

## AI MEETS HOLLYWOOD

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This article discusses several recent developments involving artificial intelligence ("AI") that will have a profound impact on Hollywood.

### 1. No Copyright Protection for AI Elements

The U.S. Copyright Office recently issued a notice (the "Notice") stating its position on whether a work with elements created by AI ("AI Elements") can be protected by copyright and thus whether the work can be registered with the Copyright Office. While the Notice does not have the force of law, courts tend to defer to the Copyright Office interpretation of the Copyright Act, so it is likely that courts will follow the Notice.

The issue of copyright protection for AI Elements is critical to Hollywood, since AI Elements may include all or portions of the screenplay, music, characters, and visuals for a film. Indeed, it will not be long before AI is creating entire feature-length films. If AI Elements do not qualify for copyright protection, they cannot be protected by state law either, since the Copyright Act preempts any conflicting state laws. The result is that if AI Elements do not qualify for copyright protection, they fall into the public domain, and anyone can copy and use them.

The key distinction between AI Elements that can and cannot be protected by copyright is buried in a few footnotes in the Notice. The Notice states that only works created by humans qualify for copyright protection, so AI Elements alone do not qualify for copyright protection, even if the instructions given by a human to generate the AI Elements are themselves sufficiently creative to be protected by copyright and even if multiple subsequent instructions modify and refine the AI Elements. However, if a human assembles or modifies the AI Elements in a manner that meets the minimum level of creativity required for copyright protection, the assembled or modified work can qualify for copyright protection.

For example, the Copyright Office recently denied copyright registration for pictures created by AI that were included in a comic book, but it permitted registration for the accompanying text written by a human, and for the order of the pictures within the text, which was likewise chosen by a human. By analogy, a film that incorporates AI Elements should qualify for copyright protection, even if the AI Elements alone would not.

The Notice states that copyright registrations should identify all AI Elements in the work to be registered, so the Copyright Office can determine the scope of copyright protection. My bet is that some people may "forget" to identify the AI Elements in an application for registration, since there will usually be no way for the Copyright Office to independently identify them. The Notice warns that failure to identify AI Elements may be grounds for the Copyright Office to cancel the entire registration or for a court to disregard

it, so the "I forgot" approach may lead to challenges through litigation later, with interesting cases regarding proving AI Elements.

## 2. WGA

Here is a recent statement of the WGA on the use of AI, which explains the WGA position in the current negotiations with the studios:

The WGA's proposal to regulate use of material produced using artificial intelligence or similar technologies ensures the [studios] can't use AI to undermine writers' working standards including compensation, residuals, separated rights and credits. AI can't be used as source material, to create [screenplays], and AI-generated text cannot be considered in determining writing credits. Our proposal is that writers may not be assigned AI-generated material to adapt, nor may AI software generate covered literary material. In the same way that a studio may point to a Wikipedia article, or other research material, and ask the writer to refer to it, they can make the writer aware of AI-generated content. But, like all research material, it has no role in guild-covered work, nor in the chain of title in the intellectual property. It is important to note that AI software does not create anything. It generates a regurgitation of what it's fed. If it's been fed both copyright-protected and public domain content, it cannot distinguish between the two. Its output is not eligible for copyright protection, nor can an AI software program sign a certificate of authorship. To the contrary, plagiarism is a feature of the AI process.

The obvious concern of the WGA is that AI is already capable of writing entire screenplays, so it could in theory entirely supplant writers. The net result of the WGA proposal is that writers could use AI as a tool in writing screenplays, without treating the AI Elements as underlying "literary or source material," so the writers would get sole writing credit without any attribution to AI. The difficulty this issue raises for the studios is that since AI Elements cannot be protected by copyright, the studios are going to need writers to identify all AI Elements in a screenplay as a carveout from the standard representation that the screenplay was written entirely by the writers as an original work.

## 3. SAG-AFTRA

And here is the SAG-AFTRA statement on AI:

The terms and conditions involving rights to digitally simulate a performer to create new performances must be bargained with the union. In addition, any use or reuse of recorded performances is limited by our collectively bargained contract provisions, including those requiring consent and negotiation of compensation. These rights are mandatory subjects of bargaining under the National Labor Relations Act. Companies are required to bargain with SAG-AFTRA before attempting to acquire these rights in individual performers' contracts. To attempt to circumvent SAG-AFTRA and deal directly with the performers on these

issues is a clear violation of the NLRA. Additionally, Global Rule One, a fundamental principle of the union stating that SAG-AFTRA members must always work under a union contract anywhere they work, covers entering into any agreement with an employer to digitally simulate a member's voice or likeness to create a new performance. As such, members should not assign these rights to any employer who has not executed a basic minimum agreement with the union. Governments should not create new copyright or other IP exemptions that allow AI developers to exploit creative works, or professional voices and likenesses, without permission or compensation."

AI will be a huge issue to SAG-AFTRA going forward, since AI can create entire characters with features that intentionally resemble existing actors, while perhaps being different enough to avoid a right of publicity suit.

#### 4. Class Actions

A number of class actions have recently been filed by creators and owners of visual content (such as artists and photo aggregators) against companies that generate AI visual content. The plaintiffs generally allege that the AI companies are violating the plaintiffs' copyrights in two ways: the first is with respect to any copying that occurs as part of feeding information into the AI computers, and the second is with respect to the resulting output, which is alleged to include elements of the copied information to some extent.

#### 5. Future Claims

Here are my predictions as to future claims:

- It won't be long before record companies and book publishers file class actions against AI companies making the same arguments as owners of visual content, since books and music are also being used by AI companies to create new music and text.
- The DGA is certain to raise the same objections as the WGA and SAG-AFTRA to the use of AI to create films.
- Celebrities are certain to sue if they think an image or voice created by AI is too similar to their own. For example, if AI creates a character that is a composite of Brad Pitt and Tom Cruise, can neither sue? Can both?
- There will be a multitude of separate copyright lawsuits filed by owners of underlying works against AI Elements that resemble those underlying works. For example, Stephen King might take exception to a book that resulted from instructions to an AI computer that said, "Make a book similar to *The Shining* using the style of Stephen King." And musicians and record companies may not be fond of songs created from instructions to specifically follow the style and rhythm of an existing recording.

So buckle in for a wild ride as AI sweeps through Hollywood, with a guarantee of litigation for years to come to sort out the issues.