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I. INTRODUCTION

The Screen Actors' Guild (SAG), a labor union of Hollywood actors from film stars to extras, ended its strike after reaching an agreement with the Alliance of Motion Picture and Television Producers (AMPTP) to provide protections for SAG-AFTRA members from nonconsensual utilization of generative AI. This particular strike was monumental because SAG-AFTRA joined with the Writers Guild of America (WGA) in striking for the first time since 1960.¹ The consequence of this strike was that it “concurrently halted the Hollywood industry to initiate collective bargaining negotiations with studios and major streaming services.”² The WGA strike was resolved on September 27th, 2023.³ The SAG-AFTRA strike was resolved a few months later on November 9th, 2023.⁴ These strikes have raised novel discontent about the role of generative AI in writing creative works and mimicking actors' likenesses.⁵

¹ Sigma Khan, *Hollywood Labor Negotiations Provide AI Road Map*, LAW360 (Oct. 19, 2023, 5:01 PM), <https://www.law360.com/articles/1733464/hollywood-labor-negotiations-provide-ai-road-map>.

² *Id.*

³ *Id.*

⁴ Andrew Dalton and Krysta Fauria, *Hollywood's Strikes are Both Now Over as Actors Reach Deal with Studios and Return to Work with Writers*, Associated Press News (Nov. 9, 2023, 12:38 PM), <https://apnews.com/article/actors-strike-ends-hollywood-5769ab584bca99fe708c67d00d2ec241>.

⁵ LAW360, <https://www.law360.com/articles/1733464/hollywood-labor-negotiations-provide-ai-road-map> (last visited Dec. 18, 2023).

In the past few years, SAG and the WGA has raised concerns about the increased usage of generative AI.⁶ Generative AI is artificial intelligence that uses AI tools to create new content through algorithms.⁷ SAG members were increasingly worried that emerging AI technology will leave them with fewer roles, less pay, and less control over their careers. AI's prevalence in the film industry has grown immensely in recent years and will only grow in the future.⁸

Recently, studios have used AI to body scan actors and digitally insert them into the background of films and television shows.⁹ Studios have used AI to de-age older actors for scenes and have even used AI to bring dead actors back to life on screen.¹⁰ Many of these issues have arisen due to the growing change in shareholder desire for film studios to focus on profitability while cutting costs where they can.¹¹ Film studios are increasingly worried about their profit margins due to the steep increase in film and tv budgets and hope to utilize AI to cut costs where they can.¹² Whether this is through using digital replicas or archival footage to use dead actors rather than living ones, the main goal is to cut costs. While a business finding ways to lower expenses and raise profits is nothing out of the ordinary, nor should it be lamented for it, these cost-saving uses of AI have led to fewer jobs for actors and writers, less creative control,

⁶ *Generative AI Steps into Starring Role in Actor, Writer Strikes*, S&P Global Market Intelligence (Aug. 9, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/research/generative-ai-steps-into-starring-role-in-actor-writer-strikes>.

⁷ Kim Martineau, *What is Generative AI?*, IBM (Apr. 20, 2023), <https://research.ibm.com/blog/what-is-generative-AI>.

⁸ S&P Global Market Intelligence, <https://www.spglobal.com/marketintelligence/en/news-insights/research/generative-ai-steps-into-starring-role-in-actor-writer-strikes> (last visited Nov. 8, 2023).

⁹ Bobby Allyn, *Movie extras worry they'll be replaced by AI. Hollywood is already doing body scans*, NPR (Aug. 2, 2023 9:58 AM), <https://www.npr.org/2023/08/02/1190605685/movie-extras-worry-theyll-be-replaced-by-ai-hollywood-is-already-doing-body-scan>.

¹⁰ S&P Global Market Intelligence, <https://www.spglobal.com/marketintelligence/en/news-insights/research/generative-ai-steps-into-starring-role-in-actor-writer-strikes> (last visited Nov. 8, 2023).

¹¹ *Id.*

¹² *Id.* (Netflix wrote a paper that described how AI technology could partially automate the process of match cutting saving ample time and money during production.)

smaller paychecks or no paychecks at all, an impact on the quality of the product, and too many others to name.¹³

The SAG-AFTRA agreement as well as the WGA agreement with the AMPTP helps provide a blueprint for how generative AI can be effectively used in industries and how other unions and nonunion industries can most clearly see the issues facing them with this influx of new technology in their daily working lives. In particular, both of these agreements show how implementing generative AI only works with the consent of the employees. This is the best strategy to ensure the best possible protection while also allowing employers to wield the benefits of this new technology. As we will see, ensuring consent is the ideal way to protect workers from harmful consequences of new technology like generative AI.

Furthermore, there is also no clear legislation to regulate AI at this time for any industries.¹⁴ Without this legislation, strikes like SAG-AFTRA and the WGA that focus on contractual clauses to ensure protections are the default mechanism for governing relationships between employees and employers regarding generative AI technologies. They are the best way at this time to highlight the importance of consent in implementing new practices to protect workers' rights for unions and nonunion industries alike.¹⁵

This paper is divided into six sections. Section I provides a brief introduction to the focus and purpose of this paper. Section II will explain the history of Generative AI, how Generative AI relates explicitly to the film industry, and the problems this relationship has created. Section

¹³ Dean Kawamura, *The SAG-AFTRA Strike: A glimpse into AI's Impact on Collective Bargaining*, Hawaii Employers Council (Aug. 1, 2023 1:00 PM), <https://www.hecouncil.org/news/2023/08/01/main/the-sag-aftra-strike-a-glimpse-into-ai-s-impact-on-collective-bargaining/>.

¹⁴ LAW360, <https://www.law360.com/articles/1733464/hollywood-labor-negotiations-provide-ai-road-map> (last visited Nov. 8, 2023).

¹⁵ *Id.*

III will discuss the history of unions and how their collective bargaining capabilities uniquely position them to fight against the unfettered implementation of new technologies. Section IV will then explain the WGA and the SAG-AFTRA agreement recently enacted regarding their protections against AI with an emphasis on the consent-based requirements for use of AI technology. Section V will specifically explain how these agreements emphasize consent-based requirements and will also provide a blueprint for other unions and other industries that will be affected by generative AI for how best to handle this growing problem. Then, I will provide specific examples of unions and nonunion industries that are most similar to SAG-AFTRA and the WGA to show how the agreements can be utilized by them to find their own consent-based requirements. Section VI will conclude the paper by reiterating that industries must focus on consent when employers want to implement generative AI to best protect their rights at work.

II. GENERATIVE AI AND HOW IT APPLIES TO THE FILM INDUSTRY

Generative AI is a form of artificial intelligence that can create content through algorithms as they are applied to existing datasets. The term “generative AI” has become a buzzword as it makes its presence known in many industries worldwide. Nowhere has it been more noticeable than in the film industry. As this paper explains below, generative AI has been used to digitize actors’ names, images, and likenesses to save money and time. It can also be used to write screenplays and conduct rewrites that would otherwise be done by human writers. This section will also explain how the use of AI as it is now, with no real restrictions, is detrimental to the livelihood of the union members in SAG-AFTRA.

A. Generative AI

Generative AI is a form of AI that uses “deep-learning models that can take raw data . . . and ‘learn’ to generate statistically probable outputs when prompted.”¹⁶ In less technical terms, generative AI is a form of technology that takes existing data to create new data that is similar but different from the original data.¹⁷

Generative AI is utilized in many different ways. For example, ChatGPT, a text generator and one of the world's most well-known generative AI systems, through analysis of large amounts of data, can create content like poems, scripts, lesson plans, etc.¹⁸ OpenAI's GPT and other generative AI systems can “create virtual agents tailored to the wants and needs of specific people, with the ability to interact with people directly.”¹⁹

These AI systems have a broad reach and are continually evolving and performing increasingly complex tasks typically done by humans.²⁰ Generative AI can monitor employee productivity, screen resumes, and can even be used to help assist in the creation of viable self-driving cars.²¹ Thomas Kochan, a professor at the Massachusetts Institute of Technology, finds the media industry one of the key industries to be affected by AI.²²

B. How Generative AI Applies to the Film Industry

¹⁶ IBM, <https://research.ibm.com/blog/what-is-generative-ai> (last visited Nov. 8, 2023).

¹⁷ *Id.*

¹⁸ Sindhu Sundar and Aaron Mok, *What is ChatGPT? Here's everything you need to know about ChatGPT, the chatbot everyone's still talking about*, Business Insider (Aug. 21, 2023 12:26 PM), <https://www.businessinsider.com/everything-you-need-to-know-about-chat-gpt-2023-1>.

¹⁹ Ryan Tracy, *Business and Labor Square Off Over AI's Future in American Workplace*, The Wall Street Journal (Jul. 19, 2023, 8:44 AM), <https://www.wsj.com/articles/business-and-labor-square-off-over-ais-future-in-american-workplace-add9e41>.

²⁰ Tim Ryan, *AI Brings Challenges, Opportunities To Bargaining Table*, LAW360 (Feb. 6, 2023, 9:19 PM), <https://www.law360.com/employment-authority/articles/1573342>.

²¹ *Id.*

²² *Id.*

As stated above, the media industry is one of the focal points for the emergence of AI technology. The projected revenue from generative AI is expected to rise from \$3.7 billion in 2023 to \$36.4 billion by 2028, partly due to its rapid implementation in the film industry.²³ One of the most noticeable ways AI is utilized in the film industry is through digital likenesses. Film studios have been implementing this for years.²⁴ They use digital likenesses to de-age actors or even bring an actor who has died back to life to appear in a film.²⁵ For example, in the film “Indiana Jones and the Dial of Destiny,” Harrison Ford, who is 80 years old, is featured in numerous scenes with him looking 40 years younger due to digital de-aging.²⁶ Ford stated that Walt Disney Co’s Lucasfilm used images of his face during the original “Indiana Jones” films in the 1980s.²⁷ James Earl Jones, who is 92, agreed to allow AI to replicate his voice work for the role of Darth Vader in the Star Wars franchise, which will enable the character to continue even after his eventual demise.²⁸ Carrie Fisher, the actress who played Princess Leia in the Star Wars franchise, was digitally inserted by Disney into the “Rise of Skywalker” after she died before filming could be continued through the help of AI.²⁹

Netflix, a digital streaming platform, announced in early 2023 that it used image generation tools to create background images in the animated short “Dog and Boy” from Netflix Anime Creators Base.³⁰ The animation director said the AI tools enabled him to expand on his

²³ S&P Global Market Intelligence, <https://www.spglobal.com/marketintelligence/en/news-insights/research/generative-ai-steps-into-starring-role-in-actor-writer-strikes> (last visited Nov. 8, 2023).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Lisa Richwine, *Digital doubles, fake trailers: AI worries Hollywood actors before labor talks*, Reuters (Jun. 1, 2023, 9:28 PM), <https://www.reuters.com/world/us/digital-doubles-fake-trailers-ai-worries-hollywood-actors-before-labor-talks-2023-06-01/>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ S&P Global Market Intelligence, <https://www.spglobal.com/marketintelligence/en/news-insights/research/generative-ai-steps-into-starring-role-in-actor-writer-strikes> (last visited Nov. 8, 2023).

“freedom of expression.”³¹ Netflix is also looking into using machine learning to partially automate the process of match-cutting or transitioning between a pair of shots that use similar framing, composition, or action to move between scenes.³² By using AI, Netflix is hoping to make the process quicker for editors.³³

Many studios are embracing generative AI applications to cut costs and improve operating efficiency because they are increasingly being judged on metrics like EBITDA, debt levels, and free cash flow.³⁴ This is due to a shift in how shareholders view value in a production company. They want production companies to focus on profitability and to take an austere approach to spending, which invites appealing cost-saving strategies that generative AI can facilitate.³⁵ This shift is due to the fact that film and TV budgets have been drastically increasing the past decade and investors are worried that losses will increase.³⁶ While many uses of AI can benefit both actors and production companies, there are also just as many ways that AI can cause harm.

C. AI’s Effect on Actors

The uses of AI in the film industry and their effects are numerous. For example, Clark Gregg, a Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) union member known for his role as Phil Coulson in the Marvel Cinematic Universe, told a House panel that he was sent content that showed himself partaking in acrobatic

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

pornography.³⁷ This can be done without an actor’s knowledge because AI can replicate performers’ voices, appearances, and movements, which raise critical concerns about individuals’ control over their own likenesses.³⁸ Just like Clark Gregg, Tom Cruise and Keanu Reeves have been subjected to deepfakes, which are created by AI algorithms.³⁹ While these examples are related to things that occur outside of the control of film studios and are therefore not relevant to the employment relationship, according to Clark Gregg, this same technology is what film studios use to replicate background actors and have their likenesses used again through AI technology.⁴⁰ Studios typically do this without compensating the background actors who would have otherwise been on set being paid for a full day’s work.

One of the main reasons SAG-AFTRA was on strike was due to actors’ fear that AI technology will replace them, and they will therefore lose control over their images and performances.⁴¹ Their likenesses can be used as digital replicas or their performances altered using generative AI.⁴² Potentially, “AI can create digital versions of actors without their consent, which will result in a loss of creative control as well as financial compensation.”⁴³ Studios use these “digital replicas” in post-production to accurately replace an actor’s face or create an on-screen double.⁴⁴ While studios have agreed to obtain consent for these uses, there are areas where

³⁷ Rebecca Klar, *Why actors are fighting for AI protections*, The Hill (Oct. 23, 2023, 6:00 AM), <https://thehill.com/policy/technology/4267345-why-actors-are-fighting-for-ai-protections/>.

³⁸ *Id.*

³⁹ Reuters, <https://www.reuters.com/world/us/digital-doubles-fake-trailers-ai-worries-hollywood-actors-before-labor-talks-2023-06-01/> (last visited Nov. 8, 2023).

⁴⁰ The Hill, <https://thehill.com/policy/technology/4267345-why-actors-are-fighting-for-ai-protections/> (last visited Nov. 8, 2023).

⁴¹ Hawaii Employers Council, <https://www.hecouncil.org/news/2023/08/01/main/the-sag-aftra-strike-a-glimpse-into-ai-s-impact-on-collective-bargaining/> (last visited Nov. 8, 2023).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Dawn Chmielewski, *Actors decry ‘existential crisis’ over AI-generated ‘synthetic’ actors*, Reuters (Jul. 21, 2023, 2:07 PM), <https://www.reuters.com/technology/actors-decry-existential-crisis-over-ai-generated-synthetic-actors-2023-07-21/>.

consent was not required, which greatly concerned SAG-AFTRA.⁴⁵ SAG-AFTRA was also concerned that a performer’s image, likeness, and performance could be used to “train” new generative AI systems.⁴⁶ This would further hurt actors’ opportunities to find work in the industry because studios could rely more on AI systems than human labor. This practice would also not require the consent of the actors whose likenesses were used to train the generative AI systems.

The key effect of AI on the film industry that is most important for other industries is the lack of informed consent actors have on whether AI will use their likeness. For instance, Stephen Fry, known for reading the Harry Potter novels for audiobooks, found out his voice—through AI—was used in a documentary without his knowledge.⁴⁷ Currently, no laws in place would deter AI usage like this. This was one of, if not the key reason why SAG-AFTRA decided to strike.⁴⁸ This lack of consent leads to a lack of compensation. There is genuine concern that as AI continues to be implemented more and more, the ability to use actors’ work more effectively and elaborately without their consent would have put many actors out of work entirely if an agreement was not met.

Despite these potential issues, the emergence of AI is likely here to stay. As mentioned above, AI provides film studios with a solid tool to cut costs. This is primarily important because

⁴⁵ Actors are worried that they could be deprived of a say in their future work if they are not allowed to consent to whether their digital likenesses are used for future projects. To protect against this, the union wants to retain the rights to digital replicas for future works, giving them ownership. *Id.*

⁴⁶ Hawaii Employers Council, <https://www.hecouncil.org/news/2023/08/01/main/the-sag-aftra-strike-a-glimpse-into-ai-s-impact-on-collective-bargaining/> (last visited Nov. 8, 2023).

⁴⁷ Sian Hewitt, *Actors speak out against AI being used without their consent*, The Standard (Oct. 2, 2023), <https://www.standard.co.uk/culture/actors-ai-voice-likeness-tom-hanks-keanu-reeves-stephen-fry-b1110753.html>.

⁴⁸ Hawaii Employers Council, <https://www.hecouncil.org/news/2023/08/01/main/the-sag-aftra-strike-a-glimpse-into-ai-s-impact-on-collective-bargaining/> (last visited Nov. 8, 2023).

of the growing shareholder concerns that studios are not focusing enough on profitability and are spending too much on each individual project.⁴⁹

As we can see, AI in the film industry has been implemented broadly. While actors are the group most in the public eye, AI can also be used behind the scenes in the editing room to make productions more time efficient or the technology can be used to quicken the writing process, which would ultimately save the studios money. All this rapid implementation has disrupted the industry, which is why the WGA and SAG-AFTRA went on strike for a record four months before a deal could be made. The next section will discuss why unions can affect change more effectively than nonunion industries.

III. WHY UNIONS ARE EFFECTIVE AT PROTECTING WORKERS' RIGHTS

Unions protect workers' rights because of collective bargaining. Collective bargaining allows labor unions to exercise power and leverage against employers that non-union employees cannot do. This section will show historical evidence of how labor unions have been able to protect workers' rights in a way that is not feasible for nonunion workers outside of legislation. This section will also explain the consequences collective bargaining can have on employers who do not agree with the unions' demands.

At a broad level, unions effectively protect workers' rights regarding AI because of their ability to collectively bargain with employers who employ union members. According to the AFL-CIO, "collective bargaining is the process in which working people, through their unions, negotiate contracts with their employers to determine their terms of employment, including pay,

⁴⁹ S&P Global Market Intelligence, <https://www.spglobal.com/marketintelligence/en/news-insights/research/generative-ai-steps-into-starring-role-in-actor-writer-strikes> (last visited Nov. 8, 2023).

benefits, hours, leave, job health and safety policies, ways to balance work and family, and more.”⁵⁰ Collective bargaining is not available to individual employees outside of unions.

One reason collective bargaining is such a powerful and unique tool for unions is that it creates leverage. For example, dockworkers in West Coast ports have a history of negotiating with employers over technological innovations.⁵¹ In the 1950s, steel containers were introduced into the shipping industry, meaning “less manual labor and longer careers on the waterfront for dockworkers.”⁵² However, the new containers would mean fewer workers would be required to manage the duties of the port.⁵³ In response to this, the International Longshore and Warehouse Union was able to secure a promise from employers that no worker would be fired due to the implementation of steel containers.⁵⁴ This agreement would never be able to take place without the leverage being in a union afforded the dockworkers. Because of the way they were organized, the International Longshore and Warehouse Union had the ability to hold up imports to the country if necessary.⁵⁵

Without a union, none of this is possible. Harry Holzer, a professor of public policy at Georgetown University, stated, “[i]f the workers are not unionized, and if you’re not in a tight labor market environment, employers have a pretty free hand.”⁵⁶ The dockworkers may be

⁵⁰ *Collective Bargaining*, AFL-CIO, <https://aflcio.org/what-unions-do/empower-workers/collective-bargaining#:~:text=Collective%20bargaining%20is%20the%20process,work%20and%20family%2C%20and%20more> (last visited Nov. 8, 2023).

⁵¹ Meghan McCarty Carino and Rosie Hughes, *Labor unions’ fight against AI is nothing new*, Marketplace Tech (May 10, 2023), <https://www.marketplace.org/shows/marketplace-tech/labor-unions-fight-against-ai-is-nothing-new/>.

⁵² Meghan McCarty Carino, *Port unions have long bargained over disruptive innovations*, Marketplace (Jun. 17, 2022), <https://www.marketplace.org/2022/06/17/port-unions-have-long-bargained-over-disruptive-innovations/>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Marketplace Tech, <https://www.marketplace.org/shows/marketplace-tech/labor-unions-fight-against-ai-is-nothing-new/> (last visited Nov. 8, 2023).

⁵⁶ Marketplace, <https://www.marketplace.org/2022/06/17/port-unions-have-long-bargained-over-disruptive-innovations/> (last visited Nov. 8, 2023).

considered to be in a unique position since they can hold up almost every import on the West Coast if employers disagree with their demands. However, a union like SAG has almost the same level of power. SAG-AFTRA is filled with over 160,000 members, including some of the most well-known celebrities in the world, like Tom Cruise and Meryl Streep.⁵⁷ By striking, they deprive film studios and streaming companies of the ability to continue shooting their films and TV shows, which is the most cash-intensive part of the production process.⁵⁸

On top of the financial loss, since these are very public figures striking, the reputational harm to the film studios and streaming companies is also a major factor here.⁵⁹ SAG-AFTRA and the WGA are different than the International Longshore and Warehouse Union (ILWU) because the ILWU can immediately hurt the finances of the employers when they refuse to work.⁶⁰ This was not the case for SAG-AFTRA or the WGA. The creation of movies and TV shows takes time and have specific release dates in the future. This allowed the studios and streaming companies some leeway to wait out SAG-AFTRA and the WGA in the hope enough members will push for an agreement due to the loss of wages since they are not working.⁶¹ Regardless, unions are still the best way to fight emerging technology even if some unions may be better positioned to do it than others.

Another example of how unions are best to handle invasive technological change can be seen with the airplane pilots union. For years, pilots have lobbied against airlines that have tried

⁵⁷ Andrew Pulver and Catherine Shoard, *The Hollywood actors' strike: everything you need to know*, The Guardian (Jul. 14, 2023, 12:02 PM) <https://www.theguardian.com/culture/2023/jul/14/the-hollywood-actors-strike-everything-you-need-to-know>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

to replace them with automation.⁶² Since the 20th century, the flight crews on commercial flights have decreased from four or five flight crews to two.⁶³ “Increased technology and automation have enabled airlines to cut navigators, radio operators, and third pilots, leaving only the pilot and the co-pilot.”⁶⁴ The autopilot technology has continued to advance.⁶⁵ Despite this, the pilots have been able to steadfastly resist airlines’ attempts to cut the flight crew down to one.⁶⁶ It is likely safe to say that if the airline pilots were not unionized, the flight crew would have been decreased to one a long time ago.

Unions can hold so much influence that it borders on the absurd. In Detroit, for instance, the union that works for the Water and Sewage Department of Detroit has maintained a union rule from 1967 that requires the city to employ a “horseshoer” despite the fact the Water and Sewage Department has no horses.⁶⁷

Probably the most well-known display of a union battling technological change to protect its members is the New York Taxi Workers Alliance and its battles against ridesharing.⁶⁸ The 21,000-member union was able to lobby the city to enact legislation that caps the ridesharing vehicles that will also force Uber and Lyft (two of the biggest ridesharing companies) to pay

⁶² [Pranshu Verma and Gerrit De Vynck, *From airlines to Hollywood, workers are fighting to keep AI at bay*, The Washington Post \(Jun. 8, 2023, 7:00 AM\) https://www.washingtonpost.com/technology/2023/06/08/labor-unions-fight-ai/.](https://www.washingtonpost.com/technology/2023/06/08/labor-unions-fight-ai/)

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Jarrett Skorup, *No Horses, But Detroit Water Department Employs “Horseshoer,”* Michigan Capitol Confidential (Aug. 20, 2012), <https://www.michigancapitolconfidential.com/17404>.

⁶⁸ Chris Brooks, *Meet the Militant Taxi Drivers Union That Just Defeated Uber and Lyft*, In These Times (Aug. 15, 2018), <https://inthesetimes.com/article/militant-taxi-drivers-union-uber-lyft-alliance-new-york-city>.

their drivers a minimum wage.⁶⁹ Uber alone spent over \$1 million dollars between January and June 2018 trying to fight against the Taxi Worker Alliance.⁷⁰

Finally, we must discuss why non-union workers are not well-equipped to protect themselves against technological change like AI. Essentially, non-union employees do not have the leverage or the power to protect and enact change like unions do.⁷¹ This lack of power typically leaves non-union employees at the mercy of their employers and the labor market as a whole.⁷² Collective bargaining establishes leverage for unions that non-union workers will never have. Therefore, they cannot negotiate from a real position of power with their employers like unions can.

Only unions can quickly and effectively protect workers' rights. Nonunion employees have to rely on long legislative processes for the most part. However, this does not mean that non-union industries cannot look to the actions of the unions in dealing with issues of emerging technology to better understand the issues that must be addressed. In the next section both agreements of the WGA and SAG-AFTRA will be explained to provide clear examples of the issues being addressed around generative AI.

IV. THE WGA AND SAG-AFTRA AGREEMENTS

The WGA recently came to agreeable terms with the film studios and streaming companies regarding AI and how it will be implemented in the industry. SAG-AFTRA also came to its own terms shortly after regarding the same issues of AI. This section will set out to explain

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Marketplace, <https://www.marketplace.org/2022/06/17/port-unions-have-long-bargained-over-disruptive-innovations/> (last visited Nov. 8, 2023).

⁷² *Id.*

the terms of each of these agreements so we can better understand how the issues have been resolved.

A. The WGA Agreement

The WGA was originally on strike before SAG-AFTRA decided to join them.⁷³ The WGA strike sought protections for much the same things that SAG-AFTRA is seeking protections for, like the studios' ability to use AI.⁷⁴ Fortunately for the WGA, they reached an agreement with the film studios and streaming companies on September 27, 2023.⁷⁵

The contract between the film studios, the streaming companies, and the WGA expires in May 2026 and ensures numerous protections to the members of the WGA regarding AI.⁷⁶ “The agreement prohibits AI from writing or rewriting literary material and says that a writer can choose to use AI if the company consents, but a company can’t require a writer to use AI software, according to a summary of the deal’s terms.”⁷⁷ “The company must also tell writers if any of the materials they give to the writer have been created by AI or incorporate AI-generated material.”⁷⁸ “The company cannot pay you a rewrite fee to rewrite the AI-generated material; the

⁷³ The WGA was originally on strike since early May of 2023. Law360, <https://www.law360.com/articles/1725189/hollywood-writers-studios-reach-deal-that-could-end-strike> (last visited Nov. 8, 2023); SAG-AFTRA has been on strike since June 2023. Lauren Berg, *Hollywood Writers To End Strike As WGA Leaders OK Deal*, LAW360 (Sep. 26, 2023, 11:36 PM), <https://www.law360.com/articles/1726118/hollywood-writers-to-end-strike-as-wga-leaders-ok-deal>.

⁷⁴ *Id.*

⁷⁵ LAW360, <https://www.law360.com/articles/1733464/hollywood-labor-negotiations-provide-ai-road-map> (last visited Nov. 8, 2023).

⁷⁶ LAW360, <https://www.law360.com/articles/1726118/hollywood-writers-to-end-strike-as-wga-leaders-ok-deal> (last visited Nov. 8, 2023).

⁷⁷ *Id.*

⁷⁸ *Id.*

writer(s) must be considered the first screenplay writer.”⁷⁹ No work done by traditional or generative AI will be considered “literary material.”⁸⁰

While there will be obvious differences between a WGA agreement and a SAG-AFTRA agreement, there is also a fair amount of overlap in the protections they were fighting for.⁸¹ The issue of creative control is paramount for both unions. WGA had this issue explicitly addressed by not allowing AI to rewrite material and not allowing companies to require writers to use AI software.⁸² The creation of new material from AI is identical to SAG-AFTRA’s concern that digital replicas from body scans will fully replace actors or at the least alter their existing performances.⁸³ Both involve a loss of control for the actor/writer in how their work is used.

Furthermore, the digital replica worries for SAG-AFTRA are rooted in a fear of lost compensation for its members.⁸⁴ The WGA’s insistence on AI-generated material not being considered literary material so its members can receive full pay rates for original work is also rooted in the need to protect the future compensation of its members.⁸⁵

Finally, the WGA agreement is concerned with balancing the technological use of AI instead of a complete prohibition on generative AI in the industry.⁸⁶ This also seems to be what the film studios and streaming companies were stressing in their negotiations with SAG-

⁷⁹ 2023 MBA Contract Changes FAQ, WGA: Writers’ Guild of America, <https://www.wga.org/contracts/contracts/mba/2023-mba-contract-changes-faq>.

⁸⁰ *Id.*

⁸¹ LAW360, <https://www.law360.com/articles/1726118/hollywood-writers-to-end-strike-as-wga-leaders-ok-deal> (last visited Nov. 8, 2023).

⁸² *Id.*

⁸³ Hawaiian Employers Council, <https://www.hecouncil.org/news/2023/08/01/main/the-sag-aftra-strike-a-glimpse-into-ai-s-impact-on-collective-bargaining/> (last visited Nov. 8, 2023).

⁸⁴ *Id.*

⁸⁵ LAW360, <https://www.law360.com/articles/1726118/hollywood-writers-to-end-strike-as-wga-leaders-ok-deal> (last visited Nov. 8, 2023).

⁸⁶ *Id.*

AFTRA.⁸⁷ As we have stated, shareholders want profitability and lower costs for film studios and streaming companies, which apply equally to SAG-AFTRA and the WGA.⁸⁸

B. The SAG-AFTRA Agreement

The SAG-AFTRA Agreement has many of the same aspects as the WGA Agreement. Both agreements have a heavy focus on consent-based requirements for the implementation of AI technology in the industry. The SAG-AFTRA agreement took a long time to complete due to numerous disagreements between SAG-AFTRA and the AMPTP regarding consent. For instance, before the current agreement was made, the AMPTP's last and best offer would allow studios and streamers to re-use AI scans of dead performers without consent of the actor's estate or SAG-AFTRA.⁸⁹ This proposal from the AMPTP was outright rejected by SAG-AFTRA.⁹⁰ The agreement that was ultimately made, at its highest level, will require the members of SAG-AFTRA to give their consent to the movie studios and streamers before they can use their likenesses to create any AI-generated content.⁹¹

Regarding digital replicas, which are likenesses created through modeling actors' images, SAG-AFTRA members have to give their consent for the AMPTP to use them.⁹² Even if the members give their consent to the movie studios and streamers, they must still be fairly compensated for the time spent creating the replica and how the replica is used.⁹³ For instance, if

⁸⁷ <https://www.hecouncil.org/news/2023/08/01/main/the-sag-aftra-strike-a-glimpse-into-ai-s-impact-on-collective-bargaining/> (last visited Dec. 21, 2023).

⁸⁸ S&P Global Market Intelligence, <https://www.spglobal.com/marketintelligence/en/news-insights/research/generative-ai-steps-into-starring-role-in-actor-writer-strikes> (last visited Nov. 8, 2023).

⁸⁹ Charisma Madarang, Kalia Richardson & Krystie Lee Yandoli, *SAG-AFTRA Reveals How Studios Will Handle AI Replicas of Living and Dead Actors*, ROLLINGSTONE (Nov. 10, 2023), <https://www.rollingstone.com/tv-movies/tv-movie-news/sag-aftra-studio-deal-artificial-intelligence-actors-1234873708/>.

⁹⁰ *Id.*

⁹¹ Rebecca Klar, *SAG-AFTRA Releases Agreement, Details AI Protections*, THE HILL (Nov. 13, 2023), <https://thehill.com/policy/technology/4307400-sag-aftra-releases-agreement-details-ai-protections/>.

⁹² *Id.*

⁹³ *Id.*

an actor works on set for three days, but the digital replica is used for two more days after the actor is no longer on set, the actor must be compensated for five days of work rather than the three they were on set for. The compensation requirements help background actors especially because they typically make the least amount of money and depend heavily on being on set as long as possible. Furthermore, studios and streamers are obligated to disclose to the actors what their digital replicas will be used for to ensure actors have full knowledge of what they are consenting to.⁹⁴

The other area related to AI in the agreement focuses on “synthetic performers.” According to the agreement, a synthetic performer is a digitally-created asset that: (1) is intended to create, and does create, the clear impression that the asset is a natural performer who is not recognizable as any identifiable natural performer; (2) is not voiced by a natural person; (3) is not a Digital Replica; and (4) no employment arrangement for the motion picture exists with a natural performer in the role being portrayed by the asset.⁹⁵ These types of performers do not require consent.⁹⁶ Instead they require the “Producer” of the synthetic performer to give SAG-AFTRA notice and an opportunity to bargain in good faith over appropriate consideration, if any, if a Synthetic Performer is used in place of a performer who would have been engaged under this Agreement in a human role.⁹⁷

However, if there is intention to create and a synthetic performer is created with a principal facial feature that is noticeable to a specific human performer and that natural

⁹⁴ ROLLINGSTONE, <https://www.rollingstone.com/tv-movies/tv-movie-news/sag-aftra-studio-deal-artificial-intelligence-actors-1234873708/> (last visited Dec. 21, 2023).

⁹⁵ *SAG-AFTRA Draft Agreement*, SAG-AFTRA (Nov. 10, 2023), p. 69 https://www.sagaftra.org/files/2023%20SAG-AFTRA%20TV-Theatrical%20MOA_F.pdf.

⁹⁶ *Id.*

⁹⁷ *Id.*

performer is used in the prompt to create the synthetic performer, then the producer of that synthetic performer must obtain the consent of the human performer.⁹⁸ The issues of synthetic performers and the fear they can fully replace certain actors is palpable among the members of SAG-AFTRA.⁹⁹ Despite these fears, SAG-AFTRA was still capable of providing some protections through the consent requirements.

Section V will provide a deeper analysis of both the WGA and SAG-AFTRA agreements to show that focusing on consent for other unions and other industries is the key for them to ensure reliable protections against misuse of generative AI technology.

V. **HOW UNIONS AND NONUNIONS CAN LEARN FROM THE WGA AND SAG-AFTRA**

The WGA and SAG-AFTRA agreements provide other unions and industries that have similarities to the WGA and SAG-AFTRA great case studies in what the issues surrounding AI are and how best to address them. As will be discussed in more depth below, the four main issues these agreements highlight are (1) informed consent, (2) fair compensation, (3) protection against the loss of creative control, and (4) balancing technological use. While all four of these issues are paramount to any industries having to deal with the emergence of generative AI, consent is what leads to all of the other issues being sufficiently addressed.¹⁰⁰

A. Key Takeaways from the SAG-AFTRA and WGA Agreements

⁹⁸ *Id.*

⁹⁹ Laura Weiss, *SAG-AFTRA's New Contract Falls Short on Protections from Artificial Intelligence*, PRISM (Dec. 5, 2023), <https://prismreports.org/2023/12/05/sag-aftra-contract-falls-short-ai-protections/>.

¹⁰⁰ Hawaiian Employers Council, <https://www.hecouncil.org/news/2023/08/01/main/the-sag-aftra-strike-a-glimpse-into-ai-s-impact-on-collective-bargaining/> (last visited Nov. 8, 2023).

As discussed in Section IV, the key component to both the SAG-AFTRA and WGA agreements is consent. The requirement of consent is littered through every AI protection provision for both of these unions. In other words, consent is key. Consent leads to fair compensation, protection against the loss of creative control for writers and actors and allows for the balancing of technological use so the AMPTP can still benefit from generative AI.¹⁰¹

We can see from both agreements that everything starts with consent. Before the AMPTP can utilize almost any generative AI technology the members of the WGA and SAG-AFTRA have to agree to their usage. By establishing their consent, this allows for the members to negotiate for fair compensation for work they would have done without the inclusion of generative AI.¹⁰²

Consent also directly protects against the loss of creative control. Writers in the WGA cannot be forced to use AI for their work, they must give their consent under the new agreement.¹⁰³ This consent means that writers can have complete protection against the loss of creative control. The same goes for SAG-AFTRA regarding digitally created replicas. Actors need not worry about the loss of creative control because these replicas cannot be created and utilized in film projects without their consent.¹⁰⁴ Ultimately, consent leads to providing a balance between the needs of the members of the WGA and SAG-AFTRA to have their rights protected while also allowing the AMPTP to utilize the new technology. Without consent, it is extremely likely that a deal would not be able to be made between the unions and the AMPTP. This is

¹⁰¹ *Id.*

¹⁰² SAG-AFTRA, https://www.sagaftra.org/files/2023%20SAG-AFTRA%20TV-Theatrical%20MOA_F.pdf (last visited Dec. 22, 2023). See page 66 of SAG-AFTRA agreement for an example of how compensation must be given for the usage of the digitally created replica.

¹⁰³ LAW360, <https://www.law360.com/articles/1726118/hollywood-writers-to-end-strike-as-wga-leaders-ok-deal> (last visited Nov. 8, 2023).

¹⁰⁴ THE HILL, <https://thehill.com/policy/technology/4307400-sag-aftra-releases-agreement-details-ai-protections/> (last visited Dec. 21, 2023).

evidenced by the fact that SAG-AFTRA was unable to sign an agreement that would allow the AMPTP to re-use AI scans of dead actors without the union or the estate's consent.¹⁰⁵

Therefore, consent is key. These agreements use consent as the foundation for all AI uses within the film and TV industry. Consent is what creates the healthy working relationship between the unions and the AMPTP. Without it, there can be no protection.

B. Lessons for Other Unions

There is much that other unions can learn from the WGA and SAG-AFTRA agreements. The main lesson is one that every labor union has and that is collective bargaining. Acknowledging the power that collective bargaining gives a work force and knowing how to wield it like SAG-AFTRA and the WGA have will likely lead to the desired results each respective union is looking to achieve. As we can see from the past agreements of SAG-AFTRA and the WGA, the desired results are likely to be focused on consent. Therefore, through collective bargaining, unions have the ability to negotiate for consent-based protections against emerging generative AI technologies.

From what has been seen throughout the world, emerging technology like AI will likely affect every industry imaginable. There will absolutely be a time when other unions must tackle similar generative AI problems SAG-AFTRA and the WGA have. The key implications of AI technology that focusing on consent will help other unions protect against is the (1) loss of

¹⁰⁵ ROLLINGSTONE, <https://www.rollingstone.com/tv-movies/tv-movie-news/sag-aftra-studio-deal-artificial-intelligence-actors-1234873708/> (last visited Dec. 21, 2023).

creative control, (2) unfair compensation, (3) unbalanced technological use, and (4) negative impacts on job opportunities.¹⁰⁶

Other unions may have the same issues when AI is used to alter the work they have completed. Informed consent is the key concern for any emerging technology, which is why the SAG-AFTRA and WGA agreements fought so painstakingly hard to make sure consent was included in nearly every provision on generative AI. Consent creates transparency and allows workers to fully understand when and how AI is being used for their work.¹⁰⁷ Balancing technological use will be relevant for all industries. The applications of AI are too beneficial for industries to completely disregard. Unions can learn from the WGA and SAG-AFTRA to help build a balanced solution that respects workers' rights without denying the benefits of new technology from the employers entirely. Automation from AI will result in a negative impact on job opportunities.¹⁰⁸ Labor unions like the dockworkers on the West Coast were able to find ways to protect jobs even when automation started taking over. Other labor unions must find a way to address this for AI automation.

An extremely relevant union that should pay close attention to the SAG-AFTRA and WGA agreements is the American Federation of Musicians (“AFM”). The AFM is a labor union that represents over 70,000 professional musicians in the United States and Canada.¹⁰⁹ The AFM has near identical issues as SAG-AFTRA and the WGA and works closely with these unions in the film and television industry.¹¹⁰ Generative AI software has applications in the music industry

¹⁰⁶ Hawaiian Employers Council, <https://www.hecouncil.org/news/2023/08/01/main/the-sag-aftra-strike-a-glimpse-into-ai-s-impact-on-collective-bargaining/> (last visited Nov. 8, 2023).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ AMERICAN FEDERATION OF MUSICIANS, <https://www.afm.org/about/about-afm/> (last visited Dec. 21, 2023).

¹¹⁰ *Id.*

that can supplement or even replace musicians who would typically be hired to create.¹¹¹ AI software like ChatGPT, can be utilized to write lyrics that would otherwise be done by human songwriters.¹¹²

AFM must focus on consent using the WGA and SAG-AFTRA agreements as a template for their future negotiations. Ken Shirk, the AFM International Secretary-Treasurer, corroborated the need to study the SAG-AFTRA and WGA agreements for when it's AFM's turn at the bargaining table.¹¹³ Shirk even specifies that the negotiations will likely be with the same producers who were on the other side of the negotiations as SAG-AFTRA and the WGA.¹¹⁴ Consent-based requirements will allow members of AFM to have creative control, fair compensation, and job opportunities similar to SAG-AFTRA and WGA members. Consent will also provide a middle ground to allow employers the benefit of generative AI without sacrificing the protections afforded to AFM members.

While this is just one union that will directly benefit from using the past agreements as a resource in future negotiations, any union that will suffer from a loss of some form of creative control due to generative AI can use these past agreements as a template for its own future negotiations.

C. Lessons for Nonunion Industries

While nonunion industries cannot utilize collective bargaining like unions can, this does not mean that the SAG-AFTRA and WGA agreements do not provide valuable insight into how

¹¹¹ Talia Smith-Muller, *AI Music: What Musicians Need to Know*, BERKLEE ONLINE, <https://online.berklee.edu/takenote/ai-music-what-musicians-need-to-know/> (last visited Dec. 21, 2023).

¹¹² *Id.*

¹¹³ Ken Shirk, *Artificial Sweeteners, Artificial Intelligence, and Us*, AFM (Oct. 2023), <https://www.afm.org/2023/10/artificial-intelligence-and-us-oct-2023/>.

¹¹⁴ *Id.*

these industries can best handle the issues revolving around AI. AI is likely to be extremely relevant in many industries, including industries typically made up of nonunion employees.¹¹⁵

First and foremost, consent is the path to achieving all other goals like fair compensation and the balancing of generative AI and human work. Just as in the unions, it is unlikely that generative AI can be completely prohibited in any industry, therefore consent is necessary to ensure protections while also allowing employers the benefit of generative AI.

Industries that can best learn from the recent SAG-AFTRA and WGA agreements are ones that require content creation that can be assisted or replaced with generative AI technology. This is because the union agreements were for an industry involved in the creation of content.

For example, any industry involved in marketing can utilize generative AI technologies to assist with social media content creation or messaging.¹¹⁶ Generative AI technology can streamline content creation, craft social media posts, and assist or create video advertising through generative AI software like ChatGPT.¹¹⁷ AI can also be used to automate these creative tasks which can disrupt the job market for digital marketers and social media managers in similar, if not identical, ways as it has for SAG-AFTRA and the WGA members.¹¹⁸ Even without collective bargaining power, employers may be able to entice talented applicants by stipulating to consent-based requirements in contract negotiations for generative AI usage. While it is unlikely

¹¹⁵ Anirudh, *10 Industries AI Will Disrupt the Most by 2030*, SPICEWORKS (Feb. 10, 2022), <https://www.spiceworks.com/tech/artificial-intelligence/articles/industries-ai-will-disrupt/>.

¹¹⁶ Rob Porter, *AI Will Affect These Industries the Most in 2023*, VAULT (Mar. 7, 2023), <https://vault.com/blogs/workplace-issues/ai-will-affect-these-industries-the-most-in-2023>.

¹¹⁷ Shadz Loresco, *Beyond the Prompt: The Impact of Artificial Intelligence on 5 Major Industries*, HOTJAR (Jun. 13, 2023), <https://www.hotjar.com/blog/ai-impact-industries-1/>.

¹¹⁸ VAULT, <https://vault.com/blogs/workplace-issues/ai-will-affect-these-industries-the-most-in-2023> (last visited Dec. 21, 2023).

that generative AI technology at this time is not prevalent enough to really have an effect on an applicant's decision in their employment, these issues will only grow as generative AI improves.

Another industry that can relate to SAG-AFTRA and the WGA despite having little to no union presence is the art industry.¹¹⁹ The art industry is directly related to the film and television industry. Both are solely involved in different forms of content creation. AI algorithms like Botto can help create art or even create its own based on prompts inputted into it.¹²⁰ Consent in an industry such as this is paramount to healthy employee-employer relationships. SAG-AFTRA and the WGA agreements' consent requirements are directly applicable for this industry and in the future this industry should look towards these agreements to best understand how to tackle art creation with generative AI technology.

As we can see, many industries can look towards these recent agreements to best understand why consent is the best path forward for a healthy working environment. Despite the fact these are union agreements that were only possible because of the power of collective bargaining, they can provide inspiration to union and nonunion industries alike. Even if it may be impossible for these industries to regulate themselves through the natural function of the job market, it may lead to meaningful regulatory or legislative change based around consent for the use of generative AI.

VI. CONCLUSION

The SAG-AFTRA and WGA agreements provide insightful case studies on how labor unions and nonunion industries should handle emerging technology like generative AI. Through

¹¹⁹ HOTJAR, <https://www.hotjar.com/blog/ai-impact-industries-1/> (last visited Dec. 21, 2023).

¹²⁰ *Id.*

collective bargaining, unions have incredible leverage over their employers to ensure the proper protections are met.

SAG-AFTRA and the WGA's focus on informed consent allowed for the protection from loss of creative control and established a balanced use of technology that can be used as a blueprint for other unions who are going through or are likely to go through collective bargaining negotiations over generative AI.

While nonunion industries do not have the luxury of collective bargaining to advocate for consent-based requirements regarding generative AI, they still can look to the SAG-AFTRA and WGA agreements as inspiration for individual contract negotiations. These agreements also provide a policy avenue for nonunion industries to advocate for consent-based requirements be implemented at the regulatory and legislative level to ensure protections against the issues that may arise out of generative AI.