and the [infringer] avoided paying the “customary price” that ASCAP is entitled to charge for the use of its songs). Scientific articles and journals, including the figures accompanying those, is a traditional market, in which Interscape’s infringement occurred. *See Am. Geophysical Union*, 60 F.3d at 927 (holding that there is a traditional market for journal issues and volumes).

4. The Infringing Use Does Not Benefit The Public Enough To Outweigh The Damage To Ovo.

Finally, the infringing use does not benefit the public significantly enough to outweigh the damage to Ovo. *See MCA, Inc.*, 677 F.2d at 183; *Hachette Book Group, Inc. v. Internet Archive*, 664 F.Supp.3d 370, 390 (S.D.N.Y. 2023) (holding that the alleged benefits of increasing public access to the copyrighted work cannot outweigh the market harm to the publishers by depriving them of revenue to which they are entitled). There is no potential benefit of increased public access to Ovo’s works here, as Interscape is instead digesting the works before they reach the public. *See Hachette Book Group, Inc.*, 664 F.Supp.3d at 390. Rather, the public stands to benefit significantly from a finding that the infringing use is not fair use because such a finding will continue to incentivize

scientists to publish and disseminate their research through journals such as *Ovo*. *See Am. Geophysical Union*, 60 F.3d at 927 (noting that publication in scientific journals is key to professional advancement and prestige for an author, and journals are the conventional and often exclusive means for disseminating individual articles, which is what motivates authors). Additionally, the academic consortium, a not-for-profit entity, *properly* licensed *Ovo*'s publications to train its own large language model, which obviates any alleged benefit to the public. *See id.*

Defendant will likely argue that Interscape seeks to serve the public benefit by helping generate new medicines in areas with public interest needs, and that the harm to *Ovo* is minimal as it does not create its own content. However, *Ovo* is serving the same public benefit through the scientific publication process, a vital role in research efforts to generate new medicines. Additionally, “copyright is a commercial doctrine whose objective is to stimulate creativity among potential authors,” and *Ovo* serves this objective by encouraging scientists to research and innovate so they can publish articles, which is the primary method scientists disseminate their work. *Authors Guild*, 804 F.3d at 202; U.S. Const. art. I, § 8, cl. 8. A finding of no fair use would best serve the public benefit as it would continue to encourage researchers to invent and circulate their knowledge through publications. *See Weissmann*, 868 F.2d at 1326 (holding that permitting the infringing use of a copyrighted syllabus would disrupt the market for works of scientific research without conferring commensurate public benefit and would disrupt the market’s function to encourage creation and dissemination of such works).

Factor four, therefore, weighs against the finding of fair use because Interscape is usurping the markets for both original and derivative works, *Ovo* has suffered a loss in royalties, and Interscape’s infringing use does not benefit the public significantly enough as to outweigh the damage to *Ovo*.

Respectfully Submitted:

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