

Digital Replicas 101

What You Need to Know About the 2023 TV/Theatrical Contracts

General Information

In the 2023 TV/Theatrical Contracts negotiations, SAG-AFTRA secured protections for the creation and use of digital replicas of performers, as well as protections relating to digital alterations of your performance.

A “**Digital Replica**” is a replica of your voice and/or likeness that is created using digital technology, such as artificial intelligence.

There are **two types** of principal performer digital replicas and one type of background actor digital replica in the CBA and TVA —

- An “Employment-Based Digital Replica” is one created in connection with your employment on a motion picture (i.e. a movie, a TV or streaming show, etc.). You might be asked to participate in the creation, such as being scanned.
- An “Independently Created Digital Replica” is one created without your participation and used in a motion picture in which you did not work.
- A “Background Actor Digital Replica,” like the Employment-Based Digital Replica, is one created with your participation.

A “Synthetic Performer” is not a digital replica, it is a *wholly digital* reproduction that appears to be a person, but does not resemble a recognizable performer and is not voiced by a person.

You have the right to **consent** to whether a digital replica of you is used or altered, and the right to **information** about the specific use or alteration prior to granting consent. We describe this as “informed consent.”

You have the right to be **paid** when your digital replica is used.

Creation of a Digital Replica of Your Voice or Likeness

If you are asked to do work, such as a scan, to create a digital replica you have the right to informed consent and be paid for it.

The producer has to notify you at least 48 hours before your services are required (unless you are engaged less than 48 hours, then at the time of engagement)

The informed consent **cannot be buried** in the “standard terms and conditions” of your contract or background voucher. It can be in your contract (or a separate rider), but it has to be clear and conspicuous, such as **BOLD AND ALL CAPITALS**, and you have to specifically sign or initial the section.

The time you spend creating the replica is work time.

There are a few caveats:

- If the producer adjusts the scheduling to accommodate your schedule, you are entitled to a half-day of pay (for principals)
- If you are doing other work that is paid you will be adjusted so you receive a full day of pay
- If you are working under Schedule F, it is included in your rate unless you have negotiated for more
- If the work is done during the period covered by your guarantee, there is no additional compensation unless you have individually negotiated otherwise

If you have to be scanned on a day you are not doing other covered work or getting paid for certain other things, such as travel, you will get paid for a full day at your *pro rata* salary or the daily minimum

Use of Your Digital Replica

Principal Performers

For all types of digital replicas, you have the right to **informed consent** as to their use in new photography or soundtrack that you didn't perform, except for minor changes.

There are specific **rules for informed consent**:

- You must be provided a “**reasonably specific description** of the intended use.” This will allow you to judge whether the use is something you are comfortable with.
- It must be **clear and conspicuous**, and you must be able to separately **sign or initial** it
 - Note: This does not apply to Independently Created Digital Replicas because there is no employment contract.
- If you die after granting consent, consent doesn't automatically end
- If you are deceased, the producer still has to get consent from your estate (or whoever controls the right to your likeness) or the union.

A few **additional points on informed consent** —

- It can only be obtained for **specific projects**. The producer cannot obtain blanket consent to use your digital replica.
- Informed consent for use in other projects must be obtained **prior to use** and not at the time of initial employment.
- There is one very limited exception — for motion pictures identified as part of a multi-project use, such as a trilogy, you can be asked to provide informed consent for multiple projects at the time of initial employment.

For informed consent to be valid:

- The project(s) must be identified
- A reasonably detailed description of the intended use must be provided
- You must be employed on the other identified project(s) (unless you are deceased when the project commences)
- For Independently Created Digital Replicas, there is a limited exception for uses “protected by the First Amendment.” This includes when the First Amendment would protect uses such as purposes of comment, criticism, scholarship, satire or parody, or would protect a use in a docudrama, or historical or biographical work.

Compensation for Digital Replicas

You have the right to to be **paid** for the use of your digital replica and **pension and health** plan contributions will be made on your behalf.

Compensation depends on the type of digital replica and how it is used.

Compensation For Employment-Based Digital Replicas —

- When it is **used in the same motion picture** for which it was created, your compensation is based on how much you would have worked in person.
 - The producer must **objectively** and **in good faith** estimate the number of production days that you would have worked for the scenes in which your digital replica is used
 - You will be paid the higher of your pro rata daily rate or the day performer minimum per estimated day
- You will be entitled to residuals if your replica remains in the motion picture and if you would have received them had you done the work yourself
 - The residuals will be based on both your replica and in-person performance
 - If *only* your replica remains in the motion picture, the replica will be treated as a day performer for purposes of residuals

- There is no compensation for use of your replica in certain, limited circumstances:
 - If your compensation would have covered the work had you done it in person
 - For example, if you are a major role performer on a one-hour television show and you worked in person for three days and the use of the replica is the equivalent of another three days
 - If you were employed under Schedule F.
 - If it was used in a scene that you performed in person
- When it is **used in a different picture** than the one for which it was created, your compensation is negotiable
 - The day performer rate is the minimum for bargaining
 - If the replica is used in a field or medium covered by a different SAG-AFTRA agreement, the minimums of that contract will apply
 - You will be entitled to the same residuals you would have received had you done the work yourself
 - There is **one exception** —
 - If you were under Schedule F when the replica was created, any additional use payment is subject to individual bargaining

Compensation for Independently Created Digital Replicas —

The contract **requires bargaining** but does not set minimum compensation. This means you can determine the minimum you are willing to accept for the kind of work described when the producer seeks consent.

Digital Alteration

Producers must obtain your **informed consent** prior to digitally altering your performance, with some limitations for minor alterations.

There are specific **rules for informed consent**:

- You must be provided a **“reasonably specific description** of the intended alteration(s).” This will allow you to judge whether it is something you are comfortable with.
- It must be **clear and conspicuous**, and you must be able to separately **sign or initial** it
- If you die after granting informed consent, the consent doesn’t automatically end
- If you are deceased, the producer still has to get informed consent from your estate (or whoever controls the right to your likeness)

There are some **exceptions** to the requirement for informed consent:

- These exceptions are intended to allow producers to **“fix it in post,”** as the saying goes. They include:
 - For post-production alterations, editing, arranging, rearranging, revising or manipulating of photography and/or sound track for purposes of:
 - Cosmetics, wardrobe, noise reduction, timing or speed, continuity, pitch or tone, clarity, addition of visual/sound effects or filters, standards and practices, ratings, an adjustment in dialogue or narration or other similar purposes
 - Under any circumstance when dubbing or use of a double is permitted under the Codified Basic Agreement or Television Agreement.
 - To make adjustments to conform your lip, facial or body movement or voice to a foreign language or for purposes of changes to dialogue or photography necessary for license or sale to a particular market

For background actors, if your lip or facial movements are altered to make it look like you are speaking, and dialogue is added, you will be upgraded to a day performer.

Use of Your Digital Replica

Background Performers

Many of the same rules relating to principal performers apply to background actors, particularly around informed consent.

One provision particular to background actors is the guarantee that digital replicas will not be used in place of background actors within the coverage maximums. The producers still have to hire humans for those roles.

You have the right to **informed consent** to the use of your digital replica in new photography or soundtrack that you didn't perform, except for minor changes.

There are specific **rules for informed consent**:

- You must be provided a “**reasonably specific description** of the intended use.” This will allow you to judge whether the use is something you are comfortable with.
- It must be **clear and conspicuous**, and you must be able to separately **sign or initial** it
- If you die after granting informed consent, the consent doesn't automatically end
- If you are deceased, the producer still has to get informed consent from your estate (or whoever controls the right to your likeness)

Additional points on informed consent —

- It can only be obtained for **specific projects**. The producer cannot obtain blanket consent to use your digital replica for future projects.
- Informed consent for use in subsequent projects must be obtained **prior to use** and not at the time of original employment.
- The new requirements do not override section 43 of the Codified Basic Agreement, relating to consent for nudity.

Compensation for use of your digital replica depends on where it is used.

- When it is **used in the same motion picture** for which it was created, your compensation for the creation of the digital replica also covers its use
 - **However**, the producer cannot use your digital replica to circumvent engaging you. This means that your digital replica cannot be used to replace you for work you would have otherwise been hired for.
- If your digital replica is **used as a principal role**, you will be **upgraded** and paid as a principal for the number of days that you would have worked had you performed in person.
 - The producer must **objectively** and **in good faith** estimate the number of production days that you would have worked to for the scenes in which your digital replica is used
 - If your work as a principal remains in the motion picture in a manner that you would have been entitled to residuals had you done the work in person, you will be **entitled to residuals** when they become due
- When it is **used in a different picture** than the one for which it was created, your compensation is negotiable
 - The background actor daily minimum is the minimum for bargaining
 - If the replica is used in a field or medium covered by a different SAG-AFTRA agreement, the minimums of that contract will apply

Generative Artificial Intelligence

This new section adds a definition of “generative artificial intelligence” to the Codified Basic Agreement, while expressly acknowledging that the terms shall apply to any similar technologies, however named.

As part of the agreement, the producers “acknowledge[d] the importance of human performance in motion pictures and the potential impact on employment... when a Synthetic Performer created through a GAI system is used in a human role that would otherwise be performed by a human”

“**Generative Artificial Intelligence**” is defined as: a subset of artificial intelligence that learns patterns from data and produces content based on those patterns (e.g., ChatGPT4, MidJourney, Dall-E2). It does not include ‘traditional AI’ technologies programmed to perform specific functions (e.g., CGI and VFX), such as those already used during all stages of motion picture production (e.g., pre-visualization, pre-production, production, post-production, distribution, marketing).

If a producer wants to use AI to create a synthetic replica with a “**principal facial feature**” (i.e., eyes, nose, ears and/or mouth) that resembles you, and they will **use your name or facial feature as a prompt**, they have to **bargain for your consent**. As a simple example, if the producer prompts the AI to “create a female character with eyes like Performer A, nose like Performer B, and mouth like Performer C,” the producer would have to bargain with each of those performers and obtain their consent.

The producers agreed to notify SAG-AFTRA when they plan to create and use “Synthetic Performers” and bargain over consideration (including compensation), when they are created and used in projects covered under the Codified Basic Agreement or TV Agreement.

The producers also agreed to meet with the union throughout the term of the contract to keep an open dialogue on this topic.