

# Drawing the Line: A Comparative Analysis of U.S. and EU Copyright Law in the Age of Generative AI.

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## Abstract

Generative Artificial Intelligence (GenAI) models are able to generate new and original works, including images, poems and music, which has garnered international scrutiny regarding infringement of copyright laws and market disruption. The European Union has decided to address this with the AI Act which imposes rules and fines for GenAI content, while the United States has left the issue for case law and the private licensing market to decide. This article will analyze both jurisdictions and then compare their way of managing the new threats of GenAI in the field of fair use, highlighting the contrast between the usage of common and civil law by the US and EU respectively. This article will conclude by outlining potential policy recommendations which could ensure the survival of human creativity and the progress of GenAI.

Keywords: AI, Generative AI, copyright law

## 1. Introduction

AI models have been on the rise: it is the combination of increasingly more powerful CPUs, bigger and cheaper data servers, and more precise and efficient algorithms trained on billions of bytes of data (as an example, GPT-4.0 was trained on one petabyte—equivalent to 1,000 terabytes—of data<sup>1</sup>). This has allowed AI models to reach an unprecedented level of computational power and ability

to produce seemingly original thoughts, including works of art.

Technology and machines have always been part of the creative production of some artists. The rise of photography disrupted traditional painting and is now an established form of art. Robotic art, in which the action—focus of the artistic experience and akin to

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<sup>1</sup> Sag M, 'Copyright Safety for Generative AI' (2023) 61 Houston Law Review 295

performance art—is physically executed by robots instead of people is another example.<sup>2</sup>

It is clear that the use of technology in its various configurations is not new to the artistic landscape.

The main difference between “traditional” forms of technology in the art world and AI models lies in the latter’s newfound separation from human creativity—a shift that highlights the possibility of a certain inherent “robotic creativity” present in AIs—and the evident risk, as this article addresses, of copyright infringement by these models in both in their training phases and their outputs.

### 1.1 Background

The issue is something that has to be addressed urgently: AI-generated art is already being sold, the most prominent case being the *Portrait of Edmond de Belamy*, produced by the Obvious collective and sold at Christie’s for \$432,500.<sup>3</sup> As AI artists proliferate worldwide,<sup>4</sup> it is clear that a market for AI-generated art exists.

As such, GenAI models may become substitutes for artists and creators while exploiting their works for training purposes,<sup>5</sup> thereby putting authors’ livelihoods at risk.<sup>6</sup>

With rising increase in interest and availability—coinciding especially with modern GenAI tools like DALL·E and Midjourney—specific regulations must be implemented to ensure these systems adhere to updated ethical, legal and economical standards.

### 1.2 Technical aspects and legal issues

Most modern AI Models—also called Large Language Models (“LLMs”)—are machine learning models trained on large quantities of unlabeled text in a self-supervised manner.<sup>7</sup> These models combine numerous representations of the inputs obtained from vast training datasets—containing both public-domain and copyrighted works<sup>8</sup>—producing a seemingly completely new image, not similar to any of the ones present in the training dataset.

This abstraction, compression and reconstitution should break the connection between the original image and the new expression of the model. However, research shows that LLMs effectively “memorize” significant details

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<sup>2</sup> Smith GW and Leymarie FF, ‘The Machine as Artist: An Introduction’ (2017) 6 Arts 5

<sup>3</sup> Christie’s, ‘Obvious and the interface between art and artificial intelligence’ (Christie’s, 12 December 2018) <<https://www.christies.com/en/stories/a-collaboration-between-two-artists-one-human-one-a-machine-0cd01f4e232f4279a525a446d60d4cd1>> Accessed 7 November 2025

<sup>4</sup> Cetinic E and She J, ‘Understanding and Creating Art with AI: Review and Outlook’ (arXiv, 18 February 2021) <<http://arxiv.org/abs/2102.09109>> Accessed 25 June 2025

<sup>5</sup> Jiang HH and others, ‘AI Art and Its Impact on Artists’, *Proceedings of the 2023 AAAI/ACM Conference on AI, Ethics, and Society* (ACM 2023)

<<https://dl.acm.org/doi/10.1145/3600211.3604681>> Accessed 9 July 2025

<sup>6</sup> Shen C, ‘Fair Use, Licensing, and Authors’ Rights in the Age of Generative AI’ (2024) 22 *Northwestern Journal of Technology and Intellectual Property* 157

<sup>7</sup> Sag M, ‘Copyright Safety for Generative AI’ (2023) 61 *Houston Law Review* 295

<sup>8</sup> Sag M, ‘Copyright Safety for Generative AI’ (2023) 61 *Houston Law Review* 295

of some inputs, occasionally producing outputs that resemble copyrighted works.<sup>9</sup>

While some studies indicate limited memorization in smaller models,<sup>10</sup> the same cannot be said for the most widely deployed AI systems;<sup>11</sup> although this can be mitigated by best practices such as eliminating duplicates and output filtering.<sup>12</sup>

To summarise, while AI models, in order to produce high quality outputs, need to heavily rely on copyrighted training data, the debt they owe consists largely of uncopyrightable abstractions,<sup>13</sup> and ideas or styles are not copyrightable.<sup>14</sup>

Thus, copyright issues remain blurred at best and nonexistent at worst, leaving courts or legislatures to define the boundaries.

## 2. Legal Framework

### 2.1 The European Union

A central component of GenAI models is text and data mining (“TDM”),<sup>15</sup> which is crucial for training modern models, and as such the respective legal framework has to be applied.

In the European Union, TDM is defined in Article 2(2) of the Copyright in the Digital Single Market Directive (“CDSMD”)<sup>16</sup> as

‘... any automated analytical technique aimed at analysing text and data in digital form in order to generate information ...’

and, in EU law, it has been accepted by most that this definition does cover the pre-training and training activities needed to develop AI Models—with the AI Act reiterating this view.<sup>17</sup>

The CDSMD also lists two notable TDM exceptions:

1. Article 3 allows research organizations and cultural-heritage institutions to conduct TDM for scientific research;

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<sup>9</sup> Sag M, ‘Copyright Safety for Generative AI’ (2023) 61 Houston Law Review 295

<sup>10</sup> Henderson P and others, ‘Foundation Models and Fair Use’ (arXiv, 28 March 2023) <<http://arxiv.org/abs/2303.15715>> Accessed 4 November 2025

<sup>11</sup> Sag M, ‘Copyright Safety for Generative AI’ (2023) 61 Houston Law Review 295

<sup>12</sup> Samuelson P, ‘Generative AI Meets Copyright’ <[https://www.science.org/doi/pdf/10.1126/science.adi0656?casa\\_token=ac94CA12H1IAAAAAA:YOYJ1o31KCcVrh\\_RdYHJcW4-yqWcPneth3T0quZOw6WTrtf70Xojoso1o3i2ISaGyt5cr0Uo1ckWkg](https://www.science.org/doi/pdf/10.1126/science.adi0656?casa_token=ac94CA12H1IAAAAAA:YOYJ1o31KCcVrh_RdYHJcW4-yqWcPneth3T0quZOw6WTrtf70Xojoso1o3i2ISaGyt5cr0Uo1ckWkg)> accessed 6 November 2025

<sup>13</sup> Sag M, ‘Copyright Safety for Generative AI’ (2023) 61 Houston Law Review 295

<sup>14</sup> Copyright Basic, Circular One. <<https://www.copyright.gov/circs/>> Accessed November 8, 2025

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<sup>15</sup> Due to length constraints, I cannot tackle in detail the fact that often the training dataset obtained through TDM is done by third-parties, and not the AI company itself; for example, in the *Andersen v. Stability AI Ltd.* case, the training dataset was produced by LAION, a nonprofit organization in Germany: as we will see, in the European Union, LAION’s TDM activities would be lawful under Article 3 of the CDSMD.

<sup>16</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125 (2019, April 17).

<sup>17</sup> Quintais JP, ‘Generative AI, Copyright and the AI Act’ (2025) 56 Computer Law & Security Review 106107

2. Article 4 allows TDM use by anyone if the works are lawfully accessible and rights holders have not opted out.<sup>18</sup>

The EU Artificial Intelligence Act (“AI Act”)<sup>19</sup> builds on this framework, ensuring entities engaging in TDM under Article 3 are largely exempt from the Act’s broader implications.<sup>20</sup>

As such, questions arise regarding who must comply with TDM-related restrictions. The AI Act establishes several copyright-related obligations, most notably:

- 1) Article 53(1)(c), requiring models to comply with EU copyright law and to respect opt-outs by rights holders; and
2. Article 53(1)(d), requiring providers to publish a summary of the model’s training content. This disclosure assists in determining where training occurred, whether access was lawful, and whether opt-outs were respected.

However, TDM is often performed by third parties rather than AI companies themselves, creating an uneven distribution of liability.

TDM activities could be done for the purpose of scientific research by a third party—that does not need to comply with the opt-out requirement—and then made publicly accessible. Then, commercial AI companies could effectively obtain the necessary datasets for the training of their models, without complying with the AI Act restrictions.

This is something that is already happening, like in the case of LAION, a non-profit organization that provides datasets, tools, and models for machine learning research, also used by commercial generative AI providers, such as Stable Diffusion.<sup>21</sup>

Per Article 101 of the AI Act, violations may incur fines not exceeding 3 percent of global annual turnover in the preceding financial year or € 15 million, whichever is higher.

Importantly, the AI act does not allow private enforcement; private parties may only file a complaint with the EU AI Office.

In case of infringement, sanctions would not compensate copyright holders directly.

The objective is instead to pressure AI companies to comply with EU copyright law—thus designing and

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<sup>18</sup> Quintais JP, ‘Generative AI, Copyright and the AI Act’ (2025) 56 Computer Law & Security Review 106107

<sup>19</sup> Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (Eu) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L, 2024/1689, 12.7.2024 (2024, June 13). Retrieved June 22, 2025, from <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>

<sup>20</sup> Quintais JP, ‘Generative AI, Copyright and the AI Act’ (2025) 56 Computer Law & Security Review 106107

<sup>21</sup> Quintais JP, ‘Generative AI, Copyright and the AI Act’ (2025) 56 Computer Law & Security Review 106107

creating better models, with a minor risk of copyright infringement—and to enter into licensing deals with the holders of remuneration rights.<sup>22</sup>

## 2.2 The United States of America

The U.S. legal system relies heavily on case law, where fair use is a fact-specific doctrine requiring case-by-case analysis.<sup>23</sup> Given the sudden emergence of GenAI, a legal gap has developed that courts may take years to fill.

Nonetheless, several prominent lawsuits—*Disney Enterprises v. Midjourney*,<sup>24</sup> *Bartz v. Anthropic*,<sup>25</sup> and *Andersen v Stability AI*<sup>26</sup>—raise claims involving both training-phase liability and output-based infringement.

In *Kadrey* and *Bartz*, courts suggested that training LLMs using copyrighted materials can constitute a transformative fair use,<sup>27,28,29</sup> though the fair use doctrine needs all factors ‘... to be explored, and the results weighed together, in light of the purposes of copyright’.<sup>30</sup>

This view is mostly shared by the U.S. Copyright Office, which states that

‘training a generative AI foundation model on a large and diverse dataset will often be transformative. [...] But transformativeness is a matter of degree, and how transformative or justified a use is will depend on the functionality of the model and how it is deployed.’<sup>31,32</sup>

The first and fourth fair-use may carry considerable weight in GenAI cases,<sup>33</sup> and the Supreme Court has repeatedly described the impact of the fourth factor, the impact on the potential market, as the ‘undoubtedly the single most important element of fair use’.<sup>34</sup>

Courts have stressed that using copyrighted books to develop a commercial market capable of producing competing works may fail the fourth-factor analysis, especially when market harm is significant.<sup>35</sup>

In the end, while these cases remain pending, judicial momentum seems to favour protecting authors where GenAI outputs function as market substitutes. This favor would also support licensing schemes between artists and

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<sup>22</sup> Quintais JP, ‘Generative AI, Copyright and the AI Act’ (2025) 56 Computer Law & Security Review 106107

<sup>23</sup> *Kadrey v. Meta Platforms, Inc.*, 3:23-cv-03417, (N.D. Cal.)

<sup>24</sup> *Disney Enterprises Inc. v. Midjourney Inc.*, 2:25-cv-05275, (C.D. Cal.)

<sup>25</sup> *Bartz v. Anthropic PBC*, 3:24-cv-05417, (N.D. Cal.)

<sup>26</sup> *Andersen v. Stability AI Ltd.*, 3:23-cv-00201, (N.D. Cal.)

<sup>27</sup> *Kadrey v. Meta Platforms, Inc.*, 3:23-cv-03417, (N.D. Cal.)

<sup>28</sup> *Bartz v. Anthropic PBC*, 3:24-cv-05417, (N.D. Cal.)

<sup>29</sup> Section 107 of the Copyright Law of the United States (Title 17) and Related Laws. Contained in Title 17 of the United States Code (n.d.).

<sup>30</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)

<sup>31</sup> While still in pre-publication, the Copyright Office states that the final version is going to be published without any substantive changes expected in the analysis or conclusions.

<sup>32</sup> U.S. Copyright Office, Copyright and Artificial Intelligence Part 3: Generative AI Training [Pre-Publication], May 2025 <<https://www.copyright.gov/ai/>> Accessed 8 November 2025

<sup>33</sup> U.S. Copyright Office, Copyright and Artificial Intelligence Part 3: Generative AI Training [Pre-Publication], May 2025 <<https://www.copyright.gov/ai/>> Accessed 8 November 2025

<sup>34</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). See also *Stewart v. Abend*, 495 U.S. 207, 238 (1990)

<sup>35</sup> U.S. Copyright Office, Copyright and Artificial Intelligence Part 3: Generative AI Training [Pre-Publication], May 2025

AI companies without any government intervention, as clearly stated by the Copyright Office in their report.<sup>36</sup>

### 2.3 Jurisdictions Compared

The European Union, through the AI Act, has taken a strong regulatory approach, addressing all AI issues through the AI Act, creating clear boundaries, opt-out rights, and compliance obligations. This framework provides predictable rules, but leaves some questions for future clarification.

The U.S. has deferred to courts, embracing a common-law, case-by-case approach centered on fair use. Scholars and the Copyright Office generally believe the fair use doctrine can address GenAI challenges without government intervention, with the exception of some fringe cases regarding market failures.<sup>37,38</sup>

Summarizing the comparison between these legal traditions, the EU has decided to enforce rules to protect its constituents and regulate its market, while still leaving to privates—AI companies and artists, in this context—the ability to partake in contracts for the works' copyright.

On the other hand, the US has fully left it to the licensing market to adapt and create innovative schemes to best suit the needs of both parties, while giving courts the

duty to enforce the fair use doctrine in those cases where it's needed.

### 3. Policy Recommendations and Conclusion

GenAI's potential to disrupt the creative market is significant. The EU, with the AI Act, creates avenues for artists to prevent datasets inclusion or negotiate compensation, while U.S. courts may shape a licensing environment organically through fair-use jurisprudence. However, these pathways do not fully address concerns that GenAI models may become substitutes for human creators.<sup>39</sup>

While the intermediary "copying" necessary for training is likely transformative and falls outside the creative markets in which artists operate, the outputs of these models may nonetheless become direct substitutes for human-created works, thereby putting authors' livelihoods at risk.<sup>40</sup>

As such, even though mechanisms like licensing arrangements in the EU and the U.S. or the AI Act's opt-out provision—albeit not a perfect execution<sup>41</sup> and not

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<sup>36</sup> U.S. Copyright Office, Copyright and Artificial Intelligence Part 3: Generative AI Training [Pre-Publication], May 2025

<sup>37</sup> U.S. Copyright Office, Copyright and Artificial Intelligence Part 3: Generative AI Training [Pre-Publication], May 2025

<sup>38</sup> Shen C, 'Fair Use, Licensing, and Authors' Rights in the Age of Generative Ai' (2024) 22 *Northwestern Journal of Technology and Intellectual Property* 157

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<sup>39</sup> Jiang HH and others, 'AI Art and Its Impact on Artists', *Proceedings of the 2023 AAAI/ACM Conference on AI, Ethics, and Society* (ACM 2023) <<https://dl.acm.org/doi/10.1145/3600211.3604681>> accessed 9 July 2025

<sup>40</sup> Shen C, 'Fair Use, Licensing, and Authors' Rights in the Age of Generative Ai' (2024) 22 *Northwestern Journal of Technology and Intellectual Property* 157

<sup>41</sup> 'When can it occur? At what level of the activity of the TDM/Training? Who holds the right to opt-out?' See Quintais JP, 'Generative AI, Copyright and the AI Act' (2025) 56 *Computer Law & Security Review* 106107

without its “loopholes”<sup>42</sup>—offer partial protection, additional measures may be needed to ensure a sustainable transition to a market in which GenAI systems will increasingly become the norm.

Potential recommendations and policy responses include:

1. Pushing governments to actively pursue and fund research regarding GenAI and its consequences on the creative market, in order to best inform the policies that need to be taken.<sup>43</sup>
2. Transparency for all GenAI models, informing users for the inputs and outputs, through various means:
  - a. By making the training dataset public, assuring artists that their works were not unlawfully utilized.<sup>44</sup> This also would help maintain the competitiveness of the AI market, both by promoting licensing schemes and by making sure that large models do not have a monopoly on high-quality training data.<sup>45</sup>
  - b. By mandating “AI-generated” labels on outputs to avoid deception. In the EU, this could be done by regulation; in the U.S., it would require federal legislation.
3. Restricting AI-generated content in certain sectors, particularly public institutions, in order to use GenAI only in those cases where efficiency is maximized and possible risks are minimized.<sup>46</sup> This would allow for a careful use of AI models, while still retaining human workers when needed.
4. Pushing for licensing schemes when market failures show up, as it has been shown multiple times that licensing human works for training AI models is the way forward to sustain both the AI sector and the traditional creative industries. In those cases where licensing fails, it should be up to the government to step in and make sure that a deal is found.
5. Offering subsidies or tax credits to entities hiring or promoting human creators rather than using AI-generation tools. This would make sure that AI models are still adopted when the savings are high, while retaining traditional human artists when the costs are covered by the government.

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<sup>42</sup> The case of TDM done by third parties, and not the commercial AI Model, bypassing the AI Act

<sup>43</sup> Glenster AK and others. *Policy Brief: AI, Copyright, and Productivity in the Creative Industries*. Minderoo Centre for Technology & Democracy. (2025)

<<https://doi.org/10.17863/CAM.115766>>

<sup>44</sup> Buick A, ‘Copyright and AI Training Data—Transparency to the Rescue?’ (2025) 20 *Journal of Intellectual Property Law and Practice* 182

<sup>45</sup> Zuzanna Warso, Maximilian Gahntz and Paul Keller, Sufficiently Detailed? A Proposal for Implementing the AI Act’s Training Data Transparency Requirements for GPAI (Open Future, 2024).

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<sup>46</sup> OECD, *Governing with Artificial Intelligence: The State of Play and Way Forward in Core Government Functions* (OECD Publishing 2025)

<[https://www.oecd.org/en/publications/governing-with-artificial-intelligence\\_795de142-en.html](https://www.oecd.org/en/publications/governing-with-artificial-intelligence_795de142-en.html)> accessed 1 December 2025

6. Requiring companies adopting AI to conduct workforce-impact assessments, in order to identify what jobs can be automated. This also helps in finding out which skill-sets need retraining, as it has been found that adopting AI does increase the need for complementary skills.<sup>47</sup>

Ultimately, while one perfect solution doesn't exist, various policies can be weaved together to create a strong and sturdy net. Governments must ensure that legal frameworks evolve alongside GenAI to protect creative labor without hindering progress.

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<sup>47</sup> Mäkelä E and Stephany F, 'Complement or Substitute? How AI Increases the Demand for Human Skills'

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