Deepfakes and Private International Law

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Private international law plays a crucial role in addressing deepfakes. By their very nature, deepfakes are inherently international. First, they are digital creations, which means they benefit from ubiquity—the same deepfake can be viewed simultaneously in Paris and New York. Second, deepfakes are primarily disseminated via the internet, making them accessible virtually everywhere. Their global reach necessitates a private international law (PIL) approach. The key question then becomes: What rights are implicated by deepfakes, and how can PIL be applied to each?

As explained in other articles published as part of this symposium, personality rights are clearly central to the issue. Neighboring rights should not be overlooked either, especially considering that AI models may be trained using performances protected under these rights. Finally, from a European Union perspective, regulatory frameworks, such as the AI Act, are also highly relevant. This Article's objective will be to develop a PIL analysis tailored to each of these dimensions. As shown, the methodology differs depending on whether the issue concerns personality rights or regulatory compliance.

I. PERSONALITY RIGHTS AND PIL

Although copyright and even neighboring rights are not central to digital replicas, personality rights appear to play a key role in their analysis. Indeed, these replicas digitally duplicate the voice and the image of a real person, raising the question of authorization. In a domestic case, domestic law usually applies. Because the replica is digital, however, it can be seen and communicated everywhere, meaning that PIL questions must be resolved. Two different sets of questions must be answered. Firstly, which court has jurisdiction? Secondly, which law, or laws, applies?

When it comes to jurisdiction in Europe, an EU regulation applies: Regulation 1215/2012, also called the Brussels I bis Regulation.[1] The goal of this regulation is to

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1. *See* Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) [hereinafter "Brussels I bis"].

harmonize EU jurisdictional rules. Consequently, the rules determining the competence of a French court are the same as those determining the competence of an Italian court. In both cases, the Brussels I bis Regulation is applicable. Nevertheless, this harmonization is limited to EU cases. If the defendant is not in an EU Member State, the Brussels I bis Regulation is not applicable. As a consequence, the means of determining whether a French court or an Italian court has jurisdiction against a U.S. defendant will depend on French or Italian PIL rules.

This being said, what are the connecting factors under which a French or Italian court may have jurisdiction under the Brussels I bis Regulation, in order to determine whether a digital replica infringes personality rights? The first connecting factor focuses on the domicile of the defendant. If the replica has been created and displayed by a person domiciled in France, French courts have jurisdiction pursuant to article 4 of the Brussels I bis Regulation.[2] Such a scenario could occur, but it is not very common. The second connecting factor is the location of the tort. Pursuant to article 7, paragraph 2 of the Brussels I bis Regulation, "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur" may have jurisdiction.[3] If the defendant is domiciled in a non-EU country, national PIL rules are applicable. The solution would be the same, since the *forum delicti* is largely recognized. Such a general recognition of the *forum delicti* raises a classical question based on the localization of the tort, especially when committed in a digital manner.

Libel and pollution cases have already shown that the tort at issue could be located in various countries, the place where the harmful act occurred being different from the place where the harm is felt.[4] Moreover, there could be more than one place where the harm is felt. Indeed, the consequences of a defamation could be located in any country where the newspapers are distributed. The European Court of Justice has interpreted article 7, paragraph 2 in a broad manner, explaining that a plaintiff may initiate legal proceedings in either the country where the tortious act occurred or the country where the consequences of the tort are felt , both localizing the tort. The multi-localization of the tort extends the jurisdictional options offered to the plaintiff. Nevertheless, if there is more than one place where the harm is felt, each of the corresponding courts may only have a limited territorial jurisdiction.[5] To put it simply, a French plaintiff may bring a legal matter before an Italian court for defamation in a French newspaper only if the French newspaper is distributed in Italy. But the Italian judge would have jurisdiction only for the harms committed in Italy, not those committed abroad. The damage would thus be limited to the number of newspapers being distributed in Italy. This limitation was at the time justified by a desire to avoid forum shopping,[6] especially in favor of UK courts.

2. *Id.* art. 4.

3. *Id.* art. 7(2).

4. *See, e.g.*, Case C-68/93, Shevill v. Presse Alliance SA, 1995 E.C.R. I-450; Case 21-76, Bier v. Mines de Potasse d'Alsace SA, 1976 E.C.R. 1735.

5. *See Shevill*, 1995 E.C.R. ¶ 33 (ruling that when a libel plaintiff brings suit in a country where the harm occurred, that court has "jurisdiction to rule solely in respect of the harm caused in the State of the court" and not harms that occurred elsewhere).

6. *See id.* ¶ 79.

The question becomes much more complex with the internet. Indeed, a tort committed on the internet may appear to be committed everywhere in the world, at least if accessibility is taken into account. The question becomes how to assign territorial jurisdiction for a tort committed over the internet. In a decisive case, the European Court of Justice went further than for a tort committed in real life.[7] A plaintiff whose personality rights have been infringed online may still benefit from an option between "the courts of the Member State in which the publisher of that content is established" and "the courts of each Member State in the territory of which content placed online is or has been accessible."[8] If the plaintiff chooses a court where the damage is accessible, that court has "jurisdiction only in respect of the damage caused in the territory of the Member State of the court [seized]."[9] This case was the first time the ECJ accepted a localization of the whole damage at the center of interest of the victim. For the Court,

> [A] person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice.[10]

For the ECJ and for EU law, this is a small revolution. When it comes to jurisdiction, the guiding principle is the forum of the defendant. The plaintiff breaking the social peace must pay the price and seize, in principle, the defendant's jurisdiction. That is why the location of the defendant's domicile is the general rule in the Brussels I bis Regulation and in many national legal systems. The ECJ mentions a "fundamental principle attributing jurisdiction to the courts of the defendant's domicile," with special jurisdiction derogating from that fundamental principle.[11] That's why the ECJ in the *Kronofer* case refused to interpret the "place where the harmful event occurred" as referring to the claimant's domicile.[12] For the Court, the principle being the domicile of the defendant, such an interpretation would be too strong a derogation contrary to the objectives of the Convention. This is no longer true when the harmful event leading to a breach of personality rights occurred on the internet. Indeed, six years after *Kronofer*, the Court reached the exact opposite conclusion in the cases *eDate* and *Martinez*.[13] By localizing the harmful event at the center of interest of the victim, the Court creates a very powerful *forum actoris*.[14] Since the center of interest is usually the

7. Joined Cases C-509/09 & C-161/10, eDate Advert., 2011 E.C.R. I-10302.
8. *Id.* ¶ 52.
9. *Id.*
10. *Id.* ¶ 48.
11. Case C-168/02, Kronhofer, 2004 E.C.R. I-6023, ¶ 13.
12. *Id.* at ¶ 44.
13. Joined Cases C-509/09 & C-161/10, eDate Advert., 2011 E.C.R. I-10302.
14. Jean-Baptiste Racine, *Le* forum actoris *en droit international privé* [*Forum Actoris* in Private International Law], 23 TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 31 (2019) (Fr.).

habitual residence, the consequence is that the plaintiff may bring the matter to their local court. The home advantage is real. Moreover, the court being seized will have jurisdiction in respect to all the damages caused. Jurisdiction is worldwide. Clearly, the recognition of a *forum actoris* in that case is not neutral from a policy point of view. Political considerations explain such a global localization of the tort at the place of the victim. The internet is seen as a danger, especially when it comes to personality rights. The *forum actoris* is understood as a procedural answer to that danger, a way to compensate the risk created by the internet. This represents a small revolution in Europe, as it shows that jurisdiction rules are fed by policy considerations; but is nothing really new in the United States, since a U.S. court has endorsed the same position in copyright.[15] In the *Penguin* case, the New York Court of Appeals concluded that "[i]n copyright infringement cases involving the uploading of a copyrighted printed literary work onto the Internet . . . the situs of injury for purposes of determining long-arm jurisdiction under [the relevant section of New York's long-arm-jurisdiction statute is] . . . the location of the copyright holder."[16]

However, the following question depends on the applicable law: Once a court's jurisdiction has been established, which law should apply? The question is particularly important when the plaintiff decides to go to court where their center of interest is located. In that case, the court has worldwide jurisdiction, as the whole damage is localized there. Consequently, a French judge may have jurisdiction to determine whether a digital replica is an infringement not only for France but on a worldwide basis. A French court's jurisdiction, indeed, may not necessarily lead to the application of French law. From an EU perspective, two questions must be resolved. First, the question has to be characterized. Second, once the characterization is made, the relevant connecting factor has to be chosen. To complicate matters further, there is no EU harmonization on personality rights' conflict of law rules. The Rome II Regulation which is applicable to IP infringement does not include personality rights.[17] Article 1, paragraph 2, subparagraph (g) says that "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation [shall be excluded from the scope of Rome II regulation]."[18] Consequently, a French judge may apply French PIL while an Italian judge may apply Italian PIL. Not only are the PIL systems different in form, but they are also different in substance.

Indeed, conflict of law rules are not the same among EU Member States. Under the Italian Private International Law Act, personality rights may depend on the national law of the person.[19] Pursuant to article 24 of the Act, the existence and content of personality rights are determined by the national law of the person, while the

15. É. FARNOUX, LES CONSIDÉRATIONS SUBSTANTIELLES DANS LE RÈGLEMENT DE LA COMPÉTENCE INTERNATIONALE DES JURIDICTIONS [Substantial Considerations in Regulating International Jurisdiction] (2022).

16. Penguin Grp. (USA) Inc. v. Am. Buddha, 946 N.E.2d 159, 161–62 (N.Y. 2011).

17. *See* Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations, 2007 O.J. (L 199) [hereinafter "Rome II"].

18. *Id.* art. 1(2)(g).

19. Art. 24, Riforma del Sistema Italiano di Diritto Internazionale Privato [Reform of the Italian System of Private International Law], n. 218, May 31, 1995.

consequence of the infringement is determined by the *lex loci deliciti*. Article 24 organizes what PIL specialists call a "dépeçage" between the law of the right and the law of the consequence of the infringement.[20] Such a *dépeçage* could be compared to the *Itar-Tass* case, in which a U.S. judge applied Russian law in order to determine whether the plaintiff possessed rights under Russian law, but applied U.S. law to determine infringement.[21] Let's imagine an unauthorized digital replica of the Senegalese-Italian influencer Khaby Lame. The digital replica has been made by an extremist activist living in Hungary, but who still has a strong connection with Italy. Khaby Lame has his habitual residence in Italy. Let's also assume he is from Senegal and does not have Italian nationality. Based on *Edate*, Lame may bring an action in Italian court, for worldwide damage that is localized in Italy. But the Italian judge would have to apply Senegalese law in order to determine whether Khaby Lame held personality rights. Only Senegalese law would be applicable to determine the content of personality rights.

Under French private international rules, this outcome would be different. Forty years ago, France's highest civil court decided a very important case concerning infringement of personality rights.[22] A French newspaper displayed some unauthorized pictures of Farah Diba, the last wife of the Shah of Iran. The tort took place in France, but the victim was Iranian. The newspaper argued that no infringement had occurred since Iranian law did not recognize personality rights. The Court decided not to apply the plaintiff's national law, ruling that the case required application of the law where the tort had taken place.[23] Thus, under French law, the question becomes how to localize the tort. The fact that, from a jurisdictional point of view, the localization could correspond to the center of interest of the victim may not necessarily lead to the same localization from a conflict of law point of view. Moreover, there is no clear precedent under French law on the question of applicable law for the virtual infringement of personality rights. Nevertheless, some influential scholars have defended a localization at the domicile of the victim.[24] Furthermore, the Project for the French Codification of Private International Law endorses such a localization.[25] Pursuant to article 95, in case of an infringement of personality rights, the law of the center of interest of the injured

20. "Dépeçage" translates literally to "cutting up" or "dismemberment"; in the context of PIL it refers to courts applying the laws of different jurisdictions to separate issues within the same case.

21. Itar-Tass Russian News Agency v. Russian Kurier, Inc., 886 F. Supp. 1120 (S.D.N.Y. 1995).

22. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 13, 1988, Bull. civ. I, 86-15.524 (Fr.).

23. *Id.*

24. *E.g.*, PIERRE BOUREL, DU RATTACHEMENT DE QUELQUES DÉLITS SPÉCIAUX EN DROIT INTERNATIONAL PRIVÉ [ON THE CONNECTING FACTORS OF CERTAIN SPECIAL TORTS IN PRIVATE INTERNATIONAL LAW] Vol. II, 336–39 (1989); François Dessemontet, *Internet, les droits de la personnalité et le droit international privé* [*Internet, Personality Rights and Private International Law*], 2 MEDIA LEX 77 (1997).

25. PROJET DE CODE DE DROIT INTERNATIONAL PRIVÉ [DRAFT CODE OF PRIVATE INTERNATIONAL LAW] (2022) https://www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/projet_code_droit_international_prive.pdf [https://web.archive.org/web/20260203214338/https://www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/projet_code_droit_international_prive.pdf].

person shall apply.[26] The combination of this conflict of law rule and the *Edate* decision creates a very powerful tool in favor of the victim. Let's imagine a digital replica of Catherine Deneuve created in the United States and displayed worldwide. The French actress may bring a legal action for damages in French court. French law would be the only applicable law, even though the replica could be seen everywhere. Such a combined solution is a very powerful tool for the victim.

Finally, the icing on the cake would be the possibility for the presiding judge to order a removal injunction with worldwide effects. Interestingly, the ECJ has said that such an injunction could be ordered by a judge having a worldwide jurisdiction. For the Court, such a "single and indivisible" order may only be issued by a court with jurisdiction on the whole.[27] That is the case for the court of the domicile of the victim. The second condition for a universal order is that the infringement be committed everywhere.[28] As previously explained, a French judge may apply French law if it is the law of the domicile of the victim that localizes the tort committed. Consequently, for a replica of Catherine Deneuve, a French judge may order a removal that would theoretically have extraterritorial effects. Nevertheless, the effectiveness of the tool depends on local means of enforcement. If the French solution could be enforced from France or from the EU, the tool would be very strong. If the decision requires U.S. recognition, the tool might be quite weak. The combination of *eDate* and article 95 of the French Project for PIL Codification constitutes a theoretically strong tool whose practical effectiveness may vary across cases.

II. TERRITORIAL SCOPE OF APPLICATION OF THE AI ACT

If personality rights are clearly at the center of the digital replica issue, we have also seen from an EU point of view that regulation is also highly important. With the GDPR, the DSA, the DMA, and more recently the AI Act, the EU Commission has drafted numerous texts in order to regulate digital activity.[29] Two common features can

26. *Id.* at art. 95.

27. C-194/16, Bolagsupplysningen and Ilsjan, ECLI:EU:C:2017:766, ¶ 48 (Oct. 17, 2017) ("[I]n the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal, an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage pursuant to the case-law resulting from the judgments of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61, paragraphs 25, 26 and 32), and of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraphs 42 and 48), and not before a court that does not have jurisdiction to do so.") (citation omitted).

28. *Cf.* C-235/09, DHL Express France v. Chronopost, 2011 E.C.R. I-2825, ¶ 45, *and* C-18/18, Glawisching-Piesczek, ECLI:EU:C:2019:821, ¶ 50 (Oct. 3, 2019) ("Consequently, and also with reference to paragraphs 29 and 30 above, Directive 2000/31 does not preclude those injunction measures from producing effects worldwide."); Regulation 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 [hereinafter "Digital Services Act"], recital 31 ("Therefore, this Regulation does not provide the legal basis for the issuing of such orders, nor does it regulate their territorial scope or cross-border enforcement.").

29. See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter "GDPR"]; Digital Services Act (DSA), *supra* note 28; Regulation 2022/1925, of the European

be identified. First, the goal of these texts is not to sanction *ex post*, but to impose a behavior *ex ante*. Compliance is key for the EU Commission in order to protect the EU digital market. Second, all these texts share the same means of determining their territorial scope of application. Those rules are unilateral, meaning that they only determine situations in which EU regulations apply, not those in which non-EU laws apply.[30] This being said, these unilateral conflict of law rules endorse two cumulative connecting factors in order to determine their territorial scope of application.

Pursuant to article 3 of the GDPR, the Regulation "applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not."[31] An EU controller must comply with the GDPR wherever the processing takes place. The goal is to avoid any circumvention of EU law by manipulating the place of processing. The specificity of the GDPR and other EU regulations on digital activity territorial scope serves to add another connecting factor when the processor or controller does not have any establishment in the EU. In such a situation, the GDPR may still be applicable if data subjects are in the Union, goods or services are offered in the Union, or if there is a monitoring of behavior taking place within the Union. A U.S. startup with no physical presence in the EU must nevertheless comply with the GDPR if the startup offers goods in the EU.

This dual and subsidiary scope of application of the GDPR becomes a common trend for all EU regulations concerning digital activities. Although the relevant provisions of the AI Act are not drafted in identical terms, the result appears to be largely the same. First, deployers of AI systems that are established or located within the EU must comply

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Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and amending Directives 2019/1937 and 2020/1828 (Digital Markets Act, or DMA), 2022 O.J. (L 265); Regulation 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and amending Regulations 300/2008, 167/2013, 168/2013, 2018/858, 2018/1139 and 2019/2144 and Directives 2014/90, 2016/797 and 2020/1828 [hereinafter "EU AI Act"], 2024 O.J. (L 1689) .

30. S. Francq, *Universalisme Versus Bilatéralisme: Une Opposition Ontologique ou un Débat Dépassé? Quelques Considérations de Droit Européen sur un Couple en Crise Perpétuelle* [Universalism Versus Bilateralism: An Ontological Opposition or an Outdated Debate? European Law Considerations on a Couple in Perpetual Crisis], *in* QUEL AVENIR POUR LA THÉORIE GÉNÉRALE DES CONFLITS DE LOIS? 51 (T. Azzi & O. Boskovic eds., 2015).

31. GDPR, *supra* note 29, art. 3(1); *see, e.g.*, M. E. Ancel, *D'une Diversité à L'autre: A propos de la "Marge de manœuvre" Laissée par le Règlement Général sur la Protection des Données aux États Membres de l'Union Européenne* [*From One Diversity to Another: About the "Margin of Maneuver" Left by the General Data Protection Regulation to the Member States of the European Union*], REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [REV. CRI. DR. INT. PRIV.] 647 (2019) (Fr.); Ludovic Paillier, *L'Applicabilité Spatiale du Règlement Général sur la Protection des Données: Commentaires de l'Article 3* [*The General Data Protection Regulation's Territorial Applicability: Commentaries on Article 3*], JOURNAL DU DROIT INTERNATIONAL (CLUNET) 823 (2018) (Fr.); C. Kohler, *Conflicts of Laws Issues in the 2016 Data Protection Regulation of the European Union*, 52 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [RIV. DIR. INT. PRIV. PROC.] 653 (2016) (It.); Luís de Lima Pinheiro, *Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues*, ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL PRIVADO [AN. ESP. DER. INT. PRIV.] 163, 163 (2018); PEDRO DE MIGUEL ASENSIO, CONFLICT OF LAWS AND THE INTERNET 113–96 (2020).

with the AI Act.[32] Under this rule, for example, the French unicorn Mistral must comply with the AI Act. Much as under the GDPR, a provider established outside of the EU must respect the AI Act if he introduces AI systems in the EU market. The same is true where the output produced by the AI system is used within the Union. An Indian provider must thus comply with the AI Act if it targets the EU market by placing an AI system in the EU or just by offering output that is used there.

The underlying objective is the same: to ensure that the policy aims pursued by these Regulations are achieved for the benefit of EU citizens and of the EU market. This dual, subsidiary scope of application, based on the place of establishment and on the target identified, seeks to prevent circumvention of these laws via manipulation of either. In the end, what counts is whether the EU public is targeted. Where that is the case, EU law must be respected. Criticism has nevertheless been directed at this EU approach. Part of that criticism rests on the allegedly extraterritorial scope of these Regulations.[33] That objection is not particularly persuasive, as extraterritoriality is an inherent principle in PIL. PIL indeed applies when a legal issue can be localized in more than one country. The conflict of law rule designates a single law, meaning that this one legal system will be applicable to a situation not solely confined to the territory of a single State. From this perspective, extraterritoriality is not a problem for PIL, but part of the solution.[34] A more substantial concern, instead, lies in the potentially exorbitant scope of application of these Regulations.[35] When the territorial scope of a norm is determined by one single connecting factor, the factor may be susceptible to "bilateralization," that is, capable of giving rise to bilateral, reciprocal relationships between two states.

As an example, the French copyright rules on satellite broadcasting are applicable provided that the uplink is located in France.[36] This rule could be "bilateralizable," meaning that if the uplink were in Germany, German law would be applicable. A unilateral conflict rule may be "bilateralizable" when only one connecting factor is used. Since only one connecting factor is used, domestic law and foreign law are on equal footing. Consequently, the scope of EU regulations could be considered extensive, because there is more than one connecting factor. Moreover, the absence of any bilateral conflict of law rule leads to a risk under which dual and contradictory order may exist.[37] An Indian AI provider located in India may have to respect Indian law if

32. EU AI Act, *supra* note 29, art. 2.

33. *E.g.*, J. Heymann, *L'extraterritorialité du Droit International Privé Européen* [*Extraterritoriality in European Private International Law*], *in* L'EXTRATERRITORIALITÉ EN DROIT DE L'UNION EUROPÉENNE 69, 86 (E. Dubout, F. Martucci & F. Picod eds., 2021); Céline Castets-Renard, *Extraterritorialité du Droit Européen des Activités Numériques* [*The Extraterritoriality of European Digital Law*], *in* L'EXTRATERRITORIALITÉ EN DROIT DE L'UNION EUROPÉENNE 113, 119 (E. Dubout, F. Martucci & F. Picod eds., 2021).

34. M. E. Ancel, *supra* note 31 at 647; Sabine Corneloup, *Commentary on the Book "Solving the Internet Jurisdiction Puzzle,"* REV. CRI. DR. INT. PRIV. 404 (2018).

35. M. Audit, *Les Lois Extraterritoriales Américaines Comme Facteur D'accélération de la Compliance* [*U.S Extraterritorial Laws as An Accelerating Factor for Compliance*], *in* COMPLIANCE: L'ENTREPRISE, LE RÉGULATEUR ET LE JUGE 45, 47 (N. Borga, J. C. Marin & J. C. Roda eds., 2018).

36. Code de la Propriété Intellectuelle (C.P.I.) 4, art. L. 122-2-4 [hereinafter "French Intellectual Property Code"].

37. Louis d'Avout, *L'entreprise et les Conflits Internationaux de Lois* [Business and International Conflicts of Laws], RCADI, 811, 811–13 (2019).

the application of Indian law is based on its establishment. If this Indian provider puts AI systems on the EU market, the AI Act would also be applicable. Because both laws would apply to the same activity, the Indian provider may have to respect contradictory orders from India and the EU.

Going back to the AI Act, article 50, paragraph 4 requires that any deployer of AI systems generating deepfakes disclose that the content has been artificially generated or manipulated.[38] This obligation applies if the deployer is in the EU, if it places AI systems in the EU, or if the output is used in the EU.[39] The same is true for article 53, paragraph 1(c).[40] Under this provision, providers must put in place a policy to comply with Union law on copyright and related rights. It has been explained that a deepfake as such does not constitute an infringement of copyright law nor a related right. Even if the output itself is not an infringement, it is nevertheless clear that an AI system creating deepfakes of Catherine Deneuve would have been trained on interpretations of Catherine Deneuve. Related rights that are inapplicable to the output become applicable to the training process. In order to comply with the AI Act, then, the provider must comply with EU policy. More simply, authorization could be required for interpretations for which the opt-out has been correctly exercised. Based on article 2, the AI Act is applicable if the output is used in the EU. Therefore, Indian providers have to respect EU copyright law if the deepfake produced by the AI system is used in the EU. Recital 106 is even clearer, explaining that "any provider placing a general purpose AI model on the Union market should comply with this obligation, regardless of the jurisdiction in which the copyright-relevant acts underpinning the training of those general-purpose AI model take place."[41] The Indian providers must comply with EU copyright law even if the training is done in Japan, where it is copyright free.[42] Under Japanese copyright law, training does not require any authorization. Nevertheless, because the Indian provider places an AI system on the Union market, he has to comply with EU law and training is no longer free. If he has not put in place a policy in order to comply with EU copyright law, it will be considered as a breach of the AI Act since article 52's requirement for territorial applicability is not respected.

What is unclear is whether the provider's actions could also be characterized as copyright infringement. The scope of the application of the AI Act is unilateral and

38. EU AI Act, *supra* note 29, art. 50(4).

39. *Id.* recital 22 (pursuant to recital 22, the term used should be understood as being "intended to be used . . . [t]o prevent the circumvention of this Regulation and to ensure an effective protection of natural persons located in the Union, this Regulation should also apply to providers and deployers of AI systems that are established in a third country, to the extent the output produced by those systems is intended to be used in the Union.").

40. *Id.* art. 53(1)(c).

41. *Id.* recital 106.

42. Chosakuken Hō [Copyright Law], Law No. 48 of 1970, art. 30-4 (Japan), as amended by Law No. 30 of 2018, English translation available at https://www.cric.or.jp/english/clj/cl2.html [https://web.archive.org/web/20260210141600/https://www.cric.or.jp/english/clj/cl2.html] (pursuant to article 30-4 of the Japanese law, no authorization is required for TDM); Tatsuhiro Ueno, *The Flexible Copyright Exception for "Non-Enjoyment" Purposes—Recent Amendment in Japan and Its Implication*, 70(2) GRUR INT'L 142 (2021).

extremely broad. It does not align with the scope of application of copyright law, which is determined by a bilateral conflict-of-law rule based on the country in which the protection is sought.[43] Consequently, there is no symmetry between the scope of application of the AI Act and the scope of application of copyright law. This means that not complying with EU copyright rules could be a breach of the AI Act, but not necessarily an infringement under copyright law if the training occurred in Japan.

The question becomes whether EU copyright law applies to a deepfake generated in the EU but by an AI tool trained in Japan. The applicable law would be that of the country in which protection is sought. It is unclear, however, whether localization has to be made in a distributive manner, act by act, or whether it should be made in a more holistic manner, taking into account not each act but the infringing activity as such.[44] If one considers that the object to be localized is the infringing activity as a whole, the activity occurs in Japan and in the EU.[45] It is then clear that the law of the public being targeted has to be applicable, based on strong EU case law.[46] Following this analysis, EU law would be applicable to the whole activity. Consequently, the provision of

43. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 10, 2013, Bull. civ. I, 11-12.508 (Fr.) (characterizing the article 5 par 2 of the Berne Convention as a bilateral conflict of law rule) (contra 2 SAM RICKESTON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND, 1299 (2006)).

44. Pierre Bourel, LES CONFLITS DE LOIS EN MATIÈRE D'OBLIGATIONS EXTRACONTRACTUELLES [CONFLICT OF LAWS IN TERMS OF EXTRACONTACTUAL OBLIGATIONS] 65–66 (1961) (distinguishing between one harmful event dissociated and a parcel of harmful events and arguing in favor of an economic localization of the harmful event); André Lucas, ASPECTS DE DROIT INTERNATIONAL PRIVÉ DE LA PROTECTION D'ŒUVRES ET D'OBJETS DE DROITS CONNEXES TRANSMIS PAR RÉSEAUX NUMÉRIQUES MONDIAUX [PRIVATE INTERNATIONAL LEGAL ASPECTS OF THE PROTECTION OF WORKS AND OBJECTS OF RELATED RIGHTS TRANSMITTED THROUGH DIGITAL NETWORKS], 26 (1998), https://www.wipo.int/edocs/mdocs/mdocs/fr/gcpic/gcpic_1.pdf [https://web.archive.org/web/20260221215814/https://www.wipo.int/edocs/mdocs/mdocs/fr/gcpic/gcpic_1.pdf].

45. For a case clearly in favor of this approach, *see* Joined Cases C-24/16 & C-25/16, Nintendo Co. Ltd. v. BigBen Interactive GmbH, ECLI:EU:C:2017:724, ¶ 109 (Sept. 27, 2017) ("As regards the second set of circumstances mentioned by the referring court, by which it inquires about the law applicable when an operator has goods that allegedly infringe the rights protected by a Community design shipped by a third-party undertaking to a Member State other than the one in which it is domiciled, it should be noted, as stated in paragraph 103 of the present judgment, that the correct approach for identifying the event giving rise to the damage within the meaning of Article 8(2) of Regulation No 864/2007 *is not to refer to each of a defendant's alleged acts of infringement, but to make an overall assessment of that defendant's conduct* in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened by it.") (emphasis added). On that question, *see* Edouard Treppoz, *Le Paradoxe du Principe de Territorialité en Droit Européen de la Propriété Intellectuelle, in* LE DROIT À L'ÉPREUVE DES SIÈCLES ET DES FRONTIÈRES, MÉLANGES EN L'HONNEUR DE B. ANCEL 1510 (2018).

46. Case C-324/09, L'Oréal, SA v. eBay Int'l A.G., ECLI:EU:C:2011:474 (July 12, 2011) (seminal case); *see also* Case C-76/24, Tradeinn Retail Servs. S.L. v. PH, ECLI:EU:C:2025:593, ¶ 37 (Aug. 1, 2025) (explaining that "[a]s is apparent from paragraph 34 above, the proprietor of a trade mark may prohibit a third party from offering, inter alia by means of online advertising, goods under that sign notwithstanding the fact that that third party, the server of the website which it uses or those goods are located outside the Member State of registration, if that offer is targeted at consumers in the territory of that Member State. In such a situation, that proprietor is also entitled to prohibit that third party from stocking those goods outside that territory if that stocking constitutes a preliminary step to the making of such an offer or its implementation, with the result that it may be regarded as having been carried out for that purpose."). For more details, *see* Treppoz, *supra* note 45.

deepfakes in the EU, generated by an AI system trained in Japan, would constitute an infringement of EU law.[47] If localization must be determined on an act-by-act basis, it becomes necessary to identify whether the reproduction right or the right of communication to the public is applicable.[48] A recent trend in the EU considers that the right of communication to the public is applicable.[49] In that case, the reasoning is the same: the act is localized in Japan for as to the place where the harmful act occurred and in the EU as to the place where the harm is felt. The same case law applies, and EU law governs as the law of the public who is being targeted. If, by contrast, only the reproduction right was implicated, and localization likewise had to be determined act by act, Japanese law would apply. A dissymmetry would then arise: the AI provider would fall outside of the AI Act, yet he would not be liable as an infringer. Nevertheless, it may be possible to argue, under the Japanese law otherwise applicable, that EU law should apply as an overriding mandatory rule, since its territorial scope of application is determined by recital 105.[50] Under EU law, "overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable."[51] Recital 105 clearly expresses the public interest at stake and the willingness to safeguard a political and economic organization in the EU by requiring the application of EU copyright law if outputs are generated in the EU (irrespective of the place of training).[52] the use of overriding mandatory rules in copyright law is not unprecedented: it has already been accepted in relation to moral

47. Eleonora Rosati, *Infringing AI: Liability for AI-Generated Outputs under International, EU, and UK Copyright Law*, 16 EUR. J. RISK REGUL. 603 (2025).

48. Alexander Peukert, *Regulating IP Exclusion/Inclusion on a Global Scale: The Example of Copyright vs. AI Training* ¶ 11 (Goethe Univ. Frankfurt Fac. of L., Research Paper No. 3, 2024) ("If AI training were subject only to conventional copyright laws, AI providers could still operate effectively, despite the uncertainties just described. The reason is that according to the universally accepted principle of territoriality and the corresponding rule of *lex loci protectionis*, reproductions in the course of AI model training are governed solely by the copyright law of the country in which these reproductions take place"); following the same position, *see* JOÃO PEDRO QUINTAIS, COPYRIGHT, THE AI ACT AND EXTRATERRITORIALITY 13 (2025), http://dx.doi.org/10.2139/ssrn.5316132 [https://perma.cc/EC48-A5TC].

49. *See* EXPERT GROUP ON COPYRIGHT & ARTIFICIAL INTELLIGENCE, RECOMMENDATIONS FROM EXPERT GROUP ON COPYRIGHT & ARTIFICIAL INTELLIGENCE 65 (Danish Ministry of Culture, Sep. 2025), https://www.aepo-artis.org/wp-content/uploads/2025/10/1.-Danish-Copyright-expert-group-report-EN.pdf, [https://web.archive.org/web/20260311171401/https://www.aepo-artis.org/wp-content/uploads/2025/10/1.-Danish-Copyright-expert-group-report-EN.pdf].

50. EU AI Act, *supra* note 29, recital 105.

51. Council Regulation 593/2008, art. 9(1), 2008 O.J. (L 177) 6, 13 (on the law applicable to contractual obligations (Rome I)).

52. EU AI Act, *supra* note 29, recital 105.

rights[53] and remuneration rights.[54] This supports the argument that EU law may apply to training carried out in Japan, even where the deepfake is generated in the EU. More fundamentally, it shows how PIL is no longer a neutral technique, but rather a framework made of deliberate political choices.

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53. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 28, 1991, Bull civ. I, 89-19.522 (Fr.) (applying French law to the ownership of moral rights for an American movie, whereas the applicable conflict of law rule designated U.S. law as being the law of the origin of the work. The direct application of French law is justified since moral rights are characterized as being "lois d'application impérative."). On that decision, *see* Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM. J.L. & ARTS 135 (1991).

54. Article L. 131-24 of the French Intellectual Property Code, creating a super "loi de police" trumping the choice of law clause and the choice of court agreement (*see* Edouard Treppoz, *Le Droit Contractuel des Auteurs—Aspects de Droit International Privé* [*Contractual Authors' Right—Aspects of International Private Law*], 80 PROPRIÉTÉS INTELLECTUELLES 60 (2021) (Fr.). For more general information on authors' remuneration and applicable law, *see* Jane C. Ginsburg & Pierre Sirinelli, *Private International Law Aspects of Author's Contracts: the Dutch and French Examples*, 39 COLUM. J.L. & ARTS 171 (2015).