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Generative AI and Copyright in the EU and the US: A View from International Investment Law

Gabriel M. Lentner

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Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Dr. Gabriel M. Lentner is Associate Professor of International Law and Arbitration at the University of Continuing Education Krems and TTLF Affiliate at Stanford Law School. The author wishes to thank Cihan Karasu for valuable research assistance.

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Copyright

Abstract

Generative artificial intelligence (GenAI) has disrupted traditional copyright frameworks by enabling large-scale ingestion of protected works for model training, sparking litigation and regulatory responses in the United States and the European Union. While existing debates focus on domestic law doctrines such as fair use and text-and-data-mining exceptions, this paper explores an underexamined dimension: the potential role of international investment law (IIL) in disputes arising from state measures—or omissions—affecting copyright holders. Many international investment agreements (IIAs) explicitly include intellectual property within the definition of 'investment,' raising the possibility that failures to enforce copyright or permissive regulatory stances toward AI training could trigger claims under standards such as full protection and security (FPS), fair and equitable treatment (FET) or indirect expropriation. Drawing on arbitral jurisprudence and doctrinal analysis, the paper evaluates the jurisdictional threshold for copyright-based investments and examines the viability of ISDS claims in this context. It concludes by finding that there are possible scenarios where certain claims could be successful.

Contents

1. Introduction

Generative artificial intelligence (GenAI) has rapidly transformed the creation and dissemination of content,[1] but it has also ignited a wave of copyright litigation.[2] High-profile cases such as *The New York Times v. OpenAI and Microsoft*[3] and *Getty Images v. Stability AI*[4] illustrate the growing tension between AI developers and rightsholders over the use of copyrighted works in training large language models.[5]

At the same time, regulators are responding with ambitious frameworks, most notably the European Union's Artificial Intelligence Act[6], which imposes transparency and governance obligations on providers of general-purpose AI systems. These developments have so far unfolded within the familiar terrain of domestic copyright law and regulatory compliance. Yet, one potential legal avenue for disputes over AI training data and copyright enforcement remains understudied: international investment law (IIL).

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[1] Luciano Floridi, 'On the Future of Content in the Age of Artificial Intelligence: Some Implications and Directions' (2024) 37 Philosophy & Technology 112. For a survey on how GenAI has impacted the experiences of college students, see Shikoh Hirabayashi and others, 'Harvard Undergraduate Survey on Generative AI' (2 June 2024) <http://arxiv.org/pdf/2406.00833v2>.

[2] As of 12 August 2025, 45 lawsuits in the US are pending against AI companies, according to the Master List on AI and Copyright https://chatgptiseatingtheworld.com/2024/08/27/master-list-of-lawsuits-v-ai-chatgpt-openai-microsoft-meta-midjourney-other-ai-cos/ . See generally on legal issues regarding GenAI, Matthew Sag, 'Copyright Safety for Generative AI' (2023) 61 Houston Law Review 295; James Grimmelmann, 'Copyright's Latent Space: Generative AI and the Limits of Fair Use' (2025) Cornell Law Review (forthcoming); Pamela Samuelson, 'Artificial Intelligence and the Creative Double Bind' (2024) 138 Harvard Law Review 1234.

[3] *The New York Times Company v Microsoft Corporation and others* (S.D.N.Y., No 1:23-cv-11195, filed 27 December 2023).

[4] *Getty Images (US) Inc and others v Stability AI Ltd* [2025] EWHC 38 (Ch) (Business and Property Courts, Chancery Division, 14 January 2025).

[5] The literature on copyright and AI is vast. Searching the words 'copyright' and 'Generative AI' in legal academic databases (HeinOnline, NexisUni) results in hundreds of results. See also Mark A Lemley and Lisa L Ouellette, 'Plagiarism, Copyright, and AI' (2025) draft University of Chicago Law Review Online 1, fn 4.

[6] 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) [2024] OJ L 1689, 12.7.2024.

IIL might be an avenue for copyright holders to challenge what many authors believe is illegal and uncompensated use of their works by LLMs. Many international investment agreements (IIAs) define 'investment' to include intellectual property rights and provide protections such as fair and equitable treatment (FET) and safeguards against direct and indirect expropriation.[7] This architecture creates a potential—albeit untested—pathway for rightsholders to frame regulatory measures, court decisions against claims by authors, or enforcement failures as treaty breaches. For instance, a foreign investor might argue that a host state's permissive stance toward text-and-data mining, substantially deprives it of the value of its IP-based investment. Conversely, states may invoke public policy defenses, TRIPS-consistency carve-outs, and the right to regulate to shield themselves from liability. The resulting interplay between copyright law, AI governance, and investment treaty arbitration raises profound questions about regulatory autonomy, investor protection, and the risk of 'regulatory chill' in the digital economy.

This paper explores whether and how investment treaty arbitration could become a forum for resolving copyright disputes arising from generative AI, in cases where states do not find a balanced regulatory response to safeguard not only AI developers and companies but also authors' and publishers' interests. It proceeds as follows. Section 2 explains the practices of GenAI in the relevant respects affecting rightholders and the legal issues it raises in the US and the EU under domestic law. On that basis, Section 3 then examines

[7] An early empirical study of existing IIAs has found as much, see Rachel A Lavery, 'Coverage of Intellectual Property Rights in International Investment Agreements: An Empirical Analysis of Definitions in a Sample of Bilateral Investment Treaties and Free Trade Agreements' (2009) 6(2) Transnational Dispute Management 1. See generally Simon Klopschinski, Christopher S Gibson and Henning Grosse Ruse-Khan, *The protection of intellectual property rights under international investment law* (Oxford University Press 2021) On the inclusion of IP in EU IIAs, see Siegfried Fina and Gabriel M Lentner, 'The European Union's New Generation of International Investment Agreements and Its Implications for the Protection of Intellectual Property Rights' (2017) 18(2) The Journal of World Investment & Trade 271.

the doctrinal foundations of IP protection under IIAs, and considers under what conditions claims that could be brought under these agreements. What follows is a close look at scenarios and evaluation of potential protection standards in section 4, before section 5 concludes with final thoughts on the findings.

2. Background on GenAI and the Legal Issues under Domestic Law

Large Language Models require a lot of training data– but not just any kind of data. AI companies—including OpenAI, Anthropic, Meta, and Stability AI—have reportedly trained their models using vast datasets composed of millions of copyrighted works, often without obtaining prior consent or providing remuneration to the original authors.[8] These AI systems therefore rely on pre-existing creative works, which they algorithmically analyze, abstract, and transform to generate new outputs. This practice has led to a situation in which these companies are now valued in the billions,[9] while the creators of the underlying content receive no share in the resulting economic gains.[10] It is for these and other reasons that rightholders might wish to pursue international investment arbitration, should State courts decide against them in their cases brought for copyright

[8] Lena Waltle and Gioia da Silva, 'KI basiert auf dem grössten Datenraub der Geschichte' (NZZ, 26 June 2025).
[9] OpenAI: Tom Dotan and Berber Jin, 'OpenAI's Valuation Soars to $300 Billion in Tender Offer' (The Wall Street Journal, 29 July 2025) https://www.wsj.com/tech/openai-valuation-300-billion-tender-offer-2025 accessed 28 August 2025; Anthropic: Katie Roof, 'Anthropic Raises $5 Billion, Valuation Jumps to $170 Billion' (Bloomberg, 25 July 2025) https://www.bloomberg.com/news/articles/2025-07-25/anthropic-raises-5-billion-valuation-hits-170-billion accessed 28 August 2025; Meta AI: Meta Platforms Inc, 'Q2 2025 Earnings Report' (Meta Investor Relations, 24 July 2025) https://investor.fb.com/financials accessed 28 August 2025; Stability AI: James Vincent, 'Stability AI's Valuation Remains Under $5 Billion Amid Industry Shakeup' (The Verge, 10 June 2025) https://www.theverge.com/2025/06/10/stability-ai-valuation-update accessed 28 August 2025.
[10] Lena Waltle and Gioia da Silva, 'KI basiert auf dem grössten Datenraub der Geschichte' (NZZ, 26 June 2025).

infringement or otherwise introduce measures, such as legislation that frustrates their existing rights. or remain passive.

In the US legal system, the copyright questions surrounding GenAI generally revolve around 'fair use'.[11] According to this view, the issue becomes whether ingesting copyrighted works for model training satisfies the statutory factors.[12] Some scholars, however, reject this framing entirely, arguing that courts need not reach fair use because training copies should not be actionable in the first place. This position rests on the argument that training involves no reproduction of copyrightable subject matter,[13] or are simply viewed as 'immaterial both literally and figuratively'[14]. Mark A. Lemley and Bryan Casey argue that ML systems should generally be able to use databases for training, whether or not the contents of that database are copyrighted.[15] Among those who accept fair use as the operative inquiry, the dominant arguments emphasize either the transformative nature of training—because the purpose differs fundamentally from that of the original works—or its characterization as non-expressive use.[16] Pamela Samuelson, for example, views AI training as likely transformative,[17] and Matthew Sag analogizes it to text and data mining, suggesting courts should treat it as non-

[11] Melville B Nimmer and David Nimmer, *Nimmer on Copyright* (LexisNexis 2024) § 20.05[C][1]; B. J Ard, 'Copyright's Latent Space: Generative AI and the Limits of Fair Use' (2025) 110 Cornell Law Review 509-595, 512.
[12] Melville B Nimmer and David Nimmer, *Nimmer on Copyright* (LexisNexis 2024) § 20.05[C][1].
[13] Oren Bracha, 'The Work of Copyright in the Age of Machine Production' (2024) 38 Harvard Journal of Law & Technology 171, 181; Michael D Murray, 'Generative AI Art: Copyright Infringement and Fair Use' (2023) 26 SMU Science and Technology Law Review 259, 285–86.
[14] Carys J Craig, 'The AI-Copyright Trap' (forthcoming 2025) 100 Chicago-Kent Law Review (manuscript at 22–23, draft 15 July 2024, on file with author).
[15] Mark A Lemley and Bryan Casey, 'Fair Learning' (2021) 99 Texas Law Review 743.
[16] Pamela Samuelson, 'Fair Use Defenses in Disruptive Technology Cases' (2024) 71 UCLA Law Review 1484, 1558; Matthew Sag, 'Copyright Safety for Generative AI' (2023) 61 Houston Law Review 295, 308.
[17] Pamela Samuelson, 'Fair Use Defenses in Disruptive Technology Cases' (2024) 71 UCLA Law Review 1484, 1558.

expressive.[18] Counterarguments challenge both premises: Benjamin Sobel warns that computerized 'consumption' of expression can still implicate expressive value,[19] while David Opderbeck questions the doctrinal basis for non-expressive use,[20] and Robert Brauneis interrogates whether analogies to human learning justify AI training under copyright norms.[21] The resulting debate thus divides into three camps: those who see fair use as central, those who deny infringement altogether, and those who remain skeptical of fair use's applicability to generative AI.

Beyond the doctrinal debate, Mark Lemley argues that generative AI does not merely raise a fair use question but destabilizes copyright's foundational architecture.[22] In his view, the rise of AI shifts creativity from producing expressive works to crafting prompts, leaving machines to generate the expressive output.[23] This inversion undermines the traditional idea–expression dichotomy and renders the substantial similarity test—long central to infringement analysis—ill-suited to the new creative process.[24] Where fair use discourse assumes the continued relevance of existing doctrinal tools, Lemley contends that those tools may need to be abandoned or radically rethought because they no longer map onto how creative value is produced in the age of generative AI.[25]

[18] Matthew Sag, 'Copyright Safety for Generative AI' (2023) 61 Houston Law Review 295, 308.
[19] Benjamin LW Sobel, 'Artificial Intelligence's Fair Use Crisis' (2017) 41 Columbia Journal of Law & the Arts 45, 70.
[20] David W Opderbeck, 'Copyright in AI Training Data: A Human-Centered Approach' (2024) 76 Oklahoma Law Review 951, 976.
[21] Robert Brauneis, 'Copyright and the Training of Human Authors and Generative Machines' (2025) 48(1) JLA.
[22] Mark A Lemley, 'How Generative AI Turns Copyright Upside Down' (2024) 25 Columbia Science & Technology Law Review 21.
[23] ibid 25–26.
[24] ibid 26–34.
[25] ibid.

In the EU and to illustrate a concrete jurisdiction, Austria is taken as an example, where arguments are made that the acquisition and preprocessing of training data already involve acts of reproduction, particularly when protected works are temporarily saved.[26] During training, further reproductions occur, raising the issue of whether encoding data into neural networks constitutes reproduction.[27] This depends on the nature of the extracted information—whether general stylistic features or specific expressions of a work are learned.[28] In practice, training datasets are often stored persistently or repeatedly, including in training, validation, and test sets.[29] Multiple digital copies across different datasets are technically necessary to identify patterns, correlations, and deviations. These reproductions typically exceed the scope of legal permissions, such as § 41a Austrian Copyright Law (UrhG) and Article 5(1) of the EU InfoSoc Directive, which do not cover sustained or repeated reproductions integral to the development of AI systems. Even programmed deletion post-training does not render the reproduction 'transient' under CJEU jurisprudence.[30] Moreover, such reproductions serve not merely technical facilitation but are functionally indispensable to the development process, especially in applications involving artistic creation or complex analysis.

The EU has introduced a text-and-data-mining (TDM) exception through the DSM Directive.[31] However, the TDM exception under § 42h(6) Austrian Copyright Law

[26] Roman Konertz and Raoul Schönhof, 'Vervielfältigungen und die Text- und Data-Mining-Schranke beim Training von (generativer) Künstlicher Intelligenz' [2024] WRP – Wettbewerb in Recht und Praxis 289, MN 4 et seq.
[27] ibid.
[28] ibid.
[29] ibid.
[30] CJEU, 16. 7. 2009, C-5/08, GRUR 2009, 1041 - Infopaq.
[31] Directive (EU) 2019/790 on Copyright in the Digital Single Market (DSM Directive). See also *Clemens Bernsteiner/Thomas Schmitt* in *Martini/Wendehorst*, KI-VO Kommentar (2024) § 53 Rz 25; *Malte Baumann*, NJW 2023, 3673 (3675).

(UrhG), for example, applies only where the work is lawfully accessible and no effective opt-out has been declared.[32] Lawful access may arise from contractual agreements or open-access licenses, which must be scrutinized for restrictive terms. Licenses such as CC-NC exclude commercial uses, including AI training. Technical protection measures or access via unlawful sources also preclude applicability, as the three-step test under Article 5(5) InfoSoc Directive remains relevant.[33]

There are legitimate concerns as to whether the EU legislator intended the TDM exception to facilitate the development of applications that systematically infringe exploitation or personality rights. If a developer is aware that their product is widely used for infringing purposes and fails to act, the exception may not apply. This interpretation is supported by the European Commission's AI initiative and Recital 23 of the DSM Directive, which allows Member States to safeguard authors' personality rights.

Notably, while generative AI training was known at the time of the DSM Directive's adoption, it was not explicitly addressed in its scope or recitals. Scholarly debate persists on whether reproductions during AI training fall within the definition of TDM. While the prevailing view affirms this,[34] others argue that the goal of AI training is not knowledge extraction but the creation of commercially viable products—distinct from research-oriented TDM.[35] The requirement that insights be accessible to the user may apply to

[32] *Clemens Bernsteiner/Thomas Schmitt* in *Martini/Wendehorst*, KI-VO Kommentar (2024) § 53 Rz 25; *Malte Baumann*, NJW 2023, 3673 (3675).
[33] *Clemens Bernsteiner/Thomas Schmitt* in *Martini/Wendehorst*, KI-VO Kommentar (2024) § 53 Rz 25; *Malte Baumann*, NJW 2023, 3673 (3675).
[34] Appl in Handig/Hofmarcher/Kucsko, urheber.recht3 § 42h UrhG Rz 39; Hacker, Ein Rechtsrahmen für KI-Trainingsdaten, ZGE 2020, 239 (257); Vesala, Developing Artificial Intelligence-Based Content Creation: Are EU Copyright and Antitrust Law Fit for Purpose?, IIC 2023, 351 (356);
[35] *Philip Jakober/Julie Vinazzer,* Nutzung urheberrechtlich geschützter Werke durch generative KI: aber nur mit Vergütung! MR 2023/6, Beilage 16 (III.2.c); *Schippan*, Der Einsatz von Künstlicher Intelligenz bei der Verarbeitung von journalistischen Inhalten, ZUM 2024, 670; *Wolfgang Zankl* in *Zankl* (Hrsg),

research TDM but not to TDM for private use, which includes the development of new technologies under Recital 18 DSM Directive.

An argument could thus be made that the training of GenAI systems using copyright-protected works generally constitutes acts of reproduction that are not covered by the exceptions for transient copying (§§ 41a, 44a UrhG) or TDM (§ 42h UrhG). Even where formal conditions such as lawful access and absence of opt-out are met, the intensity and economic scale of use diverge significantly from the types of TDM applications originally contemplated by the legislator. The legislator's decision to structure the text and data mining (TDM) exception as royalty-free was premised on the assumption that neither the author's interest in self-determination nor their economic interests would be significantly affected. Arguable, this assumption, however, does not hold in the context of generative AI training. Here, works are reproduced on a massive, systematic, and in some cases permanent scale. The informational content of these works directly shapes the functionality of AI systems and forms the basis of their commercial viability. The resulting models may compete with the original works, potentially diminishing their market value.

This brief overview of the legal debates in the US and the EU show that while the doctrinal foundations and legal theories are different. The core issue of whether and how to resolve the tension between GenAI and copyright are universally shared. For those who seek other legal avenues than domestic law-based litigation on these issues, international investment arbitration promises tools to challenge States' measures not

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Rechtshandbuch der Digitalisierung, Kapitel 23: Künstliche Intelligenz; Pukas, KI-Trainingsdaten und erweiterte kollektive Lizenzen, GRUR 2023, 614 (615).

addressing the perceived imbalance between author rights and value generated by GenAI companies.

3. International Investment Law Perspective

3.1. Basics of International Investment Law

The advantage of international investment arbitration lies in the fact that any state measure, including Court decisions,[36] can give rise to claims of compensation for the foreign investor, should an ad hoc international investment arbitral tribunal find that the state through the challenged measures has violated protection standards guaranteed by IIL.[37] The standards of protections are not depending on domestic law, but are defined in the international investment agreements in force between the state of the nationality of the investor and the host state where the investment was made. For instance, foreign investors are often granted compensation in situations where the host State has frustrated the 'legitimate expectations' of a foreign investor.[38]

An important advantage of so-called investor-state dispute settlement (ISDS) is the right of foreign investors to sue states directly for violations of IIL.[39] These claims are adjudicated not before domestic courts but before an international arbitral tribunal, whose

[36] See *Eli Lilly v Canada* [2017] Case No. UNCT/14/2, [2017] (UNCITRAL).
[37] For the classic textbook on the principles of internaitonal investment arbitration, see Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022).
[38] ibid 208–228.
[39] ibid.

decisions are not subject to appeal.[40] The resulting arbitral award are internationally enforcable either through the ICSID convention[41] or the New York Convention[42].

As already noted, most IIAs explicitly mention intellectual property rights (IPRs) as forms that an investment may take.[43] Whether a (foreign!) investor qualifies for protection, depends first on an applicable IIA between the state of nationality of the investor (in our hypothetical case the nationality of the author, publisher or other right holder) and the host state (ie where the investment has been made). Between the EU and the US, there exists to date no IIA, but with a network of almost 3000 IIAs in force around the world,[44] there will be situations where these requirements of the applicability of an IIA in a copyright-GenAI scenario are satisifed.

3.2. The Jurisdictional Threshold: Copyright as 'Investments'?

The next challenging question is the jurisdictional threshold of an 'investment' covered by the respective IIA, which must be met. Whether and under what circumstances copyrights constitute a covered investment under international investment law has not yet been directly addressed by a tribunal.[45] However, case law has addressed these questions

[40] ibid 433 et seq.
[41] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).
[42] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention).
[43] Lavery (n 7).
[44] See UNCTAD Investment Policy Hub: https://investmentpolicy.unctad.org/international-investment-agreements .
[45] But see the discussion of the pending case in Einarsson v Canada below.

on related IPRs, such as patents[46] and trademarks[47].[48] These can be seen as instructive in analyzing the hypothetical scenario with regard to copyrights.

The first cases decided did not specifically discuss whether IPRs on their own would constitute covered investment under the applicable IIAs. In *Eli Lilly v Canada,* the tribunal in considered patents a covered investment, but did not discuss the specific grounds on which it reached this conclusion. Specifically, it left open the question whether the patents on their own were considered covered investments.[49] Involving trademarks, the tribunal in *Philip Morris v Uruguay*, found 'the Claimants' investments in Uruguay', including trademarks, 'fall within the definition of the term [investments] under Article 1 of the BIT', which explicitly included 'trade or service marks, trade names, indications of source or appellation of origin'.[50] However, here too, it was not the trademarks on their own that were found to be the investment but instead considered it along with the 'long-term, substantial activities in Uruguay' as qualifying

[46] *Eli Lilly v Canada* (n 36).
[47] *Philip Morris v Uruguay* (2016) ICSID Case No ARB/10/7 (ICSID); *Bridgestone v Panama* (2017) ICSID Case No. ARB/16/34 (ICSID).
[48] For a comprehensive treatment of IP and international investment law, see Klopschinski, Gibson and Grosse Ruse-Khan (n 7).
[49] *Eli Lilly v Canada* (n 36). See also Gabriel M Lentner, 'Litigating patents in investment arbitration: Eli Lilly v Canada' (2017) 12(10) Journal of Intellectual Property Law & Practice 815; Pratyush N Upreti, 'Intellectual Property Rights in Investment Treaty Arbitration: A Critical Examination of the Philip Morris & Eli Lilly Awards' [2020] TTLF Working Paper No 67 1; Henning Grosse Ruse-Khan, Kathleen Liddell and Michael Waibel, 'Amicus Curiae Brief' [2016] University of Cambridge Faculty of Law Research Paper 1; Boris Kasolowsky and Eric Leikin, 'Eli Lilly v. Canada: A Patently Clear-Cut Dismissal on the Facts, but Opening the Door for Future Claimants on the Law' (2017) 34(5) Journal of International Arbitration 889; Ruth L Okediji, 'Is Intellectual Property "Investment"? Eli Lilly v. Canada and the International Intellectual Property System' (2014) 35 University of Pennsylvania Journal of International Law 1121; Brook K Baker and Katrina Geddes, 'Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines - Eli Lilly v. Canada and the Trans-Pacific Partnership Agreement' (2015) 32(1) Journal of Intellectual Property Law 1; Brook K Baker and Katrina Geddes, 'The Incredible Shrinking Victory: Eli Lilly v. Canada, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS' (2017) 49 Loyola University Chicago Law Journal 479.
[50] *Philip Morris v Uruguay*, Decision on Jurisdiction (2 July 2013), paras 24, 183, and 194.

'investments'.[51] For the question of copyright-protected works abroad, these cases are not instructive, but they do highlight the fact that generally, 'investments' are 'complex operations.'[52] As such copyrights might very well be part of an investment that according to the doctrine of the 'unity of an investment' might be treated by a tribunal as an investment.[53]

What these activities are in connection with a copyright remains unclear. There has been only one detailed analysis by an investment tribunal of IPRs as such in *Bridgestone v Panama*.[54] Here the question was whether trademarks and licenses (of the marks 'Bridgestone' and 'Firestone' respectively) constituted an investment in the host state.[55] The applicable investment agreement (the US-Panama TP[56]) contained a broad definition of 'investment' that listed – as many BITs do[57] – intellectual property rights also as forms that an investment may take.[58] These tend to introduce a non-exhaustive list of forms that an investment may take but under the primary conditions that these (including IPRs) have the 'characteristics' of an investment. In *Bridgestone v Panama*, the tribunal noted in reference to the Salini test,[59] that 'there is no inflexible requirement for the presence of *all* these characteristics, but that an investment will normally evidence most of them'.[60]

[51] *Philip Morris v Uruguay* (n 47) para 209.
[52] Dolzer, Kriebaum and Schreuer (n 37) 99.
[53] Cf ibid 99–100.
[54] *Bridgestone v Panama* (n 47).
[55] Comprehensively on this, see Metka Potocnik, *Arbitrating Brands: International Investment Treaties and Trade Marks* (Edward Elgar 2019).
[56] United States and Panama, 'Trade Promotion Agreement' (signed 28 June 2007, entered into force 31 October 2012).
[57] Lavery (n 7).
[58] *Bridgestone v Panama* (n 47) paras 164, 166.
[59] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).
[60] ibid para 165 (emphasis in the original).

The tribunal applied this test to the commercial activities of the investor and key was the 'exploitation' of the trademark. The investor had promoted the trademark in the host state's market and the tribunal thus found that 'the promotion involves the commitment of resources over a significant period, the expectation of profit and the assumption of the risk that the particular features of the product may not prove sufficiently attractive to enable it to win or maintain market share in the face of competition.'[61] What the tribunal also noted was that this would not be satisfied when there is a mere registration of a trademark without exploitation.[62] In the words of the tribunal, exploitation

> accords to the trademark, by the activities to which the trademark is central, the characteristics of an investment. It will involve devotion of resources, both to the production of the articles sold bearing the trademark, and to the promotion and support of those sales. It is likely also to involve after-sales servicing and guarantees. This exploitation will also be beneficial to the development of the home State. The activities involved in promoting and supporting sales will benefit the host economy, as will taxation levied on sales. Furthermore, it will normally be beneficial for products that incorporate the features that consumers find desirable to be available to consumers in the host country.[63]

[61] ibid para 169.
[62] ibid para 171.
[63] *Einarsson v Canada* [2019] ICSID CASE No UNCT/20/6, [2019] (UNCITRAL) para 172.

Such finding appears to be in line with decisions on whether copyrights (and other IPRs) fall within the scope of Article 1 of Protocol No 1 of the European Court of Human Rights (ECtHR) providing fundamental rights protection for property in a broad sense.[64]

Decisive for considering a copyright (and related rights) as an 'investment' will therefore be its relation to other commercial activities abroad, such as marketing, promoting and distributing the copyright-protected work. Merely owning a copyright without 'exploiting' it in the host State will therefore likely not satisfy the conditions for an 'investment' under most IIAs. However, a copyright along with marketing activities may very well fulfill the Salini requirements. Furthermore, as the tribunal in *Bridgestone v Panama* also found, the licensing of an IPR (in that case a trademark) may itself constitute such exploitation.

It therefore seems reasonable to assume that in certain circumstances copyrights can be protected by IIAs. A hypthetical investment along these lines could be a mid-sized European publishing house that invests in establishing a regional marketing and distribution hub in Singapore to expand its English-language academic titles into Southeast Asia. The investment includes leasing office space, hiring local marketing staff, and entering into agreements with regional distributors and university bookstores. The publisher would also allocate funds for localized promotional campaigns, such as sponsoring academic conferences, running targeted digital advertising, and translating selected frontlist titles into Bahasa Indonesia and Thai. This physical and contractual

[64] *Balan v. Moldavia* App no. 19247/03 (ECHR 29 January 2008); *Dima v. Romania* App no. 58472/00 (ECHR 26 May 2005); *Melnitchouk v. Ukraine* App no. 28743/03 (ECHR 5 July 2005), ECHR 2005-IX. See also Christophe Geiger, 'Intellectual Property and Investment Protection: A Misleading Equation' in V. Fischer and others (eds), *Gestaltung der Informationsrechtsordnung - Festschrift für Thomas Dreier zum 65. Geburtstag* (Beck 2022) 15.

presence abroad would represent a significant commitment of capital, expectation of profit, a certain duration, assumption of risk and contribution to the economic development of the host State– all of which are characteristics of an investment according to the Salini requirements.[65]

A closer look at the pending investment case involving copyrights in seismic data might be helpful. In *Einarsson v Canada*[66] seismic data was recognised under domestic law as protected by copyright.[67] As such it would immediately fulfil the definition of 'investment' of the applicable IIA (NAFTA). According to Article 1139 NAFTA, investment covers, among other things, 'intangible' property, which, as an early commentator pointed out, naturally includes IPRs.[68]

In addition, the requirement that 'investments' are made 'in the territory of the host state' might, however, constitute an obstacle in some cases. It will have to be shown that the copyrights 'investments' at issue that were allegedly violated by not enforcing them against GenAI developers were indeed made (and violated) in the host State.

Still, as pointed out above, merely owning a copyright in the host State would not, as such, satisfy the investment definition.[69] Rather it is the economic activities in connection

[65] Klopschinski, Gibson and Grosse Ruse-Khan (n 7) 159.
[66] *Einarsson v Canada* (n 63). For a preliminary analysis of the case, see Gabriel M Lentner, 'International investment law and data, copyrights and performance requirements: a closer look at Einarsson v Canada' (2023) 18(6) Journal of Intellectual Property Law & Practice 446.
[67] For a discussion on how to classify the data itself or the business as covered investment, see Ivan Stepanov, 'Investor-State Dispute Settlement and Data: Implications for Data Policy and Regulation' (2020) 69(12) GRUR International 1242, 1243–1244.
[68] Allen Z Hertz, 'Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements and at the World Trade Organization' (1997) 23 Canada-United States Law Journal 261, 295.
[69] *Bridgestone v Panama* (n 47) para 171 ('[…] the mere registration of a trademark in a country manifestly does not amount to, or have the characteristics of, an investment in that country.' For commentary see Gabriel M Lentner, 'Bridgestone v Panama: When Are Trademarks Covered Investments?' (2019) 34(3) ICSID Review 569. See also Fina and Lentner (n 7) 283.

with it, which – taken together – amount to an investment.[70] And here the *Bridgestone* case shows that this threshold can be cleared when the copyright is 'exploited'. The very fact that potential claimaints will be those that generate significant revenue by 'exploiting' their copyrights directly or by licensing them, points to the fact that this can be easily met. As held by the tribunal in *Bridgestone v Panama*, licensing IPRs is one way to exploit them,[71] so in this context that condition would be satisfied.

In conclusion, one could imagine a scenario, where the copyrights/licenses of a publisher would form part of the unity of the investment and the destruction of their value through a state's lack of copyright enforcement with respect to a GenAI company's unauthorized use of protected work in that jurisdiction could – as will be discussed below – constitute a violation of the applicable IIA.

Accordingly, a single author holding a copyright without further commercial activities would not amount to an 'investment' in the defined sense. And the question whose and what rights specifically are at issue is to be determined primarily by the host State law and not international law.[72]

As a result, certain situations can be envisaged in which this jurisdictional hurdle may be overcome.

[70] *Bridgestone v Panama* (n 47) para 172.
[71] *Bridgestone v Panama* (n 47) para 173. See also Lentner, 'Bridgestone v Panama: When Are Trademarks Covered Investments?' (n 69)
.[72] See Klopschinski, Gibson and Grosse Ruse-Khan (n 7) 168–185;

4. Relevant Protection Standards

As mentioned, establishing that the copyrights are 'investments' according to an applicable IIA is only the first step for a successful investment claim. Once this jurisdictional condition is fulfilled, it must still be shown that a state measure (not the conduct of a private party, such as an AI developer) violates a protection standard guaranteed by the IIA. The most relevant in the context of GenAI appear to be full protection and security (FPS), fair and equitable treatment standard (FET) and the protection against uncompensated (indirect) expropriation.

4.1. Full Protection and Security

IIL recognizes state responsibility for omissions where the treaty standard embeds a due-diligence duty to protect investments against third-party harm.[73] The classic Full Protection and Security (FPS) clause has been read by some tribunals to include protection from private actors, requiring the state to exercise reasonable police, administrative, and judicial diligenc.[74]

For present purposes, there could be a claim based on an extensive reading of the standard to apply in the GenAI context: if authorities know (or ought to know) that AI developers are ingesting rightsholders' works[75] at scale without authorization (and this

[73] Dolzer, Kriebaum and Schreuer (n 37) 234.
[74] While the protection against third party physical violence and harassment appears rather uncontroversial, tribunals are divided on the question regarding *legal* protection, see ibid 235–238. Slight variations in treaty language have not played a significant role for tribunals, see ibid 231.
[75] Who qualify as investors and their rights as investments, see above.

being found to be illegal) and do not take reasonable steps (investigation, guidance, injunctions, enforcement, or enabling effective opt-outs/licensing), an FPS-based claim premised on state inaction could be brought.

However, as the discussion above on the legality of the GenAI use of copyright protected work has shown, it could be argued that exceptions could be invoked within good faith interpretation of existing law to treat these practices as legal in both the US and the EU. That the courts of a host state do not adopt an investor-friendly of possible interpretations of existing law is unlikely to succeed as part of an FPS claim.

4.2. Fair and Equitable Treatment

This protection standard might be the most promising one. Tribunals have often interpreted this to cover 'legitimate expectations' of an investor.[76] Absent any specific representations made by the host state, this will most likely relate to the existing legal framework at the time of the investment.[77]

And here one can imagine that (depending, of course, on the view of the tribunal as regards copyright and GenAI on the merits) copyright holders base a claim on a host state's court decisions denying any effective remedies or redress against large-scale

[76] ibid 208 et seq.
[77] See e.g. Ioan Micula, Viorel Micula and others v. Romania (I)
ICSID Case No ARB/05/20, Award (11 December 2013) para 722; RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No ARB/14/34 Decision on Jurisdiction, Liability and Certain Issues of Quantum (30 December 2019) paras 482-490.

copyright violations, when they consider that investors had legitimate expectations to that effect.

That development of the law by courts could become subject to investment arbitration was illustrated in the *Eli Lilly* case. The US-based pharmaceutical company 'Eli Lilly' claimed that Canadian courts violated standards of treatment under NAFTA by revoking two of Eli Lilly's Canadian patents (the Zyprexa Patent and the Strattera Patent) as a result of the so-called 'promise utility doctrine' introduced by Canadian courts.[78] This doctrine requires, first, 'patent examiners and judges seek to identify a "promise" in the patent disclosure, and this promise becomes the measuring stick for utility. Second, evidence submitted with the patent application to show fulfilment of any promise in the patent description is subject to heightened scrutiny, and post-filing evidence such as commercial use may not be relied upon. Third, pre-filing evidence may not be considered to support a sound prediction unless that pre-filing evidence was referenced in the patent application itself.'[79]

Eli Lilly alleged the Canadian courts' adoption of the promise utility doctrine is 'radically new, arbitrary and discriminatory against pharmaceutical companies and products'[80] and that Eli Lilly had 'legitimate expectations that its Zyprexa and Strattera patents would not be invalidated on the basis of a radically new utility requirement.'[81] Eli Lilly claimed that the court's action in 2010 and 2011, when the Federal Court of Canada revoked the patents for lack of utility amounted to unlawful expropriation of its intellectual property

[78] *Eli Lilly v Canada* (n 36) para 5.
[79] ibid para 235.
[80] ibid para 5.
[81] ibid. (Claimant's Closing Statement, Tr. 2135:12-15)

and constituted a violation of the Minimum Standard of Treatment under Articles 1110 and 1105 of NAFTA respectively.

The same way a tribunal could view a case decided against the interests of copyright holders with respect to GenAI as 'radically new, arbitrary and discriminatory'. An investor might consequently see their legitimate expectations in a predictable legal framework violated.

The tribunal in Eli Lilly did not find the case law developed by Canadian courts in relation to patent law met that standard. While it clarified that as organs of the state, courts and their judicial acts (or omissions) may engage questions of expropriation and fair and equitable treatment under the applicable investment agreement.[82] The tribunal clarified, however, that it is not an appellate court and is thus only charged to review findings of national courts in 'very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct.'[83]

On the merits, the tribunal dismissed the alleged breaches for the claimant's failure to meet the required burden of proof. It did hold that in principle an invalidation under naturally evolving patent laws is not a breach of legitimate expectations but suggested that a violation could take place when 'a fundamental or dramatic change in Canadian patent law' occurs.[84]

It noted that '[i]n undertaking this analysis, the Tribunal is mindful of the role of the judiciary in common law jurisdictions. Claimant's position in this proceeding rests on an

[82] ibid paras 218-223.
[83] ibid para 224.
[84] ibid para 389.

implicit premise that common law decisions must follow in a reasonably foreseeable and predictable channel, without significant or material changes. Yet evolution of the law through court decisions is natural, and departures from precedent are to be expected.'[85] The conclusion was then that the promise standard did not constitute a dramatic change in the law.[86]

It substantiated this finding by reliance on expert testimony on the development of the case law in this regard in Canada.[87] It concluded that 'having considered all of the evidence, the Tribunal cannot conclude that the Supreme Court effected a dramatic change from previously well-established law when it clarified this rule in AZT.'[88]

On the element of disclosure of sound prediction, the tribunal again reviewed expert testimony and the domestic case law to find that the decision at issue did not radically change a well-settled rule of Canadian law.[89] Then it considered the promise utility doctrine as a whole, but not finding evidence for a dramatic change there either.[90]

With respect to legitimate expectations, the tribunal clarified that any legitimate expectation must be based on the existing law and 'although Claimant may not have been able to predict the precise trajectory of the law on utility, it should have, and could have, anticipated that the law would change over time as a function of judicial decision-

[85] ibid para 310.
[86] ibid para 325.
[87] ibid paras 333 et seq.
[88] ibid para 337.
[89] ibid paras 338-350.
[90] ibid paras 351 et seq.

making. The record in this case shows that the law did in fact undergo a reasonable measure of change and development.'[91]

In response to the alleged arbitrariness and discriminatory nature of the utility requirement, it noted that 'the Tribunal is satisfied that, under any plausible standard, the challenged decisions of the Canadian courts are neither arbitrary nor discriminatory, nor can it be said that the judicial measures taken were expropriatory within the meaning of Article 1110 in the present case. The patent grants to Claimant were made in a legal system that historically has, and necessarily, evolves, and this evolution resulted in later decisions, rationally and not unforeseeably, that concluded the initial patent grants were invalid, just as the Canadian statutory patent regime envisions. As such, the challenged decisions of the Canadian courts cannot constitute either a breach of NAFTA Articles 1105 or 1110.'[92]

Hence, should a tribunal find that the treatment of GenAI's copyright violations sanctioned by the state (through its courts) is a fundamental or dramatic change in the host state's copyright law, then a violation of international investment law could be found. The same would be true for scenarios in which courts or agencies refuse or unduly delay injunctive relief or damages against clear infringements such that the investor is left without a meaningful remedy. This could amount to a denial of justice, a core facet of FET.[93]

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[91] ibid para 384.
[92] ibid para 418.
[93] *Chevron v Ecuador* treats egregious judicial failures (bias, undue delay, non functioning remedies) as denial of justice under IIL— the award found that Chevron was denied justice when a domestic court ordered it to pay US$9 billion for environmental pollution, which was eventuall upheld by the Dutch Supreme Court, see https://globalarbitrationreview.com/article/ecuador-loses-final-appeal-over-chevron-denial-of-justice-award.

However, considering the background on the existing legal debates within the US and the EU, only extreme cases of disregard of copyright holder's legal interests are likely to succeed on the basis of an FET claim. An important factor (more so with regard to indirect expropriation, see below) will also be the financial viability of existing business models.

4.3. Indirect expropriation

Similar to the FET claim, a host state's inaction that facilitates or tolerates a de facto deprivation of the economic value of the IP (e.g., large-scale unlicensed training renders the works' market valueless or saturates substitutes) could be challenged via ISDS. Where the state declines to enforce basic anti-scraping or copyright rules while simultaneously facilitating AI operations (e.g., through permissive guidance, non-enforcement postures), investors may allege arbitrary impairment of their investment's use and enjoyment—especially if the business model is effectively destroyed. Imaginable is the situation where a foreign news corporation establishes a local multimedia news business in the host state but the state fails to sanction the illegal use of their copyright protected news pieces by an AI competitor that reproduces in real time their news content. In this scenario, a tribunal could find indirect expropriation—as some tribunals have recognized expropriation through actions and omissions of regulators.[94] In *Philip Morris v Uruguay* the tribunal did put an emphasis on the fact that despite the limitations of the use of brand variants of the trademark and limitations for displaying the mark in attractive packages for cigarettes (the so-called plain packaging

[94] CME Czech Republic BV v Czech Republic, Final Award (14 March 2003) 9 ICSID Rep 264, IIC 62 (2003) (UNCITRAL Arbitration).

regulation), the overall sales did not significantly drop.[95] Indeed, the threshold for finding an indirect expropriation is understood to depend on the impact of the challenged state measures. The tribunal clarified that 'in order to be considered an indirect expropriation, the government's measures interference with the investor's rights must have a major adverse impact on the Claimants' investments. As mentioned by other investment treaty decisions, the State's measures should amount to a "substantial deprivation" of its value, use or enjoyment, "determinative factors" to that effect being "the intensity and duration of the economic deprivation suffered by the investor as a result of such measures."'[96]

Here in particular, the question will turn to the facts on whether the investment in copyrights are effectively wiped out by those state measures.

5. Conclusion

The intersection of generative AI, copyright law, and international investment law reveals a rapidly evolving legal landscape marked by uncertainty and competing policy objectives. Domestic copyright regimes in the US and the EU are struggling to reconcile traditional doctrines—such as fair use—with the technical realities of large-scale machine learning based on copyright protected work. While US debates focus on whether training constitutes fair use or even actionable copying, EU law grapples with the scope of text-

[95] Philip Morris v Uruguay, Award (8 July 2016) ICSID Case No. ARB/10/7 paras 284-286.
[96] Philip Morris v Uruguay, Award (8 July 2016) ICSID Case No. ARB/10/7 para 192 (references omitted).

and-data-mining exceptions and their compatibility with authors' economic and moral rights. These unresolved questions create a volatile environment for rightsholders and AI developers alike, amplifying the risk of inconsistent judicial outcomes and regulatory fragmentation.

Against this backdrop, international investment law offers an untested but potentially powerful forum for resolving disputes where state measures—or omissions—significantly impair the value of copyright-based investments. Most IIAs explicitly include intellectual property within the definition of 'investment', and arbitral jurisprudence suggests that exploitation activities such as licensing, marketing, and distribution can satisfy the Salini criteria. In scenarios where states fail to enforce copyright protections or adopt permissive stances toward unlicensed AI training, investors may frame claims under standards such as, full protection and security, fair and equitable treatment or indirect expropriation. However, as cases like *Eli Lilly v Canada* illustrate, tribunals are reluctant to second-guess domestic courts absent egregious or unforeseeable departures from established law, underscoring the high threshold for success.

Ultimately, the prospect of ISDS claims in this domain raises profound normative questions. On one hand, investment arbitration could serve as a backstop against regulatory inertia, safeguarding the legitimate expectations of foreign investors in predictable IP regimes. On the other, expansive liability risks chilling legitimate public-interest regulation and innovation policy, particularly in the fast-moving field of AI. Striking an appropriate balance will require careful consideration of competing interests of all stakeholders involved. As generative AI continues to disrupt creative industries, the

challenge for states will be to craft solutions that preserve both technological progress and the integrity of international economic governance.