INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS

The AI Revolution: the International Legal Perspective

Edited by Anne-Marie Pecoraro and Alexander Ross

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The EU Artificial Intelligence Act: Key Provisions, Strengths & Weaknesses

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» Introduction

The use of AI in the entertainment industry is widespread and it is anticipated to revolutionise the production of music and audiovisual content. At the same time, many within the sector are concerned about unauthorised use of their works to train AI models and systems. The EU Artificial Intelligence Act (the AI Act) addresses a wide range of uses of AI, including some matters relevant to the entertainment industry – both in terms of the output of and input to AI systems and models. However, the AI Act does not address a number of questions relevant to the entertainment industry – answers to some of these questions are found in existing legislation while the prospect of further legislation to address other questions is likely.

The AI Act was approved by the European Parliament on 13 March 2024 and by the Council on 21 May 2024. The AI Act will enter into force twenty days after publication in the Official Journal and its provisions apply two years later, with some exceptions.[1]

The AI Act creates compliance obligations on providers and deployers of AI systems. Broadly speaking, providers are developers of the systems/models and deployers are users, although the distinction primarily serves as a mechanism to allocate responsibility for compliance with the obligations of the AI Act.[2] More obligations fall on providers than on deployers

and the extent of the obligations depends on the type of AI system provided and/or deployed.[3]

The AI Act classifies AI systems that are regulated under the Act into three categories:[4]

- AI systems with unacceptable risk – these are prohibited.
- AI systems with high risk – these are subject to very strict regulation under the Act.
- AI systems with transparency risk – these are subject to limited obligations relating to disclosing the use of AI.

AI systems not falling within these three categories are not subject to regulation under the AI Act. This means that many AI systems fall outside the scope of the Act.

Additionally, the AI Act imposes some obligations on providers of foundation models, known as general purpose AI (GPAI) models under the Act.[5] GPAI models will be subject to a set of limited requirements, focused on transparency, unless they pose a systemic risk, in which case they will have to comply with stricter rules.

Concurrently with regulation under the AI Act, a number of other laws, at both EU and Member State level, will be relevant to AI and the entertainment industry, ranging from data privacy laws to image rights.

As with all new legislation, there remains some ambiguity as to how to interpret the AI Act.

» Key Provisions

Two types of provisions are particularly relevant to the entertainment industry: the provisions focusing on the output of AI systems and GPAI models and the provisions focused on the input or training of the systems and models. There are four key obligations:

- An obligation on deployers of AI systems to disclose the use of AI in the creation of content.
- An obligation on providers of AI systems to label content created by AI in metadata.
- An obligation on providers of GPAI models to put in place a policy to ensure respect for EU copyright law.
- An obligation on providers of GPAI models to create a summary of the content used in the training of the model.

Each of these obligations is considered in more detail below.

» The Output Provisions

The output provisions put in place obligations relating to the use of AI in the production of content.

Disclosure of Use of AI in Content Production
Deployers of an AI system that generates or manipulates image, audio or video content that constitutes a "deep fake", as defined, must disclose that the content has been artificially generated or manipulated.[6]

> "The obligation under the AI Act falls on the person using the AI system to create the "deep fake" – not on the provider of the system and not on licensees or distributors of the content"

A deep fake is defined as: *"AI generated or manipulated image, audio or video content that resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful"*.[7] It is a broad definition, which encompasses AI-generated audio, digital replicas and AI-generated special effects.

The obligation under the AI Act falls on the person using the AI system to create the "deep fake" – not on the provider of the system and not on licensees or distributors of the content.

The AI Act requires the disclosure to be made *"at the latest at the time of the first interaction or exposure"*.[8] However, when the "deep fake" forms part of creative content, including an AV work, the disclosure obligation is limited to disclosure *"in an appropriate manner that does not hamper the display or enjoyment of the work"*.[9] The AI Act provides no express guidance on which of the provisions prevail in cases where disclosure before or at the first interaction of the content would hamper the display or enjoyment of the work, such as, potentially, in the case of film and TV content. However,

the AI Act envisages that the Commission will develop guidelines on the practical implementation of the obligation, the publication of which is anticipated to provide more clarity for the entertainment industry on how to satisfy the disclosure requirement.[10]

The obligation will apply two years after entry into force of the AI Act.

Labelling Content Created by AI
Providers of AI systems must label *"synthetic audio, image, video or text content"* created by AI as such in machine-readable format.[11] This can include watermarks and fingerprints.

The rationale for this obligation relates to the increasing difficulty humans may have in distinguishing between synthetic content and human-generated content and therefore the effect that large quantities of synthetic content therefore can have on *"the integrity and trust in the information ecosystem"*.[12]

The AI Act highlights in particular the risk of misinformation and manipulation at scale, fraud, impersonation, and consumer deception.[13] On this basis, it appears that *synthetic content* constitutes a specific sub-category of AI-generated content, with a focus on content which humans have difficulty in distinguishing from human-created content.

The obligation to label synthetic content does not cover AI systems primarily performing an assistive function for standard editing.[14] In the entertainment industry, this should exclude many AI-facilitated editing and post-production activities.

The obligation requires providers of AI systems to ensure that their technical solutions for marking the generated content are effective, interoperable, robust and reliable, and acknowledges that the specificities and limitations of different types of content may be taken into account in implementation as well as the costs of implementation.[15]

The Commission will develop guidelines on the practical implementation of this obligation, and more clarity on the types of AI-generated content covered by the obligation is expected.[16]

The obligation will apply two years after entry into force of the AI Act.

» The Input Provisions

The input provisions put in place obligations on providers of GPAI models relating to the use of content to train such models.

Policy to Comply with EU Copyright Law

The 2019 Directive on Copyright in the Digital Single Market[17] contains an exception to the reproduction right for text and data mining (TDM).[18] Rightholders can "opt out" from this exception, with the effect that the exception does not apply to works in respect of which the opt-out has been exercised.[19]

The AI Act requires providers of GPAI models to put in place a policy and technology to ensure compliance with EU copyright law including, specifically, the rightholder opt-out from the text and data mining exception.[20] While this does not address explicitly the questions of: (1) whether ingestion for the purposes of AI training amounts to copying and/or text and data mining (and, if so, which types of ingestion) or (2) whether the exception applies to ingestion for AI training, it provides a strong indication that the exception is relevant to AI training, if and to the extent that a copyright-relevant act occurs.[21]

Recital 106 provides further detail on the exception and also sets out the extraterritorial intent of the obligation – it is worth citing in full:

> *"Providers that place general-purpose AI models on the Union market should ensure compliance with the relevant obligations in this Regulation. To that end, providers of general-purpose AI models should put in place a policy to comply with Union law on copyright and related rights, in particular to identify and comply with the reservations of rights expressed by rightsholders pursuant to Article 4(3) of Directive (EU) 2019/790. 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 models take place. This is necessary to ensure a level playing field among providers of general purpose AI models where no provider should be able to gain a competitive advantage in the Union market by applying lower copyright standards than those provided in the Union."*

Article 4(3) of Directive 2019/790, to which reference is made, provides for the rightholder opt-out from the TDM exception. The opt-out requires express reservation by rightholders in an appropriate manner, such as by machine-readable means.

Recital 106 sets out the clear intent to give this provision extraterritorial effect, consistent with the overall architecture of the AI Act.[22] In other words, the intent is that providers of GPAI must exclude works opted out by rightholders pursuant to the TDM exception, regardless of where the ingestion (or copyright-relevant act) takes place.

At a general level, it seems reasonable to expect that respectable AI developers are in any case already or will be putting in place both organisational policies and technological tools to ensure respect for the rightholder opt-out in the EU.[23] Given that AI models can be trained on works ingested anywhere globally, if Article 53(1)(c) is to have any meaningful effect, then extraterritorial effect of the provision is necessary.

Nevertheless, copyright is a national and territorial right which confers protection on its holder only within the national territory of the granting state. Article 5(2) of the Berne Convention expresses the principle of lex loci protectionis as follows: *"the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed"*.

While the intent of the legislator is crystal clear – that providers of GPAI models must put in place a policy and technology to comply with the opt-out regardless of where the model is trained, such as to ensure the consent of rightholders is obtained when using their works to train GPAI models – the effect of the provisions is unclear. Complicating matters, there is currently significant uncertainty as to how to opt out, and there is no agreed upon or universal standard for opting out, in particular in terms of a machine-readable standard or solution for doing so.[24]

The newly established AI Office (based in the Commission) has been tasked with monitoring compliance with the obligations by GPAI providers.[25]

The AI Act envisages a code of practice to be drawn up in respect of this obligation.[26]

The obligation applies 12 months after the entry into force of the AI Act, unless the model is already on the market, in which case the obligations apply 36 months after entry into force.

"Complicating matters, there is currently significant uncertainty as to how to opt out, and there is no agreed upon or universal standard for opting out"

Summary of Content Used In GPAI Model Training

The AI Act requires providers of GPAI models to produce and publish a summary of the content used for training the model.[27] The summary is to be compiled in accordance with a template developed by the AI Office and is intended to increase transparency in terms of the content used to train GPAI models, including content protected by copyright, and to enable rightholders to *"exercise and enforce their rights"*.[28]

The AI Act envisages a code of practice to be drawn up in respect of this obligation[29] and the obligation applies 12 months after the entry into force of the AI Act, unless the model is already on the market, in which case the obligations apply 36 months from entry into force.

» Jurisdiction

The obligations apply where there is a connection with the EU.
For deployers of AI systems, the obligations apply if the output of the system is being used in the EU.[30] Therefore, if a song, film or programme is distributed in the EU, the obligations apply.

A deployer is defined as: *"Any natural or legal person, public authority, agency or other body using an AI system under its authority except where the AI system is used in the course of a personal non-professional activity"*.[31]

In respect of providers of GPAI models, the obligations apply if the model is made available in the EU, which includes sale, licensing and use.[32]

A provider is defined as: *"A natural or legal person, public authority, agency or other body that develops an AI system or a general purpose AI model or that has an AI system or a general purpose AI model developed and places them on the market or puts the system into service under its own name or trademark, whether for payment or free of charge"*.[33]

» AI Law and the Entertainment Industry: What's Next?

Many questions relevant to the entertainment industry are not addressed by the AI Act. These include the question of legal protection of content generated by AI, the question of infringement of copyright by AI outputs and AI-generated outputs entering into unfair competition with entertainment content, and the question of legal protection for authors, performers and other talent in the industry for their image, vocals and contributions. The answers to many, or at least some, of these questions may be found in existing law – both at EU and Member State level. That said, it is a safe bet that further EU-level legislation on AI affecting the entertainment industry will be proposed.

[1] *At the time of writing, the AI Act has not been published in the Official Journal.*

[2] *Recital 79 provides as follows: "It is appropriate that a specific natural or legal person, defined as the provider, takes the responsibility for the placing on the market or the putting into service of a high-risk AI system, regardless of whether that natural or legal person is the person who designed or developed the system."*

[3] *Per Article 3, a deployer is defined as: "Any natural or legal person, public authority, agency or other body using an AI system under its authority except where the AI system is used in the course of a personal non-professional activity" and a provider is defined as: "A natural or legal person, public authority, agency or other body that develops an AI system or a general purpose AI model or that has an AI system or a general purpose AI model developed and places them on the market or puts the system into service under its own name or trademark, whether for payment or free of charge".*

[4] *Recital 26.*

[5] *Recital 97 provides useful guidance on the difference between GPAI models and AI systems, as follows: "The notion of general-purpose AI models should be clearly defined and set apart from the notion of AI systems to enable legal certainty. The definition should be based on the key functional characteristics of a general-purpose AI model, in particular the generality and the capability to competently perform a wide range of distinct tasks. These models are typically trained on large amounts of data, through various methods, such as selfsupervised, unsupervised or reinforcement learning. General-purpose AI models may be placed on the market in various ways, including through libraries, application programming interfaces (APIs), as direct download, or as physical copy. These models may be further modified or fine-tuned into new models. Although AI models are essential components of AI systems, they do not constitute AI systems on their own. AI models require the addition of further components, such as for example a user interface, to become AI systems. AI models are typically integrated into and form part of AI systems. This Regulation provides specific rules for general-purpose AI models and for general-purpose AI models that pose systemic risks, which should apply also when these models are integrated or form part of an AI system. It should be understood that the obligations for the providers of general-purpose AI models should apply once the general-purpose AI models are placed on the market."*

[6] *Article 50(4).*

[7] *Article 3(60).*

[8] *Article 50(5).*

[9] *Recital 134.*

[10] *Article 96(1)(d).*

[11] *Article 50(2).*

[12] *Recital 133.*

[13] *Recital 133.*

[14] *Recital 133.*

[15] *Article 50(2).*

[16] *Article 96(1)(d).*

[17] *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*

[18] *Article 4*

[19] *Article 4(3)*

[20] *Article 53(1)(c)*

[21] *See also "A first look at the copyright relevant parts in the final AI Act compromise", P. Keller, Kluwer Copyright Blog (11 December 2023)*

[22] *Article 2*

[23] *It is of course redundant to state that any provider operating within the EU must respect EU copyright law.*

[24] *It is anticipated that both the European Commission and the EUIPO will publish studies addressing the opt-out and in particular the mechanics of the opt-out.*

[25] *Article 101 and Recital 108*

[26] *Article 56*

[27] *Article 53(1)(d)*

[28] *Recital 107*

[29] *Article 56*

[30] *Article 2*

[31] *Article 3*

[32] *Article 2*

[33] *Article 3*