To possible commentators: I have just started working on this paper. So, below is a very early draft. I hope the amount of text is enough to demonstrate what research question I am exploring, what methods I am applying, and what conclusions I have already made. I would be very grateful for any feedback on this draft.

Trademark Parodies and Other Trademark-Based Commentaries in the Age of AI

Abstract. Today, a generative AI (genAI) tool like ChatGPT may refuse to produce a trademark-based image, even for explicitly stated parodic purposes. In doing so, the tool will generally refer to trademark law and the alleged impossibility of criticizing trademark owners in generated content. This raises both familiar and new concerns about content moderation and the over-blocking of speech. Moreover, it reinforces a flawed understanding of trademark rules. Drawing on lessons from trademark theory and case law in the European Union (EU) – including those related to parody – and considering the gatekeeping role of certain AI tools, this paper advocates for broader allowance of trademark use at all stages of genAI processes. In addition, because the scenario described above reflects the imperfect state of trademark law in the EU, this paper recommends establishing more explicit user rights to borrow trademarks for expressive purposes.

Keywords. Trademark, parody, freedom of expression, generative artificial intelligence

1. Introduction

Artificial intelligence (AI) tools allow users to improve their performance in a broad spectrum of functions, and many people and entities have already appreciated that. To reflect it, the new AI Act in the European Union (EU) includes the notion of '*general* purpose AI (GPAI) model' into its list of definitions, with related rules in place.[1] One of examples of GPAI is comprised by generative AI (genAI) models the purpose of which is to produce such items as texts, images, audios, and videos based on users' prompts. Generation of this content 'can readily accommodate a wide range of distinctive tasks' (Recital 99 AI Act).

It is no surprise that, among other things, text and image generation by genAI tools has attracted much attention from different stakeholders. However, while users can quickly produce paragraphs and pictures in the desired style, and companies can economize on costs typically related to purchasing protected content, right holders of this type of content – intellectual property (IP) content – are worried about their items being used in training AI models as input as well as about them appearing within general results of these models as output. In addition to input and output, IP infringement concerns cover the AI model itself that may 'memorize' protected content. Because of all that, AI model/system providers (in the AI Act terms) and other actors in the AI domain start incorporating content moderation solutions at the input, model, and output stages of genAI processes to prevent violations of IP rights, along with other rights and interests of third parties.

To discuss the difference between AI model/system providers at some point.

[1] See Art. 3(63), Chapter V of the 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 [2024] (Artificial Intelligence Act/AI Act).

Content moderation has been known in the IP field, with such related topics as liability of information society services and over-blocking of user-generated content.[2] Regarding the latter, there are concerns about affecting people's freedom of expression and access to culture and – more generally – information[3] by stricter rules of actors like online platforms that they vote for to avoid liability for IP infringements. The similar topic is now relevant to unauthorized uses of IP content with respect to AI models.

If to focus on AI models, the following example in using ChatGPT has provoked a new research question presented below: If one wishes to create an image with this tool that includes a trademarked name/logo (e.g., Louis Vuitton logo) and involves criticism of the trademark owner's business or other types of commenting on or playing with the name/logo (e.g., criticism towards Louis Vuitton's business practices), the tool may refuse from doing it based on IP rules pertaining to names/logos as well as inadmissibility of criticism towards the right holder at issue. Results may change over time, as AI models in tools like ChatGPT are not stable,[4] but the presented example embodies the worries about prohibiting legitimate use of trademarks for non-distinguishing purposes (not use as a trademark[5]). Such uses may constitute an important element in people's expressive autonomy and help generate different worldviews to enrich the surrounding culture and promote a diversity of opinions.

EU trademark law is still unsettled regarding its treatment of the mentioned trademark uses, involving parodies and other commentaries. Partly because of that, information society services, to which various AI tools may belong, indeed choose to apply stricter rules on what is allowed in their environments in terms of IP issues.[6] This kind of censorship may be particularly alarming when one recognizes that, for example, ChatGPT is one of the most popular tools in the world. If a genAI tool is fine-tuned to respond to its users with comments like in the example from the previous paragraph, we need to understand that too many people will be left in the dark about trademark law and potential possibilities for non-distinguishing trademark uses, the latter of which will be prevented from the outset, even before they have been created.[7]

Based on the above, the research question in this paper is as follows: How to approach trademark uses in AI-generated content with respect to AI owners' (and the legal system's) concerns regarding trademark infringements and at the same time the general concern for freedom of expression of the genAI tools' users?

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[2] See eg Christophe Geiger and Bernd J Jütte, 'The EU Commission's Guidance on Article 17 of the Copyright in the Digital Single Market Directive – A Guide to Virtue in Content Moderation by Digital Platforms?' (SSRN 2021) <https://ssrn.com/abstract=3876608> accessed 7 July 2025. See also Emmanuel V Penagos, 'ChatGPT, Can You Solve the Content Moderation Dilemma?' (2024) 32 Int'l Journal of Law and Information Technology aeaae028.

[3] Niva Elkin-Koren, 'Contesting Algorithms: Restoring the Public Interest in Content Filtering by Artificial Intelligence' (2020) 7(2) Big Data & Society 1.

[4] Deepak Kumar, Yousef A AbuHashem and Zakir Durumeric, 'Watch Your Language: Investigating Content Moderation with Large Language Models' (2024) Proceedings of the Eighteenth International AAAI Conference on Web and Social Media (ICWSM 2024).

[5] For a comprehensive analysis, see Martin Senftleben, *The Copyright/Trademark Interface: How the Expansion of Trademark Protection Is Stifling Cultural Creativity* (Kluwer 2020).

[6] Emma J Llanso, 'No Amount of "AI" in Content Moderation Will Solve Filtering's Prior Restraint Problem' (2020) 7(1) Big Data & Society 1.

[7] On prior restraints on speech, see Llanso (n 6).

To answer this question, it is necessary to describe the existing and proposed methods for moderating content in genAI models and risks that they involve, including with respect to IP issues. Some methods are already known from outside the AI field regarding various forms of content – from violent and sexual one to hatred, misinformation, and defamation; some methods are currently being developed. The risks these methods are associated with include further exclusion of the views by different marginalized groups and general homogenization of online content.[8] This is especially worrisome when we consider the gatekeeper status and concentration of the top online tools,[9] including in the field of genAI, that are available on the market in the hands of the few.

Next, it is important to discuss the role of trademark use by third parties for purposes other than distinguishing their goods and services (i.e., parodies and other commentaries about trademark holders' activities or unrelated phenomena). For the Court of Justice of the EU (CJEU), the purpose of trademark use does not seem to matter, when it applies the infringement provision of the EU Trademark Regulation (EUTMR) or EU Trademark Directive (TMD).[10] Also, while merely generating images with some proprietors' trademarks does not seem to constitute 'use in the course of trade,' which is required to establish a trademark infringement, immediately incorporating such acts into one's commercial activity may represent such use, thus potentially widening the notion of commercial activities. Because of that, the risk of conducting infringements or providing conditions for them is real for AI owners. Still, there may be different purposes of borrowing one's trademark, which often constitutes valuable speech in our society; hence, these purposes shall be appreciated and cared about.

Finally, I will propose solutions for genAI tools with respect to borrowing real businesses' trademarks for the content generated by AI tools. Furthermore, broader ideas regarding the improvement of trademark law in the EU will be suggested, including explicit user rights in trademark law. The proposed solution and ideas will be based on the understanding of how imperfect EU trademark law is and how dangerous the unregulated AI field may become regarding people's speech and diversity of views.[11]

The paper is based on the legal dogmatics method and law-and-technology perspective. Concerning legal dogmatics, the paper will analyze current EU trademark law as well as regulations and directives in the EU in the field of information society services and their liability with respect to illegal context (AI Act, Copyright Directive, EU Digital Acquis, etc.). Also, CJEU case law and scholarly articles on EU law will be utilized. Because content moderation is covered more with regards to copyright law, provisions, case law, and papers on copyright will be referred to. Since copyright and trademark may cover the same items, insights

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[8] See eg Yaaseen Mahomed, Charlie M Crawford, Sanjana Gautam, Sorelle A Friedler and Danaë Metaxa, 'Auditing GPT's Content Moderation Guardrails: Can ChatGPT Write Your Favorite TV Show?' (2024) Proceedings of the 2024 ACM Conference on Fairness, Accountability, and Transparency 660–86.

[9] Joao P Quintais, Christian Katzenbach, Sebastian F Schwemer, Daria Dergacheva, Thomas Riis, Peter Mezei, Istvan Harkai and Joao C Magalhaes, 'Copyright Content Moderation in the European Union: State of the Art, Ways Forward and Policy Recommendations' (2024) 55 IIC 157.

[10] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L 154/1 (EU Trademark Regulation/EUTMR); Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1 (EU Trademark Directive/TMD). While the EUTMR regulates the unitary trademark rights at the EU level, TMD harmonizes trademark rules of the EU Member States on their national levels.

[11] Quintais et al (n 9).

into copyright and trademark overlaps will be brought into the paper.[12] Next, regarding the law-and-technology approach, since we live in the times when law affects technology and vice versa, these connections and internal influences shall be deeply explored to propose solutions in one of the related fields, i.e., trademark-based content moderation in genAI tools. Scholarly articles analyzing content moderation risks – from keywords and human oversight to training of AI models – and proposing solutions with respect to various groups of content, including IP, will be put into the basis for this paper. Additionally, general descriptions of related technological advancements and current content moderation approaches will be given as background information and examples to discuss.

2. GenAI and Content Moderation

A trademark-based experiment with genAI and related concerns. One of the leading genAI tools in the world today is ChatGPT. More specifically, ChatGPT is an image-generating tool based on Dall·E and currently GPT-4o;[13] it is also a large language model (LLM) as a subset of genAI, when the generation of texts is concerned.[14]

If one attempts to include the prompt 'Louis Vuitton logo' into the ChatGPT chat, in 13 cases out of 15 independent attempts,[15] ChatGPT will refuse to generate anything (or 'reproduce' anything, as in the copyright terms), while referring to trademark and/or copyright laws. In two cases, it will generate the perfect Louis Vuitton (LV) logo which consists of the LV registered trademarks, including in the EU.[16] If one asks ChatGPT, for example, to generate an image with the LV logo and the words 'stop being cruel to animals,' no attempt out of 15 will be successful. Again, trademark and/or copyright laws will be referred to, with a note that generating such an image is not possible, especially in cases of criticism and protest. Thus, a certain interpretation of trademark law is fixed in ChatGPT, and a user's speech is limited in how access to generated images of a certain content is not granted from the outset (the level of content which is requested – Level 1) and in how a user receives a text response (the level of explanation with respect to the content requested – Level 2). The point is, however, different.

On the one hand, it may be quite easy to circumvent the 'logic' of ChatGPT and get the necessary image by including other prompts in the same chat with completely made-up reasons for why the requested content is necessary (or simply avoiding the word 'logo' in some cases). For instance, it is already widely known that outsmarting AI models in pursuit of the target results is possible even in more serious contexts, like racism.[17] Also, genAI tools like ChatGPT are not stable in time, and results of the small experiment above may change tomorrow.[18] On

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[12] Senftleben (n 5).

[13] OpenAI, *Introducing 4o Image Generation* (25 March 2025) <https://openai.com/index/introducing-4o-image-generation> accessed 7 July 2025.

[14] See generally Luis Mayer, Christian Heumann, and Matthias Aßenmacher, 'Can OpenSource Beat ChatGPT?– A Comparative Study of Large Language Models for Text-to-Code Generation' (2024) <https://doi.org/10.48550/arXiv.2409.04164> accessed 7 July 2025.

[15] ie in new chats each time. As an example of such studies, see Roberto Balestri, 'Examining Multimodal Gender and Content Bias in ChatGPT-4o' in David C Wyld et al, *IoTE, CNDC, DSA, AIAA, NLPTA, DPPR – 2024* (CSCP 2024).

[16] See eg EU trademarks (EUTM) nos. 000015628 (LV) and 000015610 (LOUIS VUITTON). See European Union Intellectual Property Office's (EUIPO's) trademark search tool – EUIPO, *eSearch plus* <https://euipo.europa.eu/eSearch/#details/trademarks> accessed 7 July 2025.

[17] Erik Derner and Kristina Batistič, 'Beyond the Safeguards: Exploring the Security Risks of ChatGPT' (2023) <https://doi.org/10.48550/arXiv.2305.08005> accessed 7 July 2025.

[18] See eg Kumar (n 4).

the other hand, the point of describing and analyzing this experiment is that it is in principle possible to include such content moderation in the age of AI that will limit attempts for freedom of expression of users in the domain of IP in general and trademarks and trademark-based commentaries in particular, including parodies. The point is that there are people and entities that may come up with ideas of incorporating such content moderation into the new AI tools that people are eager to use for the plenitude of tasks. However, with respect to AI, these ideas may not be beneficial to users. This is due to the general risks of AI and those associated with large online tools in general, as well as risks of related content moderation solutions.

In addition, ChatGPT's approach to its users' prompts like the one above may be called a very *simple* one: With just one line of text referring to trademark and copyright legislation which is unfamiliar and unclear to most of the tool's users, ChatGPT authoritatively instructs on what is wrong and what is right, without considering any circumstances. However, as follows from the analysis of simplification, it works only to a certain point, and if 'one attempts too much simplification, the resulting representation can be trapped in a chasm of dissonance.'[19] Labels used to simplify, e.g., a label on something being not in line with trademark law, may be 'too quickly assumed to be accurate depictions of reality.'[20] This danger will be considered in more detail later in the paper.

Overview of AI-Associated Risks. When discussing AI, one shall keep in mind the obscure, non-transparent, non-explainable, non-accountable, not challengeable, unfair, discriminative, biased as well as unpredicted and generally non-democratic nature of AI tools, which, at the same time, may indeed grant efficiency and empowerment to various groups of people.[21] If to focus on the mentioned risks when reflecting on the paper's experiment, it is also worth keeping in mind the so-called *perceived authority* oftentimes associated with AI tools, according to Nathalie Smuha's monograph on 'Algorithmic Rule *by* Law' (emphasis added). Smuha digs into the role of algorithms in public administration where automation is associated with objectivity, neutrality, and accuracy simply because of its technological nature. Once something is introduced into the algorithm, there may be over-reliance on AI tools and institutional inertia to change that. Thus, general deference to an AI system's 'cognitive superiority' may overshadow the risks that the AI system carries with it.[22]

Despite the risks, AI tools have already become a part of our lives. We must remember that, for example, ChatGPT is the *fifth* most visited website in the world, after Google, YouTube, Facebook, and Instagram but, interestingly, before Wikipedia.[23] Today, people receive information from these generative chats, not encyclopedias. With such coverage, ChatGPT becomes a *one-window stop to generated content* and even to the *interpretation of legal rules*. That is why one can name ChatGPT a 'gatekeeper' to generated content, as in the EU Digital Markets Act devoted to regulating various platform services online.[24] Therefore, a popular tool have appeared that, however, represents serious risks and functions as an authority and a

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[19] Michael Lissack, 'Don't Be Addicted: The Oft-Overlooked Dangers of Simplification' (2016) 2(1) She Ji – The Journal of Design, Economics, and Innovation 29, 31–32.
[20] ibid.
[21] See generally Nathalie Smuha, *Algorithmic Rule by Law* (CUP 2024).
[22] ibid.
[23] Semrush, Top Websites (2025) <https://semrush.com/website/top> accessed 7 May 2025.
[24] See eg Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265/1 (Digital Markets Act/DMA). The DMA is a part of the so-called EU Digital Acquis.

gatekeeper at the same time, and it is capable of affecting millions if not billions of people in how they understand inter alia trademark law.[25]

To add an extra layer of complexity, from the technical perspective, there is research proving that AI models, for instance LLMs that produce textual explanations of why a name/logo cannot be borrowed for a critical parody, are not capable of following rules and logical reasoning in human-like way, as in word ladder puzzles; scholars already express worries about this phenomena with respect to applying LLMs in healthcare and law.[26] So, when AI tools and online services in general are asked to provide reasons while moderating content, genAI tools may not be in principle appropriate for that. In addition, everything these tools reproduce can be even considered 'bullshit,' because their content that has nothing to do with truth and/or lies but simply represent words arranged on the basis of probability calculations.[27]

Thus, it may happen that on Level 1, when not providing the requested trademark-based content, AI tools like ChatGPT do not grant access to information, limiting people's freedom of expression on a gatekeeper's scale;[28] on Level 2, when offering a certain type of explanation for not providing the content, these tools shape people's opinions based on texts that look like they were produced by humans but might carry pure nonsense with them.[29]

AI and IP. GenAI is associated with risks in such domains as those related to providing reliable information,[30] guaranteeing gender equality,[31] and eliminating harmful content.[32] Also, it is no surprise that text and image generation by genAI tools has attracted much attention from different stakeholders with respect to IP violations.

Concerns regarding IP infringements cover all stages in the functioning of an AI model behind tools like ChatGPT. First, it touches upon the input stage. With this respect, one can discuss the inclusion of copyrighted materials into the training data, so questions regarding the possible application of the text and data mining (TDM) exception under the EU Copyright Directive arise.[33] Second, the stage of an AI output gets involved when IP content – or content similar to

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[25] On the issue of scale, see eg Tarleton Gillespie, 'Content Moderation, AI, and the Question of Scale' (2020) 7(2) *Big Data & Society* 1.

[26] Zhiyong Han, Fortunato Battaglia, Kush Mansuria, Yoav Heyman, and Stanley R Terlecky, 'Beyond Text Generation: Assessing Large Language Models' Ability to Reason Logically and Follow Strict Rules' (2025) 6(1) AI 12.

[27] Michael Townsen Hicks, James Humphries, and Joe Slater, 'ChatGPT is Bullshit' (2025) 26 Ethics Inf Technol.

[28] According to Art. 11 of the Charter of Fundamental Rights of the EU (Charter), freedom of expression and information includes the right to receive information. See Chater [2012] OJ L 326/391.

[29] Hicks et al (n 25).

[30] See eg Noémi Bontridder and Yves Poullet, 'The Role of Artificial Intelligence in Disinformation' (2021) 3 Data & Policy e32.

[31] See eg Balestri (n 15).

[32] See eg Lingyao Li, Lizhou Fan, Shubham Atreja, and Libby Hemphill, "'HOT" ChatGPT: The Promise of ChatGPT in Detecting and Discriminating Hateful, Offensive, and Toxic Comments on Social Media' (2023) <https://doi.org/10.48550/arXiv.2304.10619> accessed 7 July 2025.

[33] 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 [2019] OJ L 130/92 (EU Copyright Directive, or Copyright in the Digital Single Market Directive/CDSMD). On TDM, see eg Tim W Dornis, 'The Training of Generative AI Is Not Text and Data Mining' (2025) 47(2) EIPR 65. For more general papers, see eg Ana R Marinković, 'Liability for AI-Related IP Infringements in the European Union' (2024) 19(10) JIPLP 784; Peter G Picht and Florent Thouvenin, 'AI and IP: Theory to Policy and Back

it – appears in generated results. Here, again, copyright reproductions easily come to mind as an example.[34] However, in addition to input and output, there is one more 'stage' that can be singled out.

As scholars formulate it, besides the use of IP content in the input data and appearance of IP content in the output results, AI model itself can 'memorize' this content.[35] For instance, 'memorization' happens when a piece of IP content is repeated many times in the training data due to its prominence. Some commentators define 'memorization' as an act 'when an exact or near-exact copy of a piece of training data can be reconstructed by examining the model "through any means;" it does not happen by chance but reflects patterns and correlations that the model learned from the training data.[36] Therefore, 'memorization,' as the third 'stage' in the AI model functioning singled out in this discussion, depends on the AI input stage (training choices matter) and affects the AI output stage. With respect to the latter, when a user prompts a model to generate new content which is a protected IP item, this process is called an 'extraction' of IP content happening *externally* but depending on 'memorization' going on *internally* in the model.[37]

It might be a hard task to extract the whole text of a copyrighted book from ChatGPT, and there are easier ways to 'pirate' such materials online.[38] However, in a conversation about trademarks, i.e., compact business symbols, it is much easier to imagine that for parodic, critical, or any other commenting purposes, users may ask an AI tool like ChatGPT to 'reproduce' a certain business' trademark and apply changes to it according to the user's prompts. Trademarks are also valuable IP assents, just like copyrights; so, to avoid liability in a not-always-predictable trademark law system,[39] AI model/system providers start incorporating content moderation solutions into all three stages (i.e., input, model itself, and output) to prevent violations of trademark rights and IP rights in general.

Content moderation and AI. Content moderation has been known in the IP field for many years. Information society services incorporate content moderation to follow current laws as well as their own rules. Therefore, it is possible to divide content into (i) illegal one and (ii) legal content which is, however, incompatible with the rules of online services, such as some forms of hate speech.[40] The more there is the latter, the more issues arise with respect to people's freedom of expression being limited by commercial entities, with a gatekeeper status in some cases.

Generally, online services are known to be guided first and foremost by their private commercial interests, including those aimed at guaranteeing customer/user base and, where

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Again – Policy and Research Recommendations at the Intersection of Artificial Intelligence and Intellectual Property' (2023) 54 IIC 916.

[34] For an overview, see eg Marinković (n 30).

[35] See eg Tim W Dornis and Sebastian Stober, 'Generative AI Training and Copyright Law' (2025) <https://doi.org/10.48550/arXiv.2502.15858> accessed 7 July 2025.

[36] A Feder Cooper, Aaron Gokaslan, Ahmed Ahmed, Amy B Cyphert, Christopher De Sa, Mark A Lemley, Daniel E Ho, and Percy Liang, 'Extracting Memorized Pieces of (Copyrighted) Books from Open-Weight Language Models' (2025) <https://doi.org/10.48550/arXiv.2505.12546> accessed 7 July 2025 (quoting A Feder Cooper and James Grimmelmann, 'The Files Are in the Computer: Copyright, Memorization, and Generative AI' (2024) <arXiv:2404.12590>).

[37] ibid.

[38] ibid.

[39] See section 3 below.

[40] _____.

applicable, customer/user engagement – some commentators refer to this nature of online services as 'naked corporate self-interest.'[41] In addition, the issue of scaling plays a significant role for these actors, with the process of scaling being not about the size but about the effect, as in the case with gatekeepers.[42] Thus, business interests may often be prioritized over users' freedom of speech: To grow with respect to both their size and effect, online services will try to avoid not only illegal content but also otherwise unsuitable content.

Moreover, in the legal domain, including trademark law, there are broad legal concepts characterized by flexible interpretations by courts and other authorities. For instance, one can think of the notion of use 'in relation to goods and services' under the trademark infringement provision[43] discussed in *Louboutin v Amazon* after *L'Oréal v eBay* in the EU context: The notion is interpreted in a more nuanced way now to cover the active involvement of marketplaces into the promotion of goods on their platforms.[44] Hence, marketplaces can be directly liable for trademark infringements.[45] In parallel, the same trademark infringement test, including the notions of 'use,' use 'in relation to goods and services' and use 'in the course of trade,' may be interpreted broadly to cover various trademark parodies by third-party users in the slightest commercial context. Given all that, more stringent rules applied by platforms and other online actors towards its user help information service providers guarantee clearer conditions within their environments and, consequently, fewer risks of violations.[46] This guarantee exists in line with the 'naked corporate self-interest.'

On the one hand, the application of more stringent rules corresponds to the trend of self-regulation that is being promoted in the digital field, including AI.[47] While self-regulation may be welcomed when governmental rules are led by authoritative practices,[48] the other side of this self-regulation is a sequence of 'protection of own businesses – hence, appearance of false positives' through the applied content moderation. One may conclude that new types of what has been known as 'Google's Law' may appear with many overreaches.[49]

To be more specific regarding what exact content moderation techniques are at issue, in more traditional settings like social media platforms, this can involve human oversight, various filters (including keyword-based), hash matching, as well as AI-based moderation (e.g., natural language processing and object recognition).[50] In genAI tools like ChatGPT, content

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[41] See eg Gillespie (n 23).

[42] ibid.

[43] Art. 9 EUTMR; Art. 10 TMD.

[44] Cases C-148/21 and C-184/21 *Louboutin v Amazon* [2022] ECLI:EU:C:2022:1016; Case C-324/09 *L'Oréal v eBay* [2011] ECR I-06011. While in the latter, the CJEU _____, in the former, the court _____.

[45] See Dania van Leeuwen, Mark Leiser, and Lotte Anemaet, 'Online Intermediaries and Trademark Owners: The Legal Position and Obligations of Online Intermediaries to Trademark Owners Prior and post-Louboutin v Amazon' (2024) 15(1) JIPITEC 56.

[46] See section 3 below.

[47] See eg Section 6 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC [2022] OJ L 277/1 (Digital Services Act/DSA). For AI, see Chapter X AI Act; see also Gianclaudio Malgieri and Frank Pasquale, 'From Transparency to Justification: Toward Ex Ante Accountability for AI' (2022) Brooklyn Law Research Paper 712.

[48] _____.

[49] See eg Greg Lastowka, 'Google's Law' (2008) 73(4) Brook L Rev 1327, 1329 ('the absence of any state involvement in the shape of Google's results will effectively cede the structure of our primary online index to "Google's law"').

[50] _____.

moderation can take the following forms: At the input level, what appears in the training data can be controlled, though the acquisition of new data and expensive filtering of existing data may be required;[51] at the model level, refining the model over time may help avoid undesired outputs later on, but it may be time-consuming to retrain models and tune its weights;[52] at the output level, prompts may be blocked, generated content itself can be reviewed, with the prompt and output filters based on machine learning applied.[53]

These self-regulating moderation techniques in general settings and within genAI, aimed at following the business interests of online services and characterized by overreaches by blocking false positives (over-blocking), may result in serious practical disproportions.[54] Before the current AI surge, disproportions in moderations online were associated with such consequences as further marginalization of marginalized groups, promotion of dominant views, lack of diversity in opinions, reinforcement of societal prejudices, with the parallel lack of explanations of content moderation practices as well as the lack of consideration of context around specific user cases. The latter is particularly crucial for cases like trademark parodies in which background details help the public understand even minor changes in a trademark as a poignant commentary on some matter. Overall, to handle the listed phenomena in relation to content moderation, commentators appealed to more human intervention and context consideration.

Today, the same disproportions are associated with AI, including genAI tools like ChatGPT.[55] In these circumstances, not letting people speak through the applied content moderation techniques at the genAI input, model, and output stages is again becoming the key worry about self-regulation online. Therefore, commentators refer to the violation of a social contract in how people are not allowed to speak by AI-related moderation – i.e., enforcement – practices.[56] It has already become a cultural and overall societal problem,[57] but it continues to stay with us in the new AI era.

As noted earlier, content moderation in AI – and more specifically genAI – is already associated with the same over-blocking and over-censorship as before, despite its different functioning.[58] However, thinking about the trademark-related experiment in ChatGPT from above, one might conclude that while in more traditional online services, like social media platforms, content was existent but not allowed to be published or blocked in later instances, in the genAI setting, this prior blocking is happening earlier. Content is not even created, it is prevented, as the LV experiment demonstrates.[59] This prior censorship is against freedom of expression: People are not used to such immediate limits in the *offline* world, nor are they used to *simplified* and seemingly *authoritative* judgments as the ones happening in AI.'[60]

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[51] Susan Hao, Piyush Kumar, Sarah Laszlo, Shivani Poddar, Bhaktipriya Radharapu, and Renee Shelby, 'Safety and Fairness for Content Moderation in Generative Models' (2023) <https://doi.org/10.48550/arXiv.2306.06135> accessed 7 July 2025.
[52] ibid.
[53] ibid.
[54] In the unrelated matter of gender equality, see eg Balestri (n 15).
[55] See eg _____.
[56] Elkin-Koren (n 3).
[57] Quintais (n 9).
[58] Lee et at (n 29); Mahomed et al (n 8).
[59] Elkin-Koren (n 3); Llanso (n 6).
[60] Llanso (n 6).

3. EU Trademarks Law Imperfections Regarding Parodies

It is time now to focus on trademarks, with the genAI setting in mind. Trademarks are mostly represented by words, images, and combinations thereof. Words and images are typical input data for training AI, whether it is a genAI or, more specifically, an LLM model. These words and images can also appear in AI outputs, when a genAI tool generates pictures based on some users' prompts. As for the model itself, as already mentioned, trademarks may be 'memorized' by the model and then perfectly reproduced by the AI tool at issue. For copyright, 'memorization' matters a lot, because if an AI 'model memorizes all or a substantial portion of a copyrighted work (near-)verbatim, the model itself may be an infringing copy or derivative work;' besides, memorization 'may increase the likelihood that the output of the model may be substantially similar to the copyrighted work.'[61] Trademarks function differently from copyright, as their main goal is to distinguish products of one undertaking from those of another, but trademarks also appear in all genAI stages just like copyrighted objects do.

While possibly used in all stages of genAI, trademarks in the EU may be said to exist in an imperfect legal framework, which made online services in the past vote for broader content moderation. For instance, according to the Amazon Merch on Demand's Content Policies, illegal or infringing content comprises of not only content that does not comply with applicable laws but also 'content incorporating intellectual property (such as trademarks, copyrights, or the name or likeness of others) that you *do not have the right to use*. Intellectual property may include text, visual representations of designs, patterns, products or other objects (for example, certain car models), or photographs.'[62] Nothing is mentioned about parodies, but links to different countries' trademark registers are provided for possible users of the Amazon service to conduct their prior searcher. On another similar service, RedBubble, trademark guidelines explicitly refer to the existence of fair use, as in the United States, as well as 'defenses and exceptions to trademark infringement in other countries <…> [though] it's best to seek advice from an attorney.'[63] These services try to avoid complex cases, including parodies, not to make news because of their users' behavior and not be become primary infringers themselves.

Infringement test. Irrespective of the situation described in the previous paragraph, the trademark infringement test in the EU will be the same.[64]

First, it includes three possible scenarios: (i) double identity, when there is identity between the right holder's trademark (earlier sign) and the sign of an alleged infringer as well as identity between goods/services for which the trademark is registered and for which the infringer uses its sign, with consumer confusion presumed in this situation;[65] (ii) likelihood of confusion, where there is identity or similarity both between the earlier and later signs and between related goods/services, and where there exists the likelihood of confusion (to be proven based on global appreciation);[66] (iii) reputed trademark scenario with three sub-scenarios, namely dilution by

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[61] Cooper et al (n 34) 4–5.

[62] Amazon Merch on Demand, *Content Policies* (2025) <https://merch.amazon.com/resource/201858630> accessed 7 July 2025 (emphasis added).

[63] RedBubble Help Center, *Can I Use Someone Else's Trademark in my Own Artwork?* (2024) <https://help.redbubble.com/hc/en-us/articles/360051806832-Can-I-use-someone-else-s-trademark-in-my-own-artwork> accessed 7 July 2025.

[64] Art. 9 EUTMR; Art. 10 TMD.

[65] On identity, see *Diffusion* (CJEU).

[66] On the interpretation of the likelihood of confusion, see *Sabel, Canon* (CJEU).

blurring, dilution by tarnishment, and unfair advantage, with a related defense for a defendant in the form of 'due cause' in using a reputed trademark.[67]

In addition to how the three scenarios are formulated, the CJEU has developed the so-called trademark functions theory. It has become an explicit element of the ***double identity*** test: An infringement will be found in this case only if the third party's use of the trademark adversely affects or is liable to adversely affect one of the trademark's functions.[68] These functions include the essential function of origin (i.e., confusion-related one) as well as quality, advertising, investment, and communication functions, though the list is not exhaustive.[69] The CJEU has only defined the advertising and investment functions, referring, respectively, to the ability to inform and persuade consumers and ability to acquire or maintain reputation.[70] While functions like those of advertising, investment, and communication had been traditionally associated with reputed trademarks, it follows from the CJEU interpretation that the negative effect on any of them shall be now evaluated under the double identity scenario, though this scenario concerns only regular trademarks, for which reputation does not have to be proven.[71] This situation is criticized by trademark scholars.[72] Indeed, analyzing just the origin function, or confusion-related aspects, would be justified and well-balanced in this scenario.

Generally, the key, essential function, will be affected if consumers cannot 'interpret [the sign] as designating the origin of'[73] good and services 'produced under the control of a single undertaking which is accountable for their quality.'[74] In less traditional cases of keyword advertising, the essential function will be negatively affected if an ad in a search engine makes it impossible or difficult to understand where the advertised product is coming from; however, the investment and advertising functions will not be harmed in these cases.[75] The essential function will not be negatively affected, however, if a third-party advertiser buys trademark-based keywords with the goal to pose its products as *alternatives* to the right holder's products.[76] Similarly with model cars produced by third parties: The way the trademark is used on these products may or may not make consumers think that they are coming from the right holder or an economically-linked undertaking.[77] In the parallel importation cases when trademarks are replaced by third parties' signs, the essential function will be jeopardized due to the fact that the right holder cannot fulfil its right of the first placing of trademarked goods on the market; in this situation, the investment and advertising functions will also be negatively affected by that replacement.[78]

In the ***likelihood of confusion*** scenario, the global appreciation analysis under it implies deciding whether the public may think that certain products come from the same undertaking

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[67] For the summary of all three sub-scenarios, see *L'Oréal v Bellure* (CJEU).
[68] eg *Arsenal*, *Audi* (CJEU).
[69] *L'Oréal v Bellure* (CJEU).
[70] For the advertising function, see *Google France* (CJEU); for the investment function, see *Mitsubishi* (CJEU). For recent elaborations on quality, see *Audi* (CJEU).
[71] *Celine* (CJEU).
[72] Martin Senftleben, 'Function Theory and International Exhaustion – Why it is Wise to Confine the Double Identity Rule to Cases Affecting the Origin Function' (2014) 36(8) EIPR 518.
[73] *Celine* (CJEU).
[74] *HAG II* (CJEU).
[75] eg on the origin function, see *Google France* (CJEU); on other functions, see *Interflora* (CJEU).
[76] eg *Interflora* (CJEU).
[77] Opel (CJEU).
[78] *Mitsubishi*, *Portakabin* (CJEU).

or economically linked undertaking.[79] Thus, the essential function of origin is being at issue under the likelihood of confusion test.[80] Other functions do not play a role in this scenario.[81]

In the ***reputed trademark*** scenario, it is enough that the public may make an association, or a link, between the earlier trademark and the later sign as a result of which the reputed trademark may be damaged; similarity to the degree of the likelihood of confusion is not necessary.[82] The link shall be appreciated globally, taking all factors into consideration.[83] Thus, while confusion may be absent, this scenario is not about the essential function; it is about other functions incorporated into the three specific sub-scenarios (blurring, tarnishment, and unfair advantage).

Second, for all three scenarios, it is necessary to pass several thresholds to find an infringement: There must be no consent of the trademark right holder to use the trademark, and there must be 'use' which in turn must be 'in the course of trade' and 'in relation to goods and services.' All these thresholds, just like the three scenarios and sub-scenarios for reputed trademarks from above, have received interpretation from the CJEU. In interpreting the thresholds, the CJEU often refers to the non-exhaustive list of examples of trademark uses included in the EUTMR and TMD that may be prohibited, including the act of affixing a sign to products, offering them for sale under the sign, and using the sign in advertising.[84]

For the discussion in this paper, it is important for focus on the notion of 'use' and use 'in relation to goods and services' that shall be established to find infringement on the side of a third party, given all other conditions are satisfied, including commerciality.[85] The two notions are divided in the CJEU's analysis, though not always.[86] When discussing just 'use,' the CJEU underlines active conduct, or behavior, characterized by direct or indirect control over it and not merely creation of technical conditions for someone else's conduct; this 'use' concerns using the trademark in one's own commercial communication, not necessarily an immediate one in front of consumers.[87]

With this respect, the CJEU often refers to the examples of use listed in the infringement provision, including affixing and offering on the market,[88] and underlines a (material) link that the relevant consumers will see between the right holder and the product at issue when there is 'use.'[89] The mentioned affixing is rather formal,[90] focusing on the marketing stage with respect to a product and not on the purpose, or substance, of trademark use on the product, regardless of the marketing stage. Therefore, for instance, if a non-authorized producer of automobile spare parts manufacturers car grills with a space for the car logo in the form of that logo, i.e., there is mere affixing of a trademark onto an unauthorized good, courts will establish use, while

[79] The notion of 'economically linked' also mean 'a substantive, rather than formal, criterion'. See *Schwepps* (CJEU).
[80] *Canon* (CJEU).
[81] *Bellure*, *Audi* (CJEU).
[82] *General Motors* (CJEU).
[83] *Adidas-Salomon*, *Intel* (CJEU).
[84] Art. 9(3) EUTMR; Art. 10(3) TMD.
[85] On use 'in the course of trade,' see *Arsenal*, *Ball Bearings* (CJEU).
[86] eg *Red Bull*, *Opel* (CJEU).
[87] *Louboutin*, *Mitsubishi* (CJEU).
[88] *Audi* (CJEU).
[89] ibid.
[90] As in *Opel* (CJEU).

it will be a matter of factual consideration if any of the trademark's functions are affected to find infringement in the end.[91]

To continue with more examples of 'use,' it will also be found in cases with providing services of selling second-hand original products and repair services for such items (a car workshop using the BMW trademark),[92] placing the trademark into the third party's comparative advertisement,[93] reproducing right holders' trademarks on small-sized model cars,[94] demonstrating loyalty through trademarks (e.g., unofficial soccer team merchandise),[95] decorating a piece of apparel with a sign similar to the trademark (e.g., two stripes instead of Adidas' three lines).[96] Use also occurs even with the lack of physical affixing of the sign at issue to a certain product.[97] Similarly, using a trademark in keyword advertising, with the keywords being even invisible to consumers, is also enough to find use and, hence, infringement on the side of advertisers using the keyword service.[98]

There is no use, however, when a search engine like Google and online marketplace like eBay provide possibilities for third parties, respectively, to buy keywords or publish offers on its website (unlike it may be with Amazon actively involved into the act of offering products on its platform).[99] However, there is use when the same eBay buys keywords from Google to advertise third parties' offers on its website; it happens due to the 'link' between eBay and trademarks in the offers.[100]

Regarding use 'in relation to goods and services,' it is also associated by the CJEU with the list of examples of infringing uses or with the situation when a link is established between the sign used by the third party and its products.[101] The CJEU called it 'use of the mark as a mark.'[102] This might occur, for instance, with a third party's trade name used in the described way with respect to this party's products.[103] While generally, 'in relation to goods and services' implies 'goods or services of a third party who uses a sign identical with the mark,'[104] there are cases with referring to goods or services of another person on whose behalf the third party is acting,'[105] which is not the case when a simple filling of trademarked cans occurs by a third unrelated party.[106] Moreover, in exceptional circumstances, 'in relation to goods and services' may also refer to identifying goods of the right holder, as it happened with a car workshop

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[91] *Audi* (CJEU).
[92] *BMW* (CJEU).
[93] *L'Oréal v Bellure* (CJEU).
[94] *Opel* (CJEU).
[95] *Arsenal* (CJEU).
[96] For loyalty use, see *Arsenal* (CJEU); for ornamental use, see *Adidas-Salomon* (CJEU) as well as *Adidas-Marca Mode 2008* (CJEU).
[97] Mitsubishi (CJEU).
[98] See keywork advertising cases, eg *Interflora* and *Google France* (CJEU).
[99] cf *eBay* and *Louboutin* (CJEU). Regarding Google, see eg *Google France* (CJEU). Also, in *Daimler* (CJEU), there was no use, as the 'act is carried out by an independent operator without the consent of the advertiser, or even against his express will.'
[100] *eBay* (CJEU).
[101] *Celine*, *Arsenal* (CJEU).
[102] *UDV* (CJEU).
[103] *Celine* (CJEU).
[104] *OKO-Test*, *Opel* (CJEU).
[105] *OKO-Test*, *Red Bull* (CJEU).
[106] *Red Bull* (CJEU).

advertising its BMW-cars-related services.[107] In keyword advertising cases, the advertisers will use signs 'in relation to goods and services,' irrespective of the fact that the advertiser presents alternatives to the right holder's products or tries to mislead the public as to the origin of its items.[108]

Thus, while initially it was possible to interpret the EU trademark directive provisions as covering distinguishing uses of trademark, with non-distinguishing – as well as non-commercial – ones left in the free domain, the CJEU interpreted the framework as also including the non-distinguishing uses because of the probability that some consumers will establish a link with the right holder.[109] Almost any trademark use in slightly commercial settings with the *link* to the trademark right holder may be an infringement. This link will be easy to find in trademark parodies, for it is precisely the right holder's trademark that a parody, criticism, wider commentaries, and even so-called post-parodies target.[110]

Thus, if we have a parodist or a commentator willing to use a trademark to create a parody about the trademark, with the slight hint of commerciality as in the case of placing such modified trademarks on t-shirts offered and sold on the market, they may be liable under any of the three tests, with the function theory behind the double identity test, global appreciation analysis under the likelihood of confusion scenario, and the due cause element of the reputed trademark test not helping much despite being rather flexible.[111] It is particularly true in the reputed trademark domain that parodists aim at, because the link between signs is easy to establish here, the similarity of signs does not have to be on the level of the likelihood of confusion scenario, and unfairness is easily associated with many unauthorized trademark uses[112]. The same can be said about available trademark limitations with their honest practices condition involving the well-known circular logic tied to the conditions in the main infringement scenarios.[113]

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Parody cases in the EU. According to the case law of the EU Member States, in situations with various parodies, infringement was found because of tarnishment – think of the Supreme and Lacoste trademarks on apparel of lower quality; because of blurring – think of the Kappa trademark in the style of the Kinder one applied to apparel which can be seen as weakening the uniqueness of the reputed trademark; and in many cases because of unfair advantage – think of the Pudel sign in the Puma trademark's style applied to t-shirts. In many of these cases, so-called easy, empty, post-parodies were designed. Courts could not find any serious and deep messages in them; they could not establish art in them; at the same time, the commercial nature of use and close similarity of signs mattered a lot in finding infringements.

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[107] OKO-Test 31. For examples, see BWM (regarding the unauthorized use by a third party of a sign identical to the trademark of a manufacturer of goods to notify the public of that party's services related to those goods). See also O2 regarding the use of a right holder's trademark in advertising.

[108] Google France 71-72, 89-90.

[109] For a more comprehensive discussion on the subject, see Senftleben (n 5).

[110] On post-parodies, see Charles Colman, 'Trademark Law and the Prickly Ambivalence of Post-Parodies' (2014) 163 U Pa L Rev 11.

[111] Other elements like 'the change of economic behavior' of consumers. See *Intel* (CJEU).

[112] _____.

[113] Art. 14 EUTMR/TMD. See eg Kur _____; Senftleben _____. Other defences include use of the trademark for comparative advertising and exhaustion – see _____.

To discuss these cases in more detail.

As I argue elsewhere, many of these decisions based on the EU legislation and CJEU interpretations may be wrong.[114] When a trademark parody, other commentaries, or non-distinguishing uses in general are concerned, and when such trademark uses imply affixing to physical products sold on the market, the described EU trademark system places these cases under infringements. At the same time, trademark-based speech continues to be first and foremost speech not about the origin but about other matters, and placing this speech on products does not make it signify product origin. To comprehend that, more context related to specific trademark uses, such as those on t-shirts' front, shall be considered. The current system fails to incorporate such contextual information. In the situation when official trademark limitations do not help, it leads to online service providers willing to be on the safe side and prohibiting any trademark-related but non-distinguishing speech from the outset.

On the use of a trademark as it is on the t-shirt's front – also non-distinguishing?

On the importance of trademarks as cultural symbols.

Parodies and AI. In the genAI setting, generating any of the trademark parodies touched upon in the EU Member States' case law may be easily possible. At the same time, ChatGPT already demonstrates that such generated results may not be always welcomed, though for now, it is quite easy to circumvent the first negative responses from this tool. Besides, mere reproduction of logos is first denied in most cases of the LV experiment, despite the goal of the ChatGPT to benefit humanity in a variety of tasks.[115] Interestingly, light post-parodies of trademark, like the Pudel sign displayed in the Puma trademark style, seem to be accepted by the model in 15 independent chats out of 15, despite the fact that such a parody was considered infringing by courts.[116] However, more serious trademark-based commentaries, with accusations in cruelty towards animals or use of forced labor, will not be initially accepted with references, as mentioned, to trademark law rules (very broadly) and unacceptance of criticism and protest towards right holders. So, we see that the problematic field of trademark parodies was transferred to the AI environment. But it should not be this way.

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To discuss whether there is 'use' and use 'in relation to goods and services, and use 'in the course of trade' from the genAI system providers (e.g., ChatGPT).

To discuss the safe harbor provisions for online services in the EU – does it cover ChatGPT?

4. Suggestions for More Trademark Use in GenAI

AI model's functioning. We may want to more seriously think of trademarks – convenient shortcuts to goods and services of different undertakings – as symbols of the objective shopping reality around us. Besides, we should remember that trademarks are powerful cultural symbols full of meanings and associations, with many of them coming not from their right holders, despite their hegemonies, but from consumers and public at large.[117] When doing so, one may

[114] _____.
[115] _____.
[116] *Pudel* (Germany).
[117] See generally Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (Knopf 1999).

more easily conclude that in the trademark domain, unlike in the copyright one, there should not be any questions whether to allow or not to allow trademarks as input for genAI models. Trademarks are facts of reality, and they even *shall* be included in the training data and well memorized by these models, even when such models are incorporated into commercial products. With that in mind, current studies that appeal to utilize protective measures to minimize the 'memorization' of IP content shall be critically reviewed from the trademark law perspective.[118]

As for prompts and outputs, while immediate commercial uses of genAI content are possible (the first step is to integrate genAI into social media networks), at the beginning, there is no trademark 'use' at all, whether commercial or non-commercial ones; a mere generation of any trademark per se in ChatGPT as a fact of commercial reality is not about one's active 'commercial communication' (even if it is later), so it *shall* be allowed. If these AI tools are aimed at making people's lives better, why not even stimulate the 'reproduction' of trademark registers? It may even improve the level of knowledge about brands among users.

Concerning other matters in content moderation, such as copyright, some scholars propose a reality check by an external public algorithm, so that there are no 'ex ante tradeoffs' in AI which may intervene into one's freedom of expression more significantly.[119] This check may help restore the role of such uses as for educational and parodic purposes.[120] In the field of trademarks, such a reality check is any trademark register that is already typically public, so information from it can be attached to a genAI tool as a database to get the truthful trademark representation from.[121]

The same concerns trademark parodies and other commentaries that users may want ChatGPT to generate: At the very beginning, there is a mere generation of images, with no 'use' of a modified trademark 'in relation to goods and services' 'in the course of trade.' Besides, in trademark parodies and commentaries, generated content will continue to reference trademark holders' products and, hence, be used for non-distinguishing purposes with respect to possible activities by users, though it seems to be not so important for the CJEU. Based on that, it is possible to conclude that there *shall* not be any restrictions on prompts and outputs related to trademarks.

One might ask about overlaps with copyrighted materials: What if the use of trademarks is promoted at all stages of genAI, from input to output? In this case, one my conclude that it should not matter, because a certain copyrighted sign was chosen to also become a symbol within the shopping reality – this reality must be reflected in the AI setting for better objectivity and relevance with respect to its users. Moreover, when overlaps happen, protection shall be based on the alternative which is *not* in favor of the right holder (e.g., potential indefinite term of trademark protection shall be limited by the defined copyright term).[122]

User rights. As for imperfect trademark rules in general, this paper's experiment with ChatGPT may let one think of introducing explicit user rights with respect to trademarks.

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[118] Tanja Šarčević, Alicja Karlowicz, Rudolf Mayer, Ricardo Baeza-Yates, and Andreas Rauber, 'U Can't Gen This? A Survey of Intellectual Property Protection Methods for Data in Generative AI' (2024) <arXiv:2406.15386v1> accessed 7 July 2025.

[119] Elkin-Koren (n 3).

[120] ibid.

[121] See the topic of AI agents.

[122] See generally Senftleben (n 5).

Online services and now genAI tools choose to protect themselves from trademark infringement claims by over-blocking trademark-related content. It is a *simple* solution, as briefly mentioned above, but according to the studies on simplification, this process has limits with respect to its advantages after which advantages disappear. When people only use ChatGPT or similar tools, they may quickly form a general simplified understanding of how trademark law functions. Besides obviously limiting autonomy of certain individuals, including with growing self-censorship,[123] ChatGPT-like tools may become manipulative instruments, just like it is happening in Chinese DeepSeek that does not generate any results about the Tiananmen massacre.[124] Moreover, incorrect gossips about the dangers of violating IP rights and such peculiar scenarios as trademark parodies may be distributed among genAI users.[125] AI tools are becoming convenient means in controlling the populations in non-democratic regimes; but they also threaten democratic regimes by their imperfections discussed earlier as well as the lack of discretion in these tools which is needed to consider context in less clear situations[126] like trademark parodies.

To change all that, we need a 180-degree turn to allow more trademark use. Parody uses are key in the domain of freedom of expression, and if right holders cannot be persuaded to encourage humor and open criticism towards them, people at least shall be allowed to feel confident that laughing at a trademark or criticizing it when using it at the same time is normal, including with the help of genAI tools.

User rights have been advocated for in general with respect to trademarks, for instance by Carys Craig in her piece on parodic websites.[127] As for AI more generally, procedural user rights were proposed by some scholars, and copyright user rights have also been welcomed (with a reference to the EU Copyright Directive) and further advocated for.[128] In the situation with the lack of trust towards algorithmic rule of (by) law, especially when these algorithms play the gatekeeper role, the emphasis on user rights may create a presumption of lawfulness, including in trademark matters.[129]

This emphasis on user rights shall, however, come with a counterweight. Indeed, there are pronounced concerns about direct threats of such tools as ChatGPT, including the ease with which arguably illegal content may be multiplied and then distributed.[130] This concern is related to specific users' behaviors that can be tackled with other means and not through the fixation of imperfect trademark rules in the genAI setting, as the LV experiment demonstrates. Therefore, it is the user whose subsequent behavior shall be analyzed with respect to how a genAI content, involving trademarks, is used in someone's 'commercial communication.'[131] Otherwise, when there is no concrete evidence that there is now an unprecedented number of

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[123] Sebastian F Schwemer, Christian Katzenbach, Daria Dergacheva, Thomas Riis, and João P Quintais, 'Impact of Content Moderation Practices and Technologies on Access and Diversity' (SSRN 2023) <https://ssrn.com/abstract=4380345> accessed 7 July 2025.

[124] _____.

[125] _____.

[126] Smuha (n 21).

[127] Carys Craig, 'Gripe Sites and Trademark User Rights: Lessons from Canada's *Cooperstock* Case' in Haochen Sun and Barton Beebe (eds), *Charting Limitations on Trademark Rights* (OUP 2023).

[128] Quintais et al (n 9); Schwemer et al (n 68).

[129] Quintais et al (n 9).

[130] _____.

[131] Paper on the emphasis on user cases.

unauthorized images with trademarks used in commerce due to the proliferation of genAI, mere attempts to produce a picture with a parodied trademark are blocked with just *simplified* (and false) explanations.

More broadly, explicit user rights may help make AI companies more accountable in how they limit trademark uses in those cases where there is no initially commercial and distinguishing use of the proprietors' rights – this may help involve more humans into the content moderation processes and consider more individual experiences and contexts with this respect.

Other thoughts. With respect to speech-related concerns, when private parties like AI model/system providers decide on a trademark test, they do not check any elements of such tests and, hence, are unable to incorporate the freedom of expression analysis into the application of broader doctrines and concepts like the function theory under the double identity scenario and the due cause element related to reputed trademark infringements. If they do not do it, they should not limit speech from the outset.

Content moderation is associated with the privatization of justice which is widely opposed in scholarship.[132] To help stop the privatization trend, there are appeals to make content moderation be based on less strict solutions and require online services to follow the human rights principles, including free expressions, independent of states in which they operate.[133] As a minimum requirement, there shall be transparency about how moderation works.[134] So, if trademark blocking continues, there shall be better clarifications about the fact that an AI model was trained to generate certain explanations regarding the applied legal rules and that the model provider consciously decided to expand those rules.

5. Conclusion

To conclude with some personal note, when I first prompted ChatGPT to show me trademarks of different reputed companies, included LV, or create critical trademark parodies thereabout, ChatGPT's replies made me feel lost. The situation appeared to me as untrue (though the word 'bullshit' indeed suits it better), unjust (why protecting powerful right holders against my innocent creativity), and against my self-determination (ChatGPT did not let me even see possible results, and it stopped my imagination).

The very aggressive prior censorship happening in ChatGPT in its initial responses is an extreme *simplification* of the trademark law reality. Any censorship is negative. Prior censorship with no context is even more disarming. We shall strive for 'finding stability in context,' not in its simplification.[135]

I understand that this is too much worry for some easily circumventable examples, but the field is developing, and the paper may offer guidance for content moderation in genAI.

It's another reinforcement of problematic trademark law issues with the amplification effect.

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[132] _____.
[133] Schwemer et al (n 66).
[134] ibid.
[135] Lissack (n 19).