

Thoughts on SAG-AFTRA contract November 17, 2023

Disclaimers:

1. I am an attorney with expertise in Artificial Intelligence but my opinions and thoughts below are my own and not those of any affiliated organization nor any employer (including any past, future or prospective employers). This is just my personal opinion based on the 18-page summary provided to union members, the information provided during the first several hours of the call on Wednesday November 15th, and information provided to me by individual union members. For example, I have not read the union's contract with its members.
2. I am not providing any legal advice. These are just some thoughts based on my review of the summary and information provided to me.
3. My primary focus in these thoughts is on the sections related to Artificial Intelligence since that is my particular area of expertise. There are some general thoughts on the contract beyond that, but it is mostly about the AI.

General Thoughts:

1. **Lack of Visibility into Contract:** It is not acting in good faith for the Union (or the AMPTP) to expect the membership to ratify a contract without providing the entire contract to it while expecting the membership to rely exclusively on a summary that the Union has created. There is no guarantee or expectation that the Union-generated summary is accurate and complete. The membership should insist on seeing the contract in its entirety and should be suspicious if the Union continues to deny such request. While the Union is presumably authorized to act on the membership's behalf in many situations, unless the Union contract with its membership specifies otherwise, it is typically grounds in a lawsuit to nullify a contract that was ratified without full consent and visibility into the document. Ratification requires acceptance of all terms of the contract, which a summary does not provide in any way.
2. **The Spirit of the Contract vs. The Language of the Contract:** I heard a lot of talk from the Union reps on Wednesday's call about what they ultimately are representing is the spirit of the contract (e.g. the streaming fund will go to everyone who doesn't meet the 20% viewership threshold) that is not in any way supported by the actual language of the contract. The language of the contract dictates, not the spirit of the contract. If something is not in the language of the contract, no one has to do it. Claiming adherence to the spirit is disingenuous and manipulative.
3. **Protecting the Union members' likenesses (in the form of "digital replicas") should be a top priority for the Union and its members.** The argument that AI is so new and variable so we "just have to see what happens" is a terrible one. There are clear ways to protect your rights and personas NOW because you won't be able to try to go back and do it later. Your likeness is the reason any of you have jobs. Whether it's you in human form or in digital form, that is your meal ticket. Period. Without it, you do not have employment.
 1. One important way to protect member rights regarding likenesses is for the contract to clearly state that any digital replicas or likenesses that are created either with or without consent (meaning whether or not consent is required and/or given) remain the intellectual property/under the ownership/direction of the member exclusively, who has sole control over any further licensing and use of that likeness.

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2. As written, the digital replicas, even if the AMPTP strictly adheres to what the Union is trying to claim is the spirit of the contract -- that these digital replicas can be used only in certain circumstances with informed consent -- the producers can argue (and will win) that those replicas belong to them. There is way too much wiggle room and too many vagaries in this contract for any of you to allow a studio or producer to own your likeness and the rights to it.
3. It should be specifically articulated a) that the member retains ownership of any digital replicas, and b) what the producers are doing with the digital replicas once they are finished with them (destroying? probably not. storing? probably ... but where and how??).
4. ***At the absolute barest minimum, the contract should specify that informed consent (defined by the parameters and scope of information the producers must provide like exact dialogue and script and appearance etc) is required for producers to create and use ANY digital replica under any circumstances.***
4. **Member Enforcement:**
 1. The entire Artificial Intelligence piece of this contract (summary) hinges on the members policing the actions of the producers. Most of the producers' obligations are vague with no specifics nor any clear guidelines for practice. For example reference to use of replicas for “substantially” similar work only and disclosure of “reasonable” amounts of information to the members. That will 10000% lead to the producers doing whatever they want because it is a purely subjective standard that they exclusively get to determine.
 2. For there to be any recourse, the members will have to a) find out about it; and then b) use their own resources to file claims and litigation to try to clarify the standard. That will be a losing game because the contract is leaving the judgement in the hands of the producers, so who is to say their judgement is wrong unless wildly egregious. As a result, your rights are being eroded. It should not be the individual members' responsibility to have to stand up to the producers each time they try something that isn't clearly defined in the contract.
 3. On Wednesday's call, the committee members argued that the way this works it that each time something happens, a member will have to fight it and create new case law in court and that will impact future occurrences. That is ABSURD. That is saying they expect the members to pony up the resources and time to fight the producers to ultimately have a court clarify what the language is supposed to mean. NOPE. A contract should not be written vaguely and then clarified through litigation. A contract should be written with clarity and specifics and taken to litigation *only* if there is a breach.
5. **Brief Explanation of Generative vs. Non-Generative AI:** For clarity, the first two types of AI that they describe (“employment-based” and “independently-created replicas”) will likely be industry specific tools that are used to create digital replicas using your image and likeness directly. Generative AI is like ChatGPT where you provide the tool with information and a prompt and then it generates content in return using all of the data points that exist in its model. The model learns and grows with each additional piece of data that is used as a prompt and that data that is input into the model for the purpose of generating an output becomes part of the tool's dataset. For example, "Write a song about living in Los Angeles during the pandemic in the style of Fleetwood Mac." A generative AI tool will then give you a song in return. Another example is to provide the

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model with an image of a person and asking it to generate an image of that person riding a horse in the desert. These tools can be private tools that are operating with a closed universe of data (for example if a studio has a generative AI tool that only draws on all of the films/shows that it owns), but many of them are public (e.g. ChatGPT) or semi-public. That means that any data that is input into the tool is then a part of that tool's dataset and accessible to any other person who uses the tool. There are huge security and privacy issues here that I'll talk about below, but member data of all kinds should not be put into any AI tool (generative or not) without consent and certainly should not be put into public tools.

6. **Transfer of Digital Replicas:** Nothing in the summary/contract talks about transfer of members' digital replicas. Because the contract does not provide for you to retain ownership of your likenesses, and there is nothing in the summary/contract about the producers not transferring the likenesses to another party, that's a very real possibility. Then you're SOL because someone else has your likeness and can do whatever they want with it including, for example, making a porn movie with it as though it's you.
7. **Remedies for Violation of AI Sections:** Sections BI (Digital Alteration) and Section C (Generative AI) include clauses regarding damages - claims under those sections are subject to arbitration and limited to monetary damages. That language is not in the other sections regarding AI. 1) Why are damages limited here? 2) Are they intending to limit damages elsewhere? 3) If your remedies here are limited to monetary damages, that means if you go through all the work to sue them and win, you are not entitled to a retraction, to removing your replica from the existing work nor future use, nor an apology or anything else to redeem your reputation and character. You'd only get whatever the arbitrator determines your likeness is worth in that one instance of use ... which I suspect won't be much at all. This limit on damages seems pretty bad to me.

Section II: Artificial Intelligence

1. **Section (B)(2)(b)(1):**
 1. Consent to create and use an employment-based digital replica (as defined) of an actor is **NOT** required if it is to be used for something that is "substantially" the same as what the actor has performed or what is scripted. A few thoughts here: 1) This means they can create a digital likeness of you without your consent period. Even if they don't ultimately use it. That's problematic because it's possible someone else could then get their hands on it or that they would use it without consent etc. ***Just the creation of a digital likeness should be protected under the contract.*** 2) This came up on the call on Wednesday, but the producers get to decide if the use is "substantially" similar to the contracted work/script. There are no guardrails or parameters here whatsoever, and it's a purely subjective decision by the producers, as described above. ***The contract should state explicitly what the parameters are for something to be substantially similar.*** There is no way they will not abuse this because they absolutely can. The remedy is described above and is an unreasonable burden to place on the members.
 2. This section also does not define what it means to have to provide members with a "reasonably specific description" of the intended use of the digital replica. Again, the producers can do whatever they want here, and until they are taken to court, there

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will be no requirements as to what they have to tell you. *The contract should state explicitly what information must be provided for members to be able to provide informed consent such as exact script, scenes, wardrobe, etc.*

2. **The contract should clearly state that consent to creation and use of digital replicas cannot be a condition of employment.** Otherwise, the producers will "thank you, next" to every person who declines to consent. That's a power move and creates a power dynamic that is illegal in other contexts in the workplace (e.g. sexual harassment).
3. **Section B3 - Independently Created Digital Replicas** (not employment related). The exceptions for use for First Amendment protected speech are pretty vague here. What does the contract actually say? Because I read this as someone can create a digital replica of a member, call it educational, and the member have no rights.
4. **Section B4: Digital alteration.** Same comments re "substantially" similar content. There is no definition here so the producers could take a member's work and alter it using AI to something the member did not do nor say and claim it was all within the parameters of the project without the member's permission/consent. This goes well beyond current editing technology into manipulation of content/delivery/appearance etc.
5. **Section C - Generative AI.**
 1. As I noted above, this section should provide protections and assurances that personal information and likenesses will not be put into any public or semi-public AI tools/models. Right now, that doesn't exist.
 2. Consent should be required ANY time a synthetic performer is being created and used. Right now, only notice is required to the Union and an opportunity to bargain with them about it, and there is nothing here that says the Union will tell the member (which they said they would on the call, but where is that codified? In the membership agreement or is it just their word??) So, the Union can bargain on a member's individual behalf for use of its likeness without ever telling the member. Further, if the producer gives the Union notice and the Union does nothing, the producer gets to use the creation on a free for all basis. The only time consent is required from the member is if the producer uses generative AI to create a likeness by inputting the member's name AND one of four facial features. For people who are bigger names, a likeness could absolutely be generated just by using their name or other information about them. An example of that would be inputting the following into the model "Create a likeness of the main male character in the motion picture "Big." Now we have a Tom Hanks likeness that the producer can use to literally make an entire movie without notifying the Union nor Tom Hanks nor by seeking and getting anyone's consent. See how easy it is to get around this contract????? *At the barest minimum, there should be the same notice and consent requirements for any Generative AI likenesses as exist in the Employment-Related Replica section.*

Section III: Streaming Bonus

1. The 20% threshold of a platform's viewership for the bonus is unreasonable and unattainable for I'd imagine 99% of shows. How about a scaled bonus per show based on viewership percentages that go all the way down to 5% of viewership or something like that (even that is unreasonable)?

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2. The fund they claim to be creating has zero parameters and is under the discretion of appointed “trustees.” They can literally do whatever they want with it. This needs to be clarified in the contract. Vague is not okay and expecting the articulated spirit to be followed without contract language to back it up is bad faith.

Section IV: Residuals

1. The only reasonable and fair solution here is to provide residuals based on the number of streams or hours streamed that a show has. They can and do track that information (otherwise how could they know if 20% of a platform is viewing a show to provide a bonus). This should be a dealbreaker, in my opinion. I don't know what the existing contract says, so it's hard to determine the impact of these changes since most of the language in the summary references modifications to the existing contract without specifying what the current language is. The Union holds the bargaining power here. There will never be an opportunity to get fair residuals again. The farther you all get down this road, the less realistic residuals similar to network TV become.