

FAQs on AI

The following questions and answers are based on questions we have received from members, either through the TVTheatrical2023@sagaftra.org inbox or at our informational meetings. Please keep an eye on this list as we will continue to update it with new information as questions arise.

Some Big Picture Questions

Why can't you just ban AI on signatory projects?

Although there are members who took the concept of banning AI to the picket lines, it was our goal to put guardrails around AI, not wholly ban it.

Even if we wanted to ban all AI, Federal Labor Law constrains what we can bargain, limiting it to mandatory subjects of bargaining—those that affect wages, hours and working conditions—and permissive subjects—those that are allowed *if the parties agree to bargain them*. AI encompasses both types of subjects, and it isn't entirely clear where the line is given the current state of technology.

A ban on AI, while it sounds good in theory, could have significant unintended consequences, particularly as we cannot control companies with whom we don't have a bargaining relationship.

Did you take the advice of advisors who said we need greater protection regarding AI?

We did.

We consulted many experts throughout this process and there were many different opinions regarding the best approaches for AI. The experts consulted had expertise in numerous subjects, including technology, acting, the law (including regarding performer rights, labor, technology, and intellectual property), and the union's agreements and processes. The guidance from all of our experts, which also included members of the negotiating committee and staff, was taken into consideration at the time we initially formulated our proposals and throughout our negotiations.

Many industry experts who have reviewed the language of the deal have been impressed that we were able to achieve the broad protections we did.

Why didn't you ban the companies from training AI on our work? This is what many of us wanted.

Given that the rules in this area will come from a variety of sources and not just collective bargaining agreements, an outright ban was not something that we could achieve in this round of negotiations. You may have noticed that none of the guilds got this language nor did they get express consent regarding training. The DGA's agreement is silent on it. The WGA reserved the right to assert that training AI on covered material is prohibited by MBA or other law. We also have retained this right, although it will not be expressly referenced in the contract.

The truth of the situation is that this is a complicated legal issue that is currently being fought in the courts. The U.S. Copyright Office is conducting a study on AI and has solicited comments from stakeholders. Among the questions are ones relating to training data. SAG-AFTRA submitted comments relating to the study, as did the WGA and DGA, and we will continue to work on this topic from many directions.

This is a topic we will continue to monitor and, depending on the outcome of the litigation and studies, we can revisit this topic if the courts and copyright office find training requires consent.

Consent

What happens if we don't give consent to the creation of a digital replica?

Can the producer refuse to hire me?

The short answer is yes. Producers have *always* been able to refuse to hire any person for any reason (except for those covered under applicable law). Even before this contract, producers could, and did make being scanned a condition of employment, they just were less open about it. Now, you will have notice ahead of time and be able to make an informed decision on whether you want the job if it will require scanning. No more surprises on set or last minute demands to be scanned. It also has to be **clear and conspicuous** — no more burying your consent to be scanned in the fine print.

The producer will also have to provide detailed information about how they will **use** the digital replica **and** get your consent.

So, not only do you have the opportunity to consent to the creation of the replica, you must be given a **“reasonably specific description”** of the intended use each time it will be used. This consent cannot just be hidden in the standard terms and conditions as the producers have done before — it has to be clear and conspicuous and it has to be separately signed or initialed by you.

What does “clear and conspicuous” mean?

Generally, the legal definition of this term means “reasonably understandable and designed to call attention to the nature and significance of the information presented.” So, this could mean it is in a separate rider or it could be in your contract as long as it clearly stands out, such as in a larger font, ALL CAPS or **bold**. But “clear and conspicuous” is not the only requirement — you have to be given an opportunity to separately sign the consent. A bolded paragraph granting consent, alone, is not sufficient.

There is a body of law relating to this term that we would turn to in any grievance over whether language in your contract is “clear and conspicuous.”

Is new consent required for each use of our digital replica or can the employer get it for all future uses?

Consent is required for **each use** of a digital replica with some very limited exceptions. **You** will be able to control when and how your digital replica is used.

The wording around consent says the description of use has to be “reasonably specific.” Doesn't the word “reasonably” give the producers an out where they can just give us vague descriptions?

Not at all. We are confident that there is sufficient legal precedent regarding the term “reasonably” in this context that an arbitrator would interpret this to mean a “specific description.” If you are asked to sign a contract with a description you feel is inadequate, please contact the union for assistance.

If I am in a TV series, can the studio get permission to use my digital replica in the entire series when the replica is created?

Not really. While there is a multi-project exception to the requirement for consent to use Employment-Based Digital Replicas, the producer has to identify each episode (or picture) in which it will be used and provide you with a reasonably specific description of how it will be used in each episode. If there are any changes to how your replica will be used, the producer will have to seek your consent for the changes; they cannot exceed the scope of what you agreed to.

Consent (cont'd)

Why was dubbing excluded from the requirement for “informed consent?”

Dubbing is already permitted in the Codified Basic Agreement and the Television Agreement. The exception incorporates those existing provisions and references current standard practices.

How will the provisions relating to consent after death work if the producer claims they cannot locate my “authorized representative” and seeks the union’s consent?

This concept is already in the Codified Basic Agreement and the TV Agreement relating to reuse of clips, so the same principle will generally apply here. Before the union takes any action, we will make sure the producer has exhausted all reasonable avenues to locate your authorized representative.

If you reside in a state that has a post-mortem right of publicity registry, such as California, your authorized representative, which will usually be your estate, should submit their information to the applicable registry as that is a likely place for a producer to search for their information. We also anticipate establishing a system where you can provide us with instructions regarding what you want us to do should we be approached about consent to use your digital replica.

Why does the union have this right? Shouldn’t my consent expire after death?

Believe it or not, protection of your likeness is very limited after death. Even in those states that have a post-mortem right of publicity, like California, there is limited protection in the case of creative works like movies. This deal actually creates new post-mortem protections for your likeness and voice that you otherwise may not have. It is not intended to give the union new rights, rather, it’s a new way for the union to protect your rights.

Principal Performers

Who owns an Employment-Based Digital Replica?

The employer legally owns all materials created from your work on a motion picture. With these new terms in place, they cannot **use** them without your consent and, in most cases, further payments. The consent requirement is an exception to the rights the employer otherwise has under Copyright Law. The concept is the same as how the producer has to get your consent and pay you to reuse clips in which you appear or how you earn residuals when the film or show is released in a new market — these are bargained exceptions to the employer’s legal rights.

Do the provisions on digital replicas apply to voice actors?

The definitions refer to both voice and likeness, so the same rules apply to digital replicas of your voice as they do your image.

Can you explain the difference between an Employment-Based Digital Replica and an Independently Created Digital Replica?

The Employment-Based Digital Replica is one created with your participation, such as through being scanned on set, in connection with a particular project.

An Independently Created Digital Replica is one that is created independent of a particular project and that may be licensed to a producer for a project that you are not physically working on.

Principal Performers (cont'd)

I was scanned by a producer on a movie earlier this year. There was language in the fine print of my contract that gives them permission to use my “simulated likeness and voice.” How do these new provisions protect me?

We have long taken the position that a producer’s use of your digital replica is a mandatory subject of bargaining and that language like that is void. However, we do not have any arbitration decisions on that. The new provisions related to use of a digital replica will apply to any use going forward.

Does this new language mean that when we get cast in a principal role, the producer will automatically scan us and then has to give 48 hours notice if they want to use the digital replica they create?

No. It means they have to give you at least 48-hours notice *before* they scan you. The production crew can no longer surprise you on set and send you to get scanned. The producer has to give you notice and get your consent at least 48 hours in advance (or when you are hired, if that is less than 48 hours). They will *also* have to get your consent for the use of the digital replica by providing a reasonably specific description. Then, they will have to get your consent again each time they want to use your digital replica in a different project or in a different way from what they described initially.

Background Actors

Who owns a Background Actor Digital Replica?

The employer legally owns all materials created from your work on a motion picture. With these new terms in place, they cannot *use* them without your consent and, in most cases, further payments. The consent requirement is an exception to the rights the employer otherwise has under Copyright Law. The consent requirements in the agreement are exceptions to the employer’s legal rights that the union was able to achieve through bargaining.

I am a background actor and was scanned by a producer. The language in my voucher gives them permission to use my “simulated likeness and voice.” How do the new digital replica provisions in the 2023 TV/Theatrical Contracts protect me?

We have long taken the position that a producer’s use of your digital replica is a mandatory subject of bargaining and that language like that is void. However, we do not have any arbitration decisions on that.

These new provisions related to use of a digital replica will apply to any use going forward.

The section on Background Actors appears to say I will just get paid for one day of work for scanning but not for the use in the project. Many complicated scenes can take several days of work.

Producers cannot use your digital replica to circumvent hiring you or to avoid the background coverage numbers. So if you would have been hired for a week, they cannot just use your replica in place of you to avoid hiring you for that week.

Generative AI and Synthetic Assets

What will stop producers from only using generative AI and replacing all actors?

The contract language acknowledges the importance of human performance and requires the producer to notify and bargain with the union when they want to use wholly synthetic fake performers. Had we not included that language, companies would have been free to do exactly that.

Generative AI and Synthetic Assets (cont'd)

When can “synthetic performers” be used by companies in place of a performer?

Under the definition of a “synthetic performer,” it must be wholly synthetic and not based on an actual performer. If the digitally created character is voiced by a live performer, it is not a “synthetic performer” and the voiceover work would still have to be covered. If it resembles an actual performer, it is a digital replica and the applicable digital replica terms would govern.

When a company wants to use a “synthetic performer,” they will have to provide notice to the union and an opportunity to bargain. They also must bargain with performers when they want to create an asset using a specific performer’s “principal facial feature” (i.e., eyes, nose, ears and/or mouth).

The writers and directors got language that says AI is not human. Why didn't SAG-AFTRA?

There are significant differences between all three unions' agreements, just as there are significant differences between the work of actors, writers, and directors. The language in each agreement reflects these unique interests. While we took a different approach to the language, there *is* an express acknowledgement of the importance of human performance and significant protections for the *humans* we represent in our AI terms.

We created separate rules around “digital replicas” and “synthetic performers” (a/k/a “synthetic fake performers”), with each having its own definition and specific terms governing their use. Our approach has always been to focus on consent and to ensure that the companies cannot use digital replicas of you without your consent.

For wholly synthetic assets, they *cannot use them* without notifying the union and bargaining. Had we not done that, there was nothing stopping them from using these synthetic assets without anyone's consent.

Who will get paid if the union grants consent for use of synthetic fake performers?

We are not aware of any widespread plan to use them at this point, but staff will work with the negotiating committee to establish a process and position on this. One important thing to note — the language of this section gives us the right to “bargain in good faith over appropriate consideration.” “Consideration” is a legal term that has a broader meaning than just compensation, although that is usually part of it.

Miscellaneous

What happens if a company that has created my digital replica goes bankrupt/shuts down and their assets get sold to another company?

Consent for digital replicas created under the Codified Basic Agreement or TV Agreement is granted on a per project basis at the time of use. The new company would still have to obtain your consent to make any future use of your digital replica. If there is a bankruptcy, the Bankruptcy Law is highly complex, so there may be some exceptions, and we would pursue grievances against any party that attempted to use your replica without your consent. Additionally, laws such as the right of publicity and other potential legislation we are pursuing would help to protect against misuse of your digital replica by a third party.

Will there be a new department created to keep track of digital replicas? How will you enforce these terms?

We will ensure we have the resources necessary to handle the AI provisions in the contract.

Miscellaneous (cont'd)

What safeguards are in place for secure storage of replicas?

While the agreement with the AMPTP does not include language specifically relating to storage of digital replicas, there are myriad state laws that govern the safe storage and use of personally identifiable information. In many states, this would include biometric information, such as your digital replica. We will take affirmative steps to encourage producers to put additional protections in place. You are also free to negotiate additional protections of your own.

How will this affect negotiations on other contracts, such as the Interactive Media Agreement?

We have several agreements that have different bargaining parties and wholly different bargaining histories. We will certainly bring what we have learned and achieved in these negotiations to future negotiations.

What will prevent a studio from using a digital replica during a future work stoppage/strike?

The producer needs to obtain your consent for use of your digital replica. This would be one of the services being struck, just as reuse was restricted during the strike that just ended. If you had already given consent prior to the strike, the producer would only be permitted to use the digital replica to the specific extent consent was already granted. It would not impact our ability to effectuate a strong work stoppage.

What is meant by “exceptions for uses if they would be protected by the First Amendment” in the summary of the Agreement?

It is important to note that this only applies to “Independently Created Digital Replicas,” which are those created without your physical participation, and to “synthetic performers” that incorporate recognizable “principal facial features” of known performers. The full agreement describes this as “when the First Amendment would protect a use for purposes of comment, criticism, scholarship, satire or parody, or would protect a use in a docudrama, or historical or biographical work.”

Is the union pursuing any technology to be able to track the use of our digital replicas?

We have been having conversations with companies working in the AI space for many years, including ones offering tracking technologies or services. Until recently, many of these companies have not presented us with viable business models given the rapid developments in the space. We continue to meet and talk with companies to ensure we remain at the forefront of this space.