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Generative Artificial Intelligence in Hollywood: The Turbulent Future that Lies Ahead

Zachary T. Young

West Virginia University College of Law

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GENERATIVE ARTIFICIAL INTELLIGENCE IN HOLLYWOOD: THE TURBULENT FUTURE THAT LIES AHEAD

Zachary T. Young*

ABSTRACT

Since the dawn of time, the human race has used some form of technology to assist their unwavering dedication to push society forward. From the first stone tool to the first computer, some sort of regulation controlled their usage, ranging from government regulations to industry standards. When artificial intelligence (“AI”) entered the arena of technology, regulatory bodies froze at the daunting task of controlling such a powerful tool. Across almost every industry, artificial intelligence has found its home in various work functions. Generative artificial intelligence has furthered the complexity that stems from regulating a new, and never before seen technology.

As generative artificial intelligence spread across the world as a fun application to use at home, some industries quickly began experimenting with implementing it into job functions. Hollywood quickly latched on to the artificial intelligence movement, finding different ways to implement generative AI into script writing and, more recently, creating movie scenes and fake characters. However, a crippling court decision holding that AI does not get copyright protection has put the brakes on the Hollywood AI movement for now. If the United States legal system decides that AI work product can hold copyrights, the future of Hollywood may be changed forever.

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* J.D. Candidate, 2025, West Virginia University College of Law; B.S. Civil Engineering, 2022, West Virginia University. I want to thank my parents for their unwavering support for me through engineering and law school. I want to thank Professor Amy Cyphert for all of her help in working on this complicated topic and writing this Note. Any errors contained herein are the author’s own.

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I. INTRODUCTION

The futuristic concept of artificial intelligence (“AI”) can be dated all the way back to the early 1950s, where mathematicians, scientists, and philosophers began to conceptualize the fascinating idea of AI.¹ As time progressed, the basics of an AI computer code grew and became more capable. Machine learning algorithms, the backbone of AI, began to improve day-after-day through the 1970s.² By the 1980s, learning algorithms within computer systems allowed computers to gain “experience” through “deep learning” techniques.³ On the other side of the table, AI was being trained to provide advice and assistance in a variety of situations, all of which were trained by human experts within the respective field.⁴ As AI became more functional and more properly trained, the historical landmarks of AI arose. In 1997, IBM’s AI system named “Deep Blue”

¹ Rockwell Anyoha, *The History of Artificial Intelligence*, HARV. UNIV. GRADUATE SCH. OF ARTS AND SCIS.: BLOG, SPECIAL EDITION ON ARTIFICIAL INTEL. (Aug. 28, 2017), <https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/>.

² *Id.* Machine learning algorithms are continually used to find natural patterns in data and either adapt a computer algorithm or provide insight to the user. These algorithms are used for forecasting future predictions based on patterns in data sets and other data applications. *Id.* For a basic overview of machine learning, visit: <https://www.mathworks.com/discovery/machine-learning.html#:~:text=More%20Data%2C%20More%20Questions%2C%20Better,energy%20load%20forecasting%2C%20and%20more.>

³ *Id.*

⁴ *Id.*

defeated a chess grand master.⁵ Then Windows developed their speech recognition software and a robot named Kismet, one of the first robots (coded with artificial intelligence) to display human emotions.⁶

The bridge between AI and humankind was built quickly, but the vast expanse of AI's capabilities would be understood even faster. Generative artificial intelligence, the AI that has baffled most of the world in recent years, has roots dating back to the 1960s.⁷ It is important to note that the "generative" artificial intelligence created many years ago is nothing like the AI models that are around today, but rather used prewritten responses to "talk to" users of the software.⁸ ELIZA, the first example of a natural language processor, was created as a simple "chatbot" to recognize keywords in text that were presented to it and produce a basic, preprogrammed response.⁹ As time progressed, generative AI grew in its capabilities. By the 1980s, recurrent neural networks were introduced to allow for longer, more complex responses to user input.¹⁰ A major breakthrough in 2014 saw the creation of "Generative Adversarial Networks" by Ian Goodfellow, which placed two learning algorithms against each other.¹¹ The adversarial networks produced by Goodfellow helped further both sides of the generative AI table because one of the systems produced content and the other system received and determined the plausibility of the content.¹² This expanded the understanding of how AI produces content in more reasonable and correct

⁵ *Id.*

⁶ *Id.*

⁷ *History of Generative AI*, TOLOKA (Aug. 22, 2023), <https://toloka.ai/blog/history-of-generative-ai/#:~:text=First%20generative%20AI,-As%20was%20already&text=It%20was%20a%20text%20chat,with%20humans%20in%20natural%20language.>

⁸ *Id.*

⁹ *Id.* ELIZA was programmed to recognize keywords in a text input and would generate a preprogrammed response based on this input. *Id.* ELIZA was regarded, even by the creator himself, as a nonintelligent program that only read character inputs and provided its response based on these inputs. *Id.* Although the program itself was not generating a unique and new response to the user input, the concept of a chatbot understanding and communicating with a person was novel to the field at the time and would pave the way for the modern generative AI systems that are on the market today.

¹⁰ *Id.*

¹¹ *Id.* The Generative Adversarial Network system operated to help machines discern false information from plausible, real information. One AI generated data sets and models while the other sorted through and determined if the data was plausibly real or fake. This served to train the generative AI into creating more plausible data. For a basic overview on Generative Adversarial Networks (GANs), MACH. LEARNING MASTERY (July 19, 2019), <https://machinelearningmastery.com/what-are-generative-adversarial-networks-gans/>.

¹² *See History of Generative AI, supra* note 7.

manners, as well as how AI can receive and understand an input from a person (in this case, another AI).¹³

Most recently, society has seen the expedited rise of the generative AI that is well known today, Generative Pre-trained Transformer models. OpenAI's GPT-1 was the first version of this type of AI in 2018, where the AI system was capable of conversing with user inputs and generating freeform responses.¹⁴ The next breakthrough in generative AI came with the introduction of DALL-E, also created and owned by OpenAI. DALL-E is a text-to-image program, where a user input is read by the AI and an image resembling the user's request is generated.¹⁵ DALL-E implemented three different neural networks, unlike its predecessors, to create the images requested by user input.¹⁶ These were Contrastive Language-Image Pre-training (a system responsible for recognizing the user input and creating a rough sketch of the final image), GLIDE (which converted the initial sketch into a low-resolution image), and a final neural network that increased the resolution of the output and finalized the smaller details in the image.¹⁷ Both types of AI systems have progressed and have become a major issue within the world of intellectual property ("IP") protection and copyright law. They have been quickly adapted into every industry imaginable, as the conquest for work automation grows closer by the day.

While generative AI was slowly progressing in the background, another large industry was steadily humming along—Hollywood.¹⁸ The Hollywood film industry dates back to 1908 when the first film was finished in Hollywood, California.¹⁹ Throughout time, Hollywood has benefitted from a variety of technological advancements that society saw, including better cameras, microphones, software for editing movies, software for editing scripts, and a plethora of other innovative tools.

Hollywood, since the dawn of its creation, has utilized human writers, actors, and editors to create the movies, shows, and other entertainment media that society has cherished for so long. However, the introduction of self-learning and freeform generative artificial intelligence models has quickly made its way into the workforce of Hollywood's biggest (and smallest) competitors. The usage

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ It is important to understand that throughout this Note, Hollywood will be referenced as the overarching idea of the American media industry. Although Hollywood itself is not a company or corporation, the institution of Hollywood branches over the various companies that represent the film industry. The companies can be anywhere from multibillion dollar corporations to small, family-owned businesses. The discussion of the Hollywood institution ranges to cover both the film industry and the theatre industry, as both have been affected by AI.

¹⁹ *Hollywood*, HIST. (Aug. 21, 2018), https://www.history.com/topics/roaring-twenties/hollywood#section_1.

of generative AI has become a complicated endeavor for Hollywood's media empire, but the future may hold more turbulent times for those opposed to AI movie making.

A recent strike by the Writer's Guild of America ("WGA") and the Screen Actors Guild–American Federation of Television and Radio ("SAG-AFTRA") brought to light one of the biggest concerns for members of Hollywood's massive industry: Am I being replaced with AI?²⁰ Although the newest WGA contract brought some relief to writers worried about an AI overhaul, and the SAG-AFTRA provided some protection to actors, the imposition of an AI controlled Hollywood may still remain in the near future.²¹ Without copyright capabilities for AI generated media and scripts, Hollywood's limits to the usage of AI may be short lived as the future of AI's legal rights may transform through court appeals.

This Note will discuss how generative AI has influenced Hollywood and how the evolving law around generative AI may completely change how the industry operates. Part II of this Note will explore how generative AI has been treated across the legal field; most importantly, how the United States Copyright Office treats material created by generative AI. Part III will explain how Hollywood has already begun to use generative AI across a variety of applications and how the recent WGA and SAG-AFTRA agreements limit Hollywood's usage of AI. Part IV of this Note will discover how Hollywood can move forward with the usage of generative AI under the current legal framework for AI copyrightability. Finally, Part V will discuss how a change in the law may affect how Hollywood operates and what the change would mean for the WGA and SAG-AFTRA agreements.

II. ARTIFICIAL INTELLIGENCE IN THE LAW

Generative artificial intelligence remains in a weird, separate box in the eyes of the American legal system as courts and legislatures alike do not know how to approach such a novel issue. One of the prominent issues in the world of AI law is intellectual property, both AI's infringement on intellectual property held by others and whether or not AI work product can hold intellectual property protections, such as copyrights and patents.²² As for AI's "rights" to protect its

²⁰ Amanda Silberling, *The Writers' Strike is Over; Here's How AI Negotiations Shook Out*, TECHCRUNCH (Sept. 26, 2023, 7:26 PM), <https://techcrunch.com/2023/09/26/writers-strike-over-ai/#:~:text=During%20the%20historic%20strike%2C%20AI,to%20avoid%20paying%20union%20members.>

²¹ *Id.*

²² Intellectual property infringement has become a leading issue with generative artificial intelligence. One of the most popular ways that infringement arises is when generative AI (such as Chat-GPT) compiles information from various sources to produce a response but does not give any credit or citations to the original authors that wrote the pieces that it is pulling from. A variety of lawsuits against multiple AI companies have presented the issue of generative AI "stealing" work from other websites and creators. Ben Lutkevich, *AI Lawsuits Explained: Who's Getting Sued?*,

work (more sensibly, an AI company's rights), the American legal system has refused to grant IP protections to work that was created by generative AI. A recent district court case, now on appeal, outlined this judgment by the U.S. Copyright Office.

In *Thaler v. Perlmutter*,²³ Stephen Thaler attempted to have a piece of artwork, created by the generative AI system that Thaler operates, copyrighted through the U.S. Copyright Office.²⁴ The Copyright Office denied his application for a copyright, stating that a copyright cannot be obtained for work that was generated by artificial intelligence.²⁵ On review before the United States District Court for the District of Columbia, the court held that the decision to deny the copyright was not "arbitrary and capricious" and the Copyright Office did not error in their decision.²⁶ In holding this, the court looked to the primary issue with the original copyright application: Do copyrights require human authorship?²⁷ The Copyright Office determined that the generative AI work cannot hold a copyright because of no human authorship being involved and the District Court agreed on review.²⁸

Thaler argued that the work product of generative AI should still get a copyright because there is some form of human authorship involved in the creation process.²⁹ By arguing this, he formulated his contention under property law principles of him being the owner of the computer and the work-for-hire doctrine.³⁰ However, this was quickly dismissed as being the argument for *whom* a copyright is given to, not if the creator is in fact capable of receiving a copyright in their name.³¹ Ultimately, the court upheld the decision of the Copyright Office, but it is important to note the standard of review in the case.³² Because this was a review of an agency action, the "arbitrary and capricious" standard was applied to determine if the Copyright Office's decision was incorrect.³³ Although the

TECHTARGET (June 25, 2024), <https://www.techtargget.com/whatis/feature/AI-lawsuits-explained-Whos-getting-sued>. Technology companies that own generative AI systems have continuously argued that generative AI is a "black box" program, meaning the company doesn't even know how the AI is going to use the material it was trained on, or even what material it is going to use. *Id.* This has presented a plethora of issues with the lawsuits surrounding IP infringement because companies have contended that they cannot control what they do not know and cannot be responsible for the AI's actions.

²³ *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 142 (D.D.C. 2023).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 146.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 143, 145.

³⁰ *Id.* at 145.

³¹ *Id.*

³² *Id.* at 144.

³³ *Id.*; *see also* 5 U.S.C.A. § 706(2)(A) (West, Westlaw through Pub. L. No. 118-106).

court seemed adamant in agreeing with the Copyright Office's decision, the underlying standard was only to ensure that the decision was not arbitrary and capricious.³⁴

It is also important to understand that the standard of review set for agency reviews in this case has since changed. At the time of this case, the standard of review still followed the traditional holding of *Chevron*, where deference is given to an agency's decision when the court reviews it.³⁵ However, the recent Supreme Court decision of *Loper Bright*³⁶ has changed the way courts review an agency decision. *Loper Bright* held that no deference needs to be given to an agency decision on review, upending the traditional notion that agency decisions are generally followed.³⁷ With this new standard of review set, it is possible that an AI sympathetic court would rule in favor of a challenger like Thaler. However, the District Court here made clear statements in their opinion that eluded to the fact that the court agreed with the agency's decision, so the change in standard of review may not change the holdings of court reviews.³⁸

A. *The Future Copyrightability of AI*

Although the court agreed with the conclusion reached by the Copyright Office, a nod to a preceding Supreme Court case may provide one of the many legs for supporters of AI copyright protection to stand on. In *Burrow-Giles Lithographic Co. v. Sarony*,³⁹ the Supreme Court ruled on the constitutionality of an amendment to the Copyright Act that encompassed photographs. The Court there held that although the photographs are produced through a mechanical device, the resulting image is still copyrightable.⁴⁰ The Court theorized that the act of taking a photograph requires the photographer to develop a "mental conception" of the photograph prior to the "mechanical reproduction."⁴¹ However, before the court even knew their decision would be used against AI, they clarified the conception element of a photograph. They stated that photographers "pos[e] the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph."⁴² This elusion almost speaks to the predictability element that the Copyright Office has recently promulgated.⁴³

³⁴ *Id.*

³⁵ *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

³⁶ *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024).

³⁷ *Id.*

³⁸ *Thaler*, 687 F. Supp. 3d at 146.

³⁹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

⁴⁰ *Id.*

⁴¹ *Id.* at 60.

⁴² *Id.*

⁴³ *See infra* Part II.B.

Although the court in *Thaler* was decisive in its decision to uphold the denial of a copyright created by a generative AI, the broader implications of *Sarony* will undoubtedly be brought back into question as *Thaler* goes up on appeal. Provided the Supreme Court's characterization that photographs are granted on copyrights because a "mental conception" is created before the photograph is taken,⁴⁴ an argument can be made that the human creators that prompt generative AI have a "mental conception" of what they expect the AI to create. This argument is strained, given the vast differences between the two situations, but will undoubtedly be argued with the mechanical tool exception that the court carved out for photographs in *Sarony*.

To contest this argument, people against IP protections for AI have argued that the use of generative AI creates a rift between a copyrightable work and simply an idea by the author.⁴⁵ Section 102 of The Copyright Act states that a copyright cannot extend to any ideas, concepts, and various other things.⁴⁶ Many arguments have come up surrounding the fact that an attempt to copyright generative AI material is an attempt to copyright an idea, not actual material that is viewed as copyrightable under the Act.⁴⁷ Because the author is simply providing an "idea" of how they would like the final product to look like, without knowing exactly how that product will turn out, the material itself is not copyrightable under the Act, regardless of the human authorship requirement.⁴⁸ The Copyright Office has not directly addressed the issue of these works not being copyrightable as an idea, although this assertion falls into the bucket of requiring (and not having) a human author for the work to be copyrightable.

B. *The Human Authorship Requirement*

The Copyright Office has provided some guidance on what exactly is required to meet the human authorship requirement that has quickly become a modern issue for copyrightability. Prior to a revised guidance sheet, the Copyright Office went through a proceeding that narrowed its requirements for human authorship. In September 2022, author Kristina Kashtanova applied for and successfully registered a copyright on a graphic novel where the images in

⁴⁴ *Id.*

⁴⁵ CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB10922, GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT LAW (2023).

⁴⁶ 17 U.S.C.A § 102 (West, Westlaw through Pub. L. No. 118-106).

⁴⁷ ZIRPOLI, *supra* note 45 at 2.

⁴⁸ *Id.*

the novel were created with the use of the Midjourney⁴⁹ AI system.⁵⁰ After discovering that the images in the novel were generated using Midjourney, the Copyright Office initiated a cancellation proceeding to remove the copyright from the images in the novel.⁵¹ Kashtanova argued that the images were made through text input, and therefore still utilized a human with creative intent and process.⁵² Ultimately, the Copyright Office held true to its determination and removed the copyright from the images, stating that Midjourney had authored the images, not Kashtanova, and that did not satisfy the human authorship requirement.⁵³

Shortly after removing Kashtanova's copyright, the Copyright Office published additional guidance on how to satisfy the human authorship requirement that was now being strictly imposed on copyright applications. This guidance served to express some finality on where the Copyright Office currently stands on works generated by AI. The Office stated that “[w]hen an AI technology determines the expressive elements of its output, the generated material is not the product of human authorship.”⁵⁴ In that situation, the work is not copyrightable and any attempt to copyright work that contains some AI material must disclaim the material in the application, meaning the author must not attempt to cover that material in the copyright application.⁵⁵ The Copyright Office's contention is compared to an author hiring an artist and giving them limited, general instructions.⁵⁶ According to the guidance published by the Office, “users do not exercise ultimate creative control over how such systems interpret prompts and generate material.”⁵⁷ Like the artist with limited directions, the AI system determines how to depict an image based on the instructions.⁵⁸

Another similarity brought up by the Copyright Office is the issue of copyrights for works created by animals. Some zoos across the United States have their animals paint or take pictures to sell to help fund the zoos' missions,

⁴⁹ Midjourney is a small research lab “focused on design, human infrastructure, and AI” according to their website. MIDJOURNEY, <https://www.midjourney.com/home?callbackUrl=%2Fexplore> (last visited Nov. 2, 2024). Midjourney is the generative AI program that the company maintains, which serves as a text-to-image AI system, similar to DALL-E. *Id.*

⁵⁰ ZIRPOLI, *supra* note 45 at 2.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

⁵⁵ *Id.*

⁵⁶ ZIRPOLI, *supra* note 45 at 2.

⁵⁷ Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

⁵⁸ *Id.*

but none of that work can be copyrighted. In the case of *Naruto v. Slater*,⁵⁹ the Ninth Circuit worked through a fascinating case of a monkey (through an organization) suing a photographer.⁶⁰ Although the case was decided on grounds of standing, the court made a gentle nod to the copyrightability of the photographs in question, which the Copyright Office has since agreed with.⁶¹ In that case, Slater set up a camera on an animal reserve and a monkey came up and allegedly “photographed himself” by pressing the shutter button on the camera.⁶² The monkey sued the photographer for publishing the photographs, alleging (through an organization representing him) that he was the rightful owner to the photographs and that Slater infringed on his copyright protections.⁶³ However ridiculous sounding the case may be, the Ninth Circuit found no statutory standing for the monkey to sue Slater and also found that the monkey does not qualify under The Copyright Act to hold a copyright in the United States.⁶⁴ The Copyright Office, in their March 2023 guidance on human authorship, mentions this case in support of their strict contentions to control who qualifies for copyrightability.⁶⁵ As it stands today, the Copyright Office holds strong on the idea that for work to be eligible for copyright protection, there must be a human author that created the material.

C. *The New Predictability Requirement*

Kristina Kashtanova’s case before the U.S. Copyright Office not only furthered the human authorship requirement for copyright eligibility but presented a new requirement that had never been discussed by the Copyright Office. Predictability became one of the main reasons for a denial of the copyright for Midjourney’s images used in Kashtanova’s novel.⁶⁶ Specifically, the Copyright Office stated that the “process [of generating an image] is not controlled by the user because it is not possible to predict what Midjourney will create ahead of time.”⁶⁷ The predictability requirement presented by the Office follows laterally with the human authorship requirement because, without a human author, the end result is unpredictable.

⁵⁹ *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 420.

⁶³ *Id.*

⁶⁴ *Id.* at 426.

⁶⁵ Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

⁶⁶ Letter from U.S. Copyright Off. to Van Lindberg (Feb. 21, 2023) (available at: <https://fingfx.thomsonreuters.com/gfx/legaldocs/klpygnkyrpg/AI%20COPYRIGHT%20decision.pdf#page=9>) (regarding the redetermination of Kristina Kashtanova’s copyright).

⁶⁷ *Id.*

The predictability requirement is most closely related to the painter example provided by the Copyright Office. If a person presents an idea to a painter, with no specific instructions on what to create or how to create it, the person presenting the idea to the painter does not gain copyright protections on the painting.⁶⁸ Of course, the painter themselves may gain copyright protections because they have formulated and created the resulting image through their own creative design process. Because the person presenting the idea to the painter is merely providing an idea and has no way of predicting the outcome of the painting, they cannot gain a copyright on the painting in their own name.⁶⁹ Regardless of the predictability requirement, examples where the result is unpredictable based on an idea would still struggle to gain copyright protection because copyrights cannot be granted on ideas.⁷⁰ Although ideas are not copyrightable in the first place, the Copyright Office presented the new and hidden requirement of material needing to be predictable by the author to receive copyright protections.

D. How the Copyright Office Handles Partial AI Material Now

Not all work submitted to the Copyright Office is solely created with the “human authorship” requirement that has been imposed as a requirement for copyright protection. Some work, primarily different types of media, include portions of generative AI product in them. The Copyright Office has tread into this gray area carefully, attempting to prevent copyrighting material that cannot be protected by their newest decisions, but also providing the appropriate protections to the material that satisfies all the requirements of a copyright. In the Copyright Office’s human authorship guidance, the Office provides some support on how to gain copyright protection on mixed work or material that was created by AI but altered by a human author.

The easiest way to avoid an issue with obtaining a copyright is by disclaiming any piece of material in the final product that was generated through the use of AI.⁷¹ Disclaiming material essentially voids the author’s claim to copyright protections for that piece of material, so it is not included in the final copyright grant from the office.⁷² For example, if an author writes a five-page story about something and utilizes generative AI to write the last page of the story, a copyright application by that author may disclaim the final page of the story. By doing so, the Copyright Office will grant a copyright on the first four pages of the story (so long as all the other requirements are met) and will hold the fifth page of the story as disclaimed on the copyright. The author will not

⁶⁸ ZIRPOLI, *supra* note 45, at 2.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16193 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

⁷² *Id.*

gain any copyright protections to the fifth page but will still be granted the traditional copyright protections to the first four pages of the story.

The other way for mixed material to gain a copyright is by rearranging and “injecting” human authorship into the final product.⁷³ This method may be trickier to accomplish, but the Copyright Office recognizes this as an acceptable way to overcome the human authorship requirement.⁷⁴ To do this, the author must “select or arrange AI-generated material in a sufficiently creative way that ‘the resulting work as a whole constitutes an original work of authorship.’”⁷⁵ The author may also modify material that was created by generative AI to “such a degree that the modifications meet the standard for copyright protection.”⁷⁶ In either of these methods, the author may gain copyright protection on the “human-authored aspects” of the work.⁷⁷ The Office still contends that the use of technology is not banned or limited by these decisions, such as the use of Adobe Photoshop.⁷⁸ They only focus on the “extent to which the human has creative control” when making the final product and creating the material in the copyright application.⁷⁹

The Copyright Office does not require that material be disclaimed if it is *de minimis* to the final product.⁸⁰ Anything more than *de minimis* should be disclaimed from the application for a copyright to prevent issues with copyrightability and the human authorship requirement. Although the human authorship requirement for copyrights may not have been an issue over the past few hundred years, the expansion of generative AI into industries across the country has required stricter enforcement from the Copyright Office. Allowing mixed material in very limited and narrow capacities has drawn a bright line in the sand between copyrightable and not copyrightable, but court decisions and reviews may change that bright line for good.

III. HOLLYWOOD’S GENERATIVE AI FANCY

One of the largest industries faced with the conundrum of using generative artificial intelligence is the media industry. Companies in Hollywood have been struggling with the balance of using generative AI to complete a variety of tasks while maintaining their intellectual property rights over their

⁷³ Sergei Tokmakov, *How to Own AI-Generated Content? A Dive into Copyright Law*, TERMS.LAW (July 13, 2023), <https://terms.law/2023/07/13/how-to-own-ai-generated-content-a-dive-into-copyright-law/>.

⁷⁴ Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

⁷⁵ *Id.*

⁷⁶ *Id.* at 16193.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

respective products (movies, television shows, and other media). Provided the Copyright Office's firm decision to not allow generative AI work to be copyrighted, Hollywood producers must walk a fine line between AI and IP protection. This fine line, and the impending implementation of AI into Hollywood, has become one of the highly debated topics across the Hollywood industry.

A. *How Generative AI is Used in Hollywood*

Following its expansion over the past few years, artificial intelligence has quickly injected its way into almost every single part of Hollywood. Hollywood's implementation of AI has thrust its usage into most of the processes followed in the creation of a movie, TV show, theatre play, or anything else that Hollywood might come up with. The most prominent usage of generative AI is in the script writing portion of Hollywood, where writers across the industry have utilized generative AI systems to help them write scripts. Besides helping to write the script, generative AI has been used to come up with new, novel storylines based on old scripts that are provided to the AI system.⁸¹ AI has also been used to analyze scripts that writers have created for films, serving as a check to study, assess, and determine questions and possible issues that might arise in the usage of the story in a movie or show.⁸²

Outside of script writing, Hollywood has attempted to use AI in a variety of ways. AI is being used to assist in the pre-production process by determining deadlines for filming and other tasks, as well as planning schedules and increasing the efficiency of a movie making process.⁸³ Generative AI is being used to predict the success of films by inputting the movie's script or content and allowing the AI to compare the script to market trends to determine its possible success rate.⁸⁴ The actor selection and editing process is beginning to be streamlined into AI as well by choosing actors based on inputs by the film company and "creating" new actors through the use of generative AI.⁸⁵ Some film companies have experimented with AI creating music and soundtracks for

⁸¹ Siranush Andriasyan, *How Artificial Intelligence is Used in the Film Industry*, SMARTCLICK, <https://smartclick.ai/articles/how-artificial-intelligence-is-used-in-the-film-industry/#:~:text=Editing%20movies,help%20editors%20make%20enticing%20trailers> (last visited Nov. 3, 2024).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* Warner Bros. has begun to use Cinelytic to predict how much revenue their movies will produce when they hit the box office. *Id.*

⁸⁵ *Id.* Generative AI has been used by some film companies to select actors based on requirements given to it by the company. This has been further used to add and edit actors in a film with AI, such as adding more background actors to a scene or overlaying a specific character's face onto an existing actor. *Id.* Most notably, generative AI was used in the creation of Thanos, a character in the Avengers saga. *Id.*

films.⁸⁶ Generative AI has been stretched all the way to the final stage of movie production by being used to edit and even produce movies.⁸⁷ In one of the most impressive feats by generative AI in Hollywood, Benjamin AI created an entire movie, titled “Zone Out,” through the use of generative artificial intelligence.⁸⁸ Although almost every scene held a glaringly obvious error, such as a stray mustache or a disappearing mouth, the proof of concept held true to its intentions: generative AI can replace the job of every single person in Hollywood.⁸⁹ However, the real humans of Hollywood have pushed back on the ever-expanding usage of AI in Hollywood, most notably becoming one of the largest debates in the recent writer’s and actor’s strike.

B. Current Struggles Hollywood Faces with AI and IP Conflicts

With Hollywood’s slow injection of generative AI into their everyday operations, they have begun to face a variety of intellectual property challenges. As previously discussed, generative AI material is not eligible (with very minor exceptions) to receive copyright protections. This restriction from the U.S. Copyright Office has held back the reins on a full-fledged AI attack on Hollywood because, without copyright protections, the material being published by Hollywood is up for grabs by anyone in the world to be used and “infringed” upon. Without proper recourse being available for Hollywood producers to sue competitors for infringement, the existing Hollywood empire would become a turbulent breeding ground for theft of intellectual property.

The biggest area where Hollywood is restricted by the U.S. Copyright Office is script writing. Using generative AI to write a script for a new movie or show, and then using that script to produce the movie or show, does not allow for the respective producers to receive copyright protections on that script. They may also lose protection on movies or shows that were produced using generative AI, such as the movie “Zone Out” made solely by Benjamin AI.⁹⁰ The movie itself, including the scenes, images, and other media, would not be eligible for protection under the current structure of copyright law, leaving those producers no protection for their work. However, the use of generative AI to create the movie with the use of a script made by human writers may circumvent the copyright gates.⁹¹

⁸⁶ *Id.* Although this version of generative AI technology is still under major development, some filmmakers have employed the use of AI to create songs and noises for their movies. *Id.*

⁸⁷ *Id.*

⁸⁸ Lauren Goode, *AI Made a Movie—and the Results are Horrifyingly Encouraging*, WIRED (June 11, 2018, 3:00 PM), <https://www.wired.com/story/ai-filmmaker-zone-out/>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See infra* Part IV.A.

C. WGA Agreement

The Writers Guild of America began their strike on May 2, 2023, after failing to agree to a new contract with studios.⁹² The members of the WGA cited the implementation of generative AI across their jobs as one of their main concerns, driving it to the forefront of the contested agreement talks as a main contention, besides demanding an increase in pay, better residuals, and other concerns.⁹³ After nearly five months of being on strike, the WGA and the studios struck an agreement that covered the pertinent issues raised throughout the negotiation period of the strike. One of the most important sections of the newest agreement was the addition of Article 72 covering the usage of generative AI in the writing process. Article 72 of the WGA Agreement addresses how studios will go about restricting the usage of generative AI in Hollywood.⁹⁴

In pertinent part, Article 72 restricts generative AI usage in the following ways: generative AI cannot be used to write or rewrite any material; AI generated material will not be held as source material, so the material will not undermine a writer's credit or rights; writers can choose to use AI, but only if their employer consents to its usage and the writer follows all guidelines imposed by the company; companies cannot require writers to use AI when they are writing; companies must disclose any AI generated material to the writer if any is given to them; and material created by writers cannot be used to train generative AI.⁹⁵ It is important to note that the provisions in the WGA contract covering generative AI usage in Hollywood were all new, meaning the WGA (and Hollywood) have never had to come to an agreement about AI usage prior to this contract. Although the future of AI is being restricted in this contract, Hollywood began to heavily implement AI across the industry prior to making this agreement, requiring rollbacks on how AI was being used. Currently, the true understanding of how this affects Hollywood is unknown because of the prolonged actors' strike (ratified their new contract on December 5, 2023), but as the Hollywood machine slowly begins churning again, the full scope of the agreement's effect will be seen.

⁹² Antonio Pequeno IV, *Hollywood Writers' Strike: Here's a Timeline of What Led to the 100-Day Mark*, FORBES (Aug. 9, 2023, 7:12 PM), <https://www.forbes.com/sites/antoniopequenoiv/2023/08/09/hollywood-writers-strike-heres-a-timeline-of-what-led-to-the-100-day-mark/?sh=2ba718287ad3>.

⁹³ *Id.*

⁹⁴ Memorandum of Agreement for the 2023 WGA Theatrical and Television Basic Agreement, Writers Guild of Am. (Sept. 25, 2023) (available at https://www.wga.org/uploadedfiles/contracts/2023_mba_moa.pdf).

⁹⁵ *Summary of the 2023 WGA MBA*, WRITERS GUILD OF AM. W. 2023, <https://www.wgacontract2023.org/the-campaign/summary-of-the-2023-wga-mba> (last visited Nov. 3, 2024). This is a summary of the much lengthier provisions in the WGA contract regarding AI. This summary is provided by the WGA and is considered accurate to the provisions included in the full contract.

D. SAG-AFTRA Agreement

The Writers Guild of America was not the only group to go on strike because of unfair contract terms. The Screen Actors Guild and American Federation of Television and Radio Artists (“SAG-AFTRA”) began their strike on July 13, 2023, after similar contract issues to the WGA arose in their negotiations.⁹⁶ Primarily, SAG-AFTRA demanded better compensation, larger residuals (especially from streaming services), and protections from generative AI.⁹⁷ Like the WGA, the actors’ union demanded that generative AI be severely limited moving forward. Mainly, they wanted their name, image, and likeness protected from being used improperly by studios through the employment of generative AI, such as AI voice-overs and screen appearances with actor’s faces.

The SAG-AFTRA strike continued until November 9, 2023, when the union finally reached a tentative agreement with the Alliance of Motion Picture and Television Producers (“AMPTP”).⁹⁸ Unlike the WGA, the newly ratified contract (ratified December 5, 2023) falls short on the protections that actors requested from generative AI being used across Hollywood. The agreement set out to define one of Hollywood’s fantasy issues: synthetic performers (a.k.a. the characters made solely by generative AI). The agreement defined synthetic performers as a “digitally-created asset” that (1) intends to create the impression that the asset is a human performer; (2) is not voiced by a human; (3) is not a replica of a human; and (4) there is no human actor employed to help perform the asset.⁹⁹ This definition draws the line between a character solely created by generative AI and characters that are made with the aid of AI, such as Thanos in the Avengers movies.¹⁰⁰ However, it is hard to currently discern how much human modeling removes a character from this definition, due to the fact that generative AI models are trained using images of people, most of the time current actors.

The largest issue in the agreement is the failure of SAG-AFTRA to ban the usage of generative AI to make and use actors. It simply acknowledges that

⁹⁶ Zoe Phillips, *SAG-AFTRA and WGA Strikes: All the Major Dates to Know*, ET ONLINE (Dec. 6, 2023, 11:01 AM), <https://www.etonline.com/sag-and-wga-strikes-all-the-major-dates-to-know-207915>.

⁹⁷ Suzy Woltmann, *Everything You Need to Know About the SAG-AFTRA + AMPTP Negotiations*, BACKSTAGE (Dec. 6, 2023), <https://www.backstage.com/magazine/article/sag-aftra-strike-negotiations-explained-76246/#:~:text=Money%3A%20SAG%20wanted%20the%20AMPTP,the%20value%20of%20m ember%20contributions>.

⁹⁸ Phillips, *supra* note 96. AMPTP is the trade association that is responsible for negotiating contracts with different Hollywood unions, such as the WGA, SAG-AFTRA, and other unions working in the film industry. *See generally* AMPTP, <https://www.amptp.org/> (last visited Nov. 3, 2024).

⁹⁹ Draft Memorandum of Agreement from SAG-AFTRA (Nov. 10, 2023) (available at: https://www.sagaftra.org/files/2023%20SAG-AFTRA%20TV-Theatrical%20MOA_F.pdf).

¹⁰⁰ Andriasyan, *supra* note 81.

“humans” are important to motion pictures and the union will be notified if an AI generated actor is going to be used in a role instead of a real person.¹⁰¹ Besides the definition of a “synthetic performer” and the acknowledgment of human importance, SAG-AFTRA did nothing to prevent studios from using only AI created characters. It does prevent human actors from being scanned and recreated by generative AI without an agreement, so the image and likeness of actors are still being protected from infringement.¹⁰² More notably, studios can refuse to hire an actor if they refuse to be scanned for generative AI reproduction, only now requiring that they notify the actor of the term in their contracts.¹⁰³ The contract still allows for actors to refuse the use of their digital replication, but given the lack of protections for hiring actors that refuse, there may be a large reluctance to say no to the use of these replications.¹⁰⁴ Like the WGA agreement, the true scope of how Hollywood is going to react to these contracts is unknown, but there is undoubtedly a lot of room left for a generative AI overhaul.

IV. HOLLYWOOD’S AI USAGE MOVING FORWARD

The WGA agreement and the expansion of generative AI throughout Hollywood has left the media industry in a unique position of being limited with what AI can be used for while pushing to expand the use of AI across different applications. The WGA agreement will provide the largest limiting blanket across Hollywood to prevent a full AI takeover, but there are still holes within that coverage. The greatest threat to the WGA agreement is a sudden change in the Copyright Office’s stance on the copyrightability of material produced by generative AI. However, some analysts believe that the existing law on generative AI still provides for loopholes to get around the human authorship requirement of copyrights. Either through the loopholes or a change in the law, Hollywood will surely be looking to expand the fast-growing usage of generative AI throughout their industry.

¹⁰¹ Michael Grothaus, *Generative AI Uncertainty Remains for Hollywood Actors, Even After SAG-AFTRA Ratifies New Contract*, FAST CO. (Dec. 6, 2023), <https://www.fastcompany.com/90993645/sag-aftra-new-contract-generative-ai-uncertainty-synthetic-performers>.

¹⁰² Phillips, *supra* note 96.

¹⁰³ *Artificial Intelligence Resources*, SAG-AFTRA, <https://www.sagaftra.org/contracts-industry-resources/contracts/2023-tvtheatrical-contracts/artificial-intelligence-resources> (last visited Nov. 3, 2024) (select “If the 2023 TV/Theatrical Contracts get ratified, what happens if we don’t give consent to the creation of a digital replica? Can the producer refuse to hire me?” dropdown under the AI FAQs section).

¹⁰⁴ *Id.* (select “In the 2023 TV/Theatrical Contracts tentative agreement, is new consent required for each use of our digital replica or can the employer get it for all future uses?” dropdown under the AI FAQs section).

A. *Loophole to the Existing Law*

Without a ruling from a higher court on the copyrightability of generative AI material, and the U.S. Copyright Office's hard stance on the human authorship requirement, it can be assumed that the copyrightability of generative AI will be held at bay for the foreseeable future. However, this does not mean that any piece of material created by generative AI or put through some AI application cannot receive any copyright protection. As Hollywood and the general public have taken different swings at the copyrightability of generative AI material, a possible loophole has emerged to help gain the coveted IP rights that generative AI has seemingly wiped away.¹⁰⁵

The proposed loophole to the copyright conundrum created by generative AI is the use of almost wholly human script writing, but the complete removal of movie producers. If a team of script writers creates an entire screenplay, their script is copyrightable under basic copyright principles (so long as it does not infringe on another piece of intellectual property and meets the basic copyrightability requirements). With the script holding a copyright, the subsequent movie produced by the studio can be done in two different ways. One, the traditional method of movie making can be employed and the studio can receive IP protections on the movie (as Hollywood has done since its inception). The second way bends the rules of the copyright office slightly by employing the rule on the copyrightability of derivative works.¹⁰⁶

Derivative works are works, most usually copyrighted, that are based off other copyrighted materials.¹⁰⁷ They must add "a sufficient amount of change" from the original copyrighted piece to be considered derivative.¹⁰⁸ Derivative works must also contain a substantial amount of the original work to be considered a derivative.¹⁰⁹ The issue of generative AI material being considered

¹⁰⁵ It is important to note that the future copyrightability of generative AI is a wholly separate topic by itself. Underlying these discussions are the propositions to create a new Section 230 to cover generative AI and a possibly new separate framework for generative AI publications to receive their own, unique protections. As this paper is focused solely on the application of the existing copyright law in the United States to generative AI, that topic is well outside the scope of this paper and will not be discussed. The proposed loophole discussed in Part IV.A. is based around the existing structure of copyright law and does not take into account the possibilities of creating a new legal scheme for generative AI.

¹⁰⁶ The proposition of using derivative works in this section as a loophole to AI outputs receiving some form of copyright protection is purely hypothetical. It is very possible that courts or the Copyright Office could disagree with this theory and deny extended protections through derivative works. Because of how much the legal landscape is subject to change regarding generative AI, noting the hypothetical nature of this loophole is important.

¹⁰⁷ *Derivative Work*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/derivative_work#:~:text=Derivative%20works%20can%20be%20created,on%20the%20type%20of%20work (last visited Nov. 3, 2024).

¹⁰⁸ *Id.*

¹⁰⁹ See *Caffey v. Cook*, 409 F. Supp. 2d 484, 496 (S.D.N.Y. 2006).

as a derivative work of a previously copyrighted work has been viewed through the lens of how generative AI is infringing on existing copyrighted material. This is because, if the AI is trained through the use of copyrighted material, the material subsequently created by the AI might be a derivative work of the protected material that it was trained with.¹¹⁰ However, arguments relating to the applicability of the law on derivative work is strained in IP infringement cases because it is very difficult to determine if the AI product contains a substantial amount of the original work (unlikely because AI models are usually trained on a large variety of source material).

Additionally, the doctrine of fair use comes into play when derivative works are being challenged as infringing on a copyright. If the derivative work is sufficiently transformative of the original work, the derivative work will be considered fair use and there will be no actionable copyright infringement.¹¹¹ Fair use of copyrighted works to train and “help” generative AI produce material may be rational, so long as the AI has produced a work that is transformative of the original works. Of course, if the generative AI produced a work that looked nearly identical to a copyrighted work, it may not satisfy the transformative requirement for the fair use doctrine. Regardless of the transformative nature of the AI work, court systems will ultimately determine if the subsequent works created by generative AI are infringing on their trained copyrighted material.

The principle of derivative work has not been challenged on the other side of the copyright table, so the possibility of generative AI material being protected as a derivative work is still in the conversation—partially. The U.S. Copyright Office has already recognized that motion pictures created from some type of literary material is a common derivative material.¹¹² So, if a studio writes a full script for a movie (using human writers)¹¹³ and receives a copyright for that script, a movie created by generative AI using that script may be considered a copyrightable derivative work. But that depends solely on how detailed the

¹¹⁰ The legal discussion regarding copyright infringement by generative AI is outside the scope of this Note. A multitude of court cases across the United States are currently faced with the infringement problem, but that will not be discussed in this Note. However, it is important to note that the results of those cases will directly affect the future functionality of generative AI in almost every current application.

¹¹¹ John DiGiacomo, *Are Derivative Works Copyright Infringement?*, REVISION LEGAL (June 23, 2022), <https://revisionlegal.com/copyright/are-derivative-works-copyright-infringement/#:~:text=Whether%20something%20is%20sufficiently%20transformative,not%20be%20deemed%20copyright%20infringement>.

¹¹² U.S. COPYRIGHT OFF., 14.0720, COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS (2020), <https://www.copyright.gov/circs/circ14.pdf>.

¹¹³ The use of human writers does not mean that there can only be human involvement through the entire process of writing the script. As discussed in Part II.D, some AI can be used to edit, make, and change how a literary piece is written and still receive copyright protections. This requires the injection of human authorship into the process, so the final piece is not solely from generative AI, but the AI does not necessarily need to be locked away to achieve a copyright for the work.

underlying script is and how the generative AI is trained. The underlying script could be extremely detailed, describing nearly every scene sequence in the movie (which most high-end movie scripts are anyways). With this extent of detail, the users of the generative AI platform creating a movie know exactly what to expect and how the resulting movie should turn out. This satisfies the new predictability requirement that the Copyright Office imposed against Kashtanova, so there are no copyrightability issues with regard to how predictable the resulting material is supposed to look, unlike Kashtanova simply asking Midjourney to draw pictures relating to her novel.¹¹⁴

With predictability satisfied, there remains one major hurdle for the derivative work to pass, the human authorship requirement. Although the script was written completely by humans, the final movie was not produced by humans. By recent standards, the subsequent movie produced by generative AI, like the movie produced by Benjamin AI, does not receive any copyright protections because it is produced by generative AI, not humans. This violates the highly contested human authorship requirement that the Copyright Office has pushed over the last few years but leaves two main concerns. Although an AI machine produced the movie, the studio may have met the human authorship requirement by writing the entire script in a detailed manner. Also, the derivative copyright protections may apply to the movie itself because it is such a close representation of an already copyrighted work.

1. Satisfying the Human Authorship Requirement

The human authorship requirement may have been just barely satisfied by writing the underlying script that the generative AI is prompted with. The Copyright Office already recognizes that mixed work of human and AI material may receive copyright protections so long as the person injects a sufficient amount of human creativity to the final product.¹¹⁵ Whether that human injection can be satisfied by writing an extensively detailed script has yet to be determined, but it definitely leaves a unique question as to how much human injection, and at what stage of the process, is enough. If writing a thorough script detailing almost every part of the resulting movie produced by the generative AI satisfies the human authorship requirement, then the movie produced by a generative AI model is copyrightable. However, the Copyright Office would likely refrain from carving this large caveat into the existing human authorship requirement because that would draw a very arbitrary (and movable) line as to what constitutes human authorship and what does not.

¹¹⁴ Letter from U.S. Copyright Off. to Van Lindberg, *supra* note 66.

¹¹⁵ See *supra* Part II.D.

2. Using Derivative Work Protections Backwards

A denial to copyrighting the movie produced by generative AI may not mean the end for IP protections for studios. In a backwards way of utilizing the derivative works law, studios can enjoy an extension of the script's copyright to the movie. Derivative works possess the copyright protections bestowed by the original work, meaning the owner of the original work can control who has the ability to create a derivative work based on their original piece.¹¹⁶ This does not mean that a copyright is automatically granted to a derivative work; but the protections of the original, copyright idea are what is being truly protected. Functionally, the author of an original, copyrighted work may allow others to create derivative works based off their work or, if no permission has been granted, sue for copyright infringement of the original copyrighted piece.¹¹⁷ In the example above, the studio may grant another studio or producer the ability to make a derivative work of their script, which would be the movie.

So, how does the extension of copyright protections to derivative works incidentally protect the movie produced by a generative AI system? Establishing the produced movie as a derivative work, which the AI would have received "permission" to create, means the movie is a representation of the original copyrighted work. If a subsequent studio uses the images and scenes from the movie without permission (which would have traditionally been viewed as IP infringement), the original owners may have an action for copyright infringement. This lawsuit would not technically stand as an action for infringing on the movie itself, but an action for infringing on the script that has already received copyright protections. In a very convoluted way, the studio that owns the script could allege that the reuse of their AI movie would be an improper use of their original, copyrighted script. By doing so, the studios are effectively stretching the protections of the underlying script to their movie created by generative AI, something that the Copyright Office would not allow if a copyright application was filed for the movie itself.

Another factor that must be considered in this loophole is the licensing aspect of a derivative work. Under the traditional method of licensing derivative works, the author of a script or book would license their copyrighted work to a studio to create a movie on that work.¹¹⁸ Then, after the movie is produced, the copyright for the movie can either be granted to the original author or the studio, depending on how the licensing agreement is drafted. However, with the use of generative AI as the intermediary producer, a fair question can be raised: Can AI

¹¹⁶ Edward A. Haman, *What are Derivative Works Under Copyright Law?*, LEGAL ZOOM (July 18, 2024), <https://www.legalzoom.com/articles/what-are-derivative-works-under-copyright-law>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

be a party to a licensing agreement?¹¹⁹ The answer to this question has yet to be determined by the courts, but a sense of perspective to the agreement may assist in partially answering this problem.

The first and second steps of licensing a derivative work can be satisfied easily: human authors write a script and license that script to a studio (or the studio owns the script under the work-for-hire doctrine). Where there may be a break in the licensing process is the production of the movie by generative AI. However, if the generative AI can be viewed solely as a tool for the studio to use in the movie production phase, there may be less of an issue with licensing the copyrighted work. Nonetheless, the original author still holds the IP protections to the derivative work (unless the licensing agreement states otherwise), so there is less of an issue with the generative AI gaining IP protections. Regardless of the ownership principles of derivative works, the licensing aspect of the copyrighted work will undoubtedly be an issue that courts will have to face.

This loophole has never been tried in a court of law (partly because the technology behind producing a movie with generative AI is still developing), but the larger implications of extending copyright protections through a generative AI system are massive. If a court, and the Copyright Office, held that this was a legal method of protecting the IP rights of a movie generated by AI, production studios would be cut from Hollywood's regime to save studios a lot of money.

3. Money-Saving Possibilities from Copyright Loophole

A "feature film" in Hollywood costs on average around \$100 million to \$150 million (assume an average of \$125 million for this examination), with some costing much more or less.¹²⁰ Breakdowns of the pricing for a feature film estimate that the script costs approximately 5% of the total cost; production costs 25%; marketing costs 35%; and the remaining 35% is consumed by salaries, licensing, special effects, and music composition.¹²¹ If studios can enjoy IP protections on movies produced by generative AI, the production costs can be cut completely out of the expenses, knocking the average cost down to a little less than \$94 million. Then, removing the cost to cast actors and employees for production, the cost for special effects (not needed when a generative AI is

¹¹⁹ The argument of whether or not AI models can be parties to an agreement is well beyond the scope of this Note. The arguments for and against the idea of AI sentience being able to contract is more philosophical than it is legal and that will not be covered herein.

¹²⁰ *How Much Does it Cost to Make a Movie? Everything You Need to Know*, NFI, <https://www.nfi.edu/how-much-does-it-cost-to-make-a-movie/> (last visited Nov. 3, 2024). Feature films are generally films that have a run time between 80 and 180 minutes long, however that varies across the industry. The Academy defines it as a film that runs for more than 40 minutes, whereas the Screen Actors Guild defines it as more than 80 minutes. Regardless, the denotation of "feature film" is used to categorize films between short films and long-span movies. Kyle Deguzman, *What is a Feature Film—Definition & Qualifications Explained*, STUDIOBINDER (May 15, 2022), <https://www.studiobinder.com/blog/what-is-a-feature-film-definition/>.

¹²¹ *How Much Does it Cost to Make a Movie? Everything You Need to Know*, *supra* note 120.

making the movie), and the licensing costs, almost a full 35% can be removed from the expenses as well, lowering the total costs down to \$75 million, less than half the original cost. The only remaining costs to producing a movie are the script writing and marketing, which would likely remain the same regardless of a shift in the IP protections of generative AI. Although a loophole like this would be extremely appealing to the Hollywood money machine, the recent WGA and SAG-AFTRA agreements may not allow something like this to happen.

B. Loophole Against the Existing WGA Agreement

A (possible) loophole in the copyrightability of generative AI may sound like the best money-saver that Hollywood has ever stumbled across, but they may not be able to use any of it. The recent WGA agreement placed hefty restrictions on how studios can use AI moving forward. Almost all of the provisions in the agreement discuss how literary material created by generative AI can be used by writers, such as how much AI material is provided to the writers by studios and how writers can choose to use generative AI.¹²² However, one of the points agreed upon by the WGA relates to how a writer's material can be used to train AI.¹²³

The WGA agreement allows for them to “assert that exploitation of writers’ material to train AI is prohibited by MBA [the agreement] or other law.”¹²⁴ This provision, if asserted consistently by writers, could eliminate the possible loophole in protecting generative AI movies because the writers could almost always claim that the written script is being used to train the film-making AI machine and is therefore in violation of the WGA agreement. Although a fair assertion, the studios can contest that the written material is not being used to train generative AI, but rather being used as the input for a response. In this scenario, the WGA is likely protecting the writer's script from being used to teach generative AI how to write its own script, rather than being used as an input to generate a film. If this contract term remains constrained to only the training of AI as explained above, the WGA would likely have no substantial ground to contest the use of writers’ scripts to create AI films, which could greatly expand the studios’ usage of generative AI for film production.

C. Loophole Against SAG-AFTRA Agreement

The WGA's agreement places restrictions on a variety of usages for generative AI, but the SAG-AFTRA agreement seems to miss a lot of key issues. The only true protection provided in the agreement is guaranteeing that actors’ faces and voices cannot be reproduced through generative AI without their

¹²² *Summary of the 2023 WGA MBA*, *supra* note 95.

¹²³ *Id.*

¹²⁴ *Id.*

permission, but everything else remains on the table as fair game.¹²⁵ Comparing the new SAG-AFTRA agreement to the potential loophole for Hollywood to utilize, actors have nearly no recourse or protections. The agreement provided a definition for what a “synthetic performer” is but did not agree to any limitations about how these performers are used.¹²⁶ The only protections to a generative AI film are the restrictions on how studios utilize an actor’s likeness, but that only requires that an agreement be struck between the actor and the studio.

In the case of a generative AI film, the studios have two blatantly clear options to circumvent the high costs of hiring A-list actors. First, studios across Hollywood can strike an agreement to use an actor’s face and voice in a generative AI film. This would cost the studio considerably less money (assumedly) because they do not have to pay the actor to be on site to film any scenes in the movie. Although the actor would likely receive considerably less compensation for their role (rather, their characters role) in a film, they would be receiving money to do essentially nothing, assuming the studio already has a digital scan of their character. The biggest downside to a situation like this is the development of new actors because newer actors in the industry would struggle to make a name for themselves if everything has been converted to generative AI.

The second scenario available to studios is to game the industry by hiring people that look strikingly similar to their target actors. If a studio wants Sandra Bullock in their movie but does not want to pay the high salary that comes with her acting services, they could hire someone that looks and sounds very similar to her at a fraction of the cost. So long as the studio does not purport the portrayed actor to be the actual Sandra Bullock, there would be no recourse. The studio is not using Sandra’s name, face, or voice in the film, so no agreement is required between her and the studio. Although removing the big-name actors from advertisements may hurt studios box office money a bit, the general population of movie-goers would likely fail to recognize (or recognize and not care) that it is not actually their favorite famous actor, but just a similar replication.

V. HOW A CHANGE IN LAW CAN OVERTHROW THE HOLLYWOOD INDUSTRY

The loophole discussed in Part IV.A. and its potential effect on the WGA and SAG-AFTRA agreements is premised around the existing framework of copyright law in the United States and the limited amount of guidance and law around generative AI. However, the legal landscape of generative AI is still developing daily, as more lawsuits and demands for regulation pour into the court systems and legislative bodies. With the high potential for a change in the law coming in the potentially near future, it is important to understand what effect

¹²⁵ Memorandum of Agreement for the 2023 WGA Theatrical and Television Basic Agreement, *supra* note 94.

¹²⁶ *Id.*

that change might have on the contracts that are holding the Hollywood industry at bay.

The law in the United States, and the Copyright Office, holds steady that material created by generative AI is not copyrightable or patentable and does not receive the traditional IP protections that creative material has always been granted.¹²⁷ However, as the use of generative AI continues to quickly expand and more issues are brought before both the legislature and courts, a complete shift in the law may be coming. Primarily, the *Thaler* appeal case on copyrightability of generative AI material could completely override how the U.S. treats AI work. If a higher court were to allow for IP protections to be extended to generative AI, or laws were passed that allowed for it, the future of Hollywood would be changed forever. Some of the largest things that would likely be seen from a change in the law would be a balance, or overhaul, in the film industry and a possible removal of the existing agreements across the industry.

A. *Balancing the Industry*

Hollywood is primarily made up of a few large companies that control almost all the existing industry. To represent the few large companies, the Motion Picture Association of America (“MPA”) serves as the advocate for the film, television, and streaming service industry. The MPA is comprised of only seven companies.¹²⁸ The companies under the MPA include Disney, Netflix, Paramount, Sony, Universal, Warner Brothers, and Prime Video & Amazon MGM Studios.¹²⁹ These companies lead and control the current Hollywood industry, leaving little to no room for smaller companies to grow and succeed. If change in the existing law allows for companies (and individuals) to protect the material they create through the use of generative AI, this may completely change.

Industry leaders control Hollywood because they have the money, resources, and name to produce high-class movies and television shows. The lack of resources and money is generally why small start-up companies and individuals struggle to succeed in Hollywood. However, if that factor was completely removed from the power equation, small start-ups may finally be able to produce films at a reasonable cost and succeed in the Hollywood market. This would serve to balance the industry by providing more opportunities to companies and individuals that are trying to expand into the film industry. Even individuals could begin competing in the Hollywood markets because, under a possible change in law, a person with access to generative AI could have it write a full script and then produce a movie. In the economic model in Part IV.A., that

¹²⁷ See *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 147 (D.D.C. 2023); see also *Thaler v. Vidal*, 43 F.4th 1207, 1213 (Fed. Cir. 2022).

¹²⁸ *About*, MOTION PICTURE ASS’N, <https://www.motionpictures.org/about/> (last visited Nov. 3, 2024).

¹²⁹ *Id.*

would mean that the only remaining costs for the production would be the marketing costs (and maybe a subscription cost to generative AI software). With the rapid expansion of social media (allowing for cheaper and easier marketing strategies), a feature film could be produced at a mere fraction of the current cost.

Small companies and, in particular, individuals, would also be able to circumvent the WGA and SAG-AFTRA agreements and their AI provisions. Smaller firms may not have unionized writers working for them, so there would be no apparent conflict with the WGA agreement regarding how their writers use generative AI, or how the company requires their writers to use AI. Likewise, so long as the company avoids using an actor's likeness without their permission, they would not be violating the SAG-AFTRA agreement. Individuals operating in the Hollywood market would not be subject to either agreement, assuming they would not be employing writers or actors to create their AI films.

B. AI Grab-ups of Scripts

With an expansion of generative AI across the media industry, one major concern may be presented if the law on copyrightability of AI works changes. Companies can begin "grabbing up" screenplays and film ideas by employing a variety of generative AI machines to constantly write new scripts with new ideas. These companies can then file hundreds, if not thousands, of copyright applications to every single script that their generative AI machines write and gain protection on nearly every novel idea possible. This would effectively freeze the market from developing new film ideas because, at any moment, a company could be sued by another company that managed to get a copyright on an AI script that was generated previously.

With a script grab-up across Hollywood, a few issues must be considered to determine if this would be allowed and if there would be actionable copyright protections for companies that compete in the grab-up scheme. The fair use doctrine, used across different intellectual property fields, would have to be considered here. The fair use doctrine serves as an affirmative defense to copyright infringement claims, so long as the defendant can establish that their reproduction of the copyrighted material serves to "advance[] a socially beneficial activity" and if the use of the work is commercial and transformative.¹³⁰ The court would also assess the "nature of the copyrighted work," how much of the original work is being used in the second work, and what the effect on the market or on the value of the work is.¹³¹ Courts are generally more lenient on the secondary work if it is for non-commercial

¹³⁰ *Copyright and Fair Use*, HARV. UNIV. OFF. OF THE GEN. COUNS., <https://ogc.harvard.edu/pages/copyright-and-fair-use#:~:text=of%20Copyrighted%20Material-,What%20is%20%22fair%20use%22%3F,law%20is%20designed%20to%20foster> (last visited Nov. 3, 2024).

¹³¹ *Id.*

purposes.¹³² When assessing the nature of the original copyrighted work, courts generally look to see if it is published or unpublished, with a leniency to grant more broad protections to unpublished works under a fair use consideration.¹³³

In the scenario above, firms producing scripts that are subsequently sued by a company that used generative AI to make that script would have to show that their use of the idea is beneficial to the public and transformative of the original idea. It is important to note that copyright infringement does not require intent, so owners (in this situation, the companies using generative AI) do not need to establish that the infringing party knew of their copyright and intended to use the idea.¹³⁴ Regardless of the no-intent requirement, the studios being sued for infringement would likely struggle to establish a fair use defense because the script does not serve a benefit to society unless a court is willing to accept an argument that the arts are a benefit.

The other factors for the application of the fair use doctrine would be a tall hurdle for companies to pass as well. Assumably, most of the scripts generated by AI would be unpublished because companies would have hundreds, if not thousands, of scripts being created by AI models. Because most of these would be unpublished, the court would lean in favor of their AI scripts, protecting an idea that can be published in the future. The extent to which the scripts are similar may help in establishing the fair use defense if the scripts are not exceptionally similar, but with thousands of scripts at their disposal, the chances of having a parallel script are high. Lastly, the market impact would favor AI script companies because they could contend that they will publish and use the script (at some unknown time in the future), so allowing another studio to use that script would harm their own script. Thus, a struggle to establish a fair use defense, and therefore write their own original scripts, would freeze Hollywood.

Where does this scenario leave the Hollywood industry? A few powerhouse corporations that have millions to spend on generative AI programs controlling everything. Anytime a studio comes up with what they believe to be a new idea, these conglomerates can filter through their thousands of scripts and find the closest applicable, then sue for copyright infringement. Then, whenever the smaller studios wish to use this idea for a film, they will need to license with (and pay) the large generative AI machines to produce the movie. Although this would surely grind the industry to a halt, the Copyright Office would likely pass new regulations to protect against such a disaster. They may possibly lean towards the material needing to be used in some sort of public way (akin to the United States Patent and Trademark Office requiring trademarks to be used in commerce for grant). A hold in the generative AI legal scheme is preventing this for now, so long as the courts do not go against the Copyright Office's decision.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 17 U.S.C.A. § 501(a) (West 2019).

C. *A Change in the Law Against the WGA and SAG-AFTRA Agreements*

If the Copyright Office and the court systems across the United States change their stance on how generative AI receives intellectual property protection, the existing agreements across Hollywood would crumble. As it stands, the WGA is holding onto the intellectual property rights of their writers, but that could drastically change within the next few years. The current WGA agreement is scheduled to expire on May 1, 2026, and the capabilities of artificial intelligence by then will be drastically different.¹³⁵ Over the span of the last few years, America has seen a drastic change in how generative AI operates, as well as its efficiency of correctly creating whatever the user requests. Although a variety of issues lie beneath the ethical implications of generative AI usage across the country, it is impossible to deny the fact that AI is expanding at a rapid rate and is getting really good at what it is meant to do.

The expansions across the AI field conveniently fit into every bracket of Hollywood's industry. Stability AI has recently produced Stable Audio, a generative AI program that can generate music and sounds, serving as a potential replacement to Hollywood's traditional Foley artists and music producers.¹³⁶ OpenAI is already on its fourth iteration of their ChatGPT platform, with ChatGPT 5 coming soon.¹³⁷ With a change in law and further advancements in generative AI that writes (like ChatGPT), script writers in Hollywood would soon find themselves out of the Hollywood industry. OpenAI is also on its third iteration of DALL-E with DALL-E 3, their version of an image generating software.¹³⁸ A quick internet search produces a variety of generative AI programs that produce videos and movies, all of which are making large advancements with their respective models.¹³⁹ Visla, an AI model that creates videos, is specifically designed to turn a variety of inputs into videos and movies, most notably among their possibilities being scripts.¹⁴⁰ Benjamin, the AI model that

¹³⁵ Bob Hopkinson, *WGA Ratifies 2023 Tentative Agreement with AMPTP*, WRITERS GUILD OF AM. W. (Oct. 9, 2023), <https://www.wga.org/news/press/wga-ratifies-2023-tentative-agreement-with-amptp#:~:text=The%20term%20of%20the%20new,said%20WGAW%20President%20Meredith%20Stiehm>.

¹³⁶ Nick Patience & Alex Johnston, *Generative AI: Latest Breakthroughs and Developments*, S&P GLOB. (Oct. 25, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/research/generative-ai-latest-breakthroughs-and-developments>.

¹³⁷ Saqib Shah, *ChatGPT 5 Release Date: What we Know About OpenAI's Next Chatbot*, THE STANDARD (Mar. 26, 2024), <https://www.standard.co.uk/news/tech/chatgpt-5-release-date-details-openai-chatbot-b1130369.html>.

¹³⁸ *DALL-E 3*, OPENAI, <https://openai.com/dall-e-3> (last visited Nov. 3, 2024).

¹³⁹ Miguel Rebelo, *The 9 Best AI Video Generators in 2024*, ZAPIER (Sept. 17, 2024), <https://zapier.com/blog/best-ai-video-generator/>. Some examples of generative AI models that create videos are Descript, Runway, Peech, Visla, and Opus Clip. *Id.*

¹⁴⁰ *AI Video Generator*, VISLA, <https://www.visla.us/ai-video-generator> (last visited Nov. 3, 2024).

created the first AI movie, has made great strides in improving the quality of the movies it produces, including less errors and cuts in the reproduction of human characters in its films.¹⁴¹ OpenAI has just recently announced their version of a text-to-video generator named Sora, which will likely be released to the public soon.¹⁴²

With the broad and fast improvements of generative AI across the world, all facets of Hollywood are threatened. The WGA agreement has provided some security to writers against being replaced by generative AI, but by (or before) May 1, 2026, that may all change. A deliberate breach of the WGA contract by studios across Hollywood may begin to occur because of shifts in the law or further advancements of generative AI. Although a breach would constitute legal action for the studios, the benefits of a deliberate breach may far outweigh the long wait until 2026. A lawsuit brought by the WGA for an injunction or damages might only cost the studios “a few bucks” in the long term, but cutting their movie production costs in half, or more, could be even more beneficial.¹⁴³

As far as the actors’ jobs are threatened by the advancements in video-making generative AI, the SAG-AFTRA agreement cannot ensure many protections. The new SAG-AFTRA agreement expires on June 30, 2026, only a few months after the WGA contract expires. With even less written into their contract, actors may find themselves out of jobs at a much faster rate than writers, especially background and supporting actors. Unlike the WGA agreement, studios can start replacing human actors with generative AI characters almost immediately. So long as studios do not use human characters based off a real person, no deliberate breach of contract is needed to start using generative AI across the field. By 2026, the need for human actors might be completely erased from Hollywood and any negotiations on a new contract would be futile or limited to actors trying to expand their likeness through generative AI to salvage their careers.

VI. CONCLUSION

Hollywood has immersed itself in the ever-expanding field of generative artificial intelligence. From script writing and editing, music and sound creation, and even movie production, studios across Hollywood have embraced the use of generative AI, withholding the few setbacks. As the U.S. Copyright Office and court systems fight back the growing attempts to protect generative AI material through the traditional IP protections that humans are privy to, a shift in the legal

¹⁴¹ THEREFOREFILMS, <https://www.thereforefilms.com/films-by-benjamin-the-ai.html#:~:text=Sunspring.,%2C%20Elisabeth%20Grey%20%26%20Humphrey%20Ker> (last visited Nov. 3, 2024).

¹⁴² Lauren Leffer, *Everything to Know About OpenAI’s New Text-to-Video Generator, Sora*, SCI. AM. (Mar. 4, 2024), <https://www.scientificamerican.com/article/sora-openai-text-video-generator/>.

¹⁴³ See *supra* Part IV.A.

field would spell disaster for the employees of the Hollywood machine. Although the WGA agreement and SAG-AFTRA agreement have provided limited protections against the expansion of generative AI in the industry, deliberate breaches on contracts might become a daily occurrence in Hollywood. Once generative AI has advanced to the level that Hollywood needs it at (which is a lot closer than most think), the need for human workers could be eliminated. But, as time moves on and the legal field grapples with how generative AI is to be treated, one thing is certain: generative artificial intelligence has forever changed the historic Hollywood industry.