

The Impact of Artificial Intelligence on Media and Entertainment Dealmaking

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PRACTICES Media Entertainment and Sports, AI and Deep Learning

The swift technological advancement of artificial intelligence is affecting all aspects of business around the world. Its risks and potential should never be underestimated. It seems that everyone is talking about the implications of its development and use. Artificial intelligence is at the forefront of the discussions within the media and entertainment industry and justifiably so. It was one of the key points of negotiation in resolving the recent industry strike. There is no doubt that artificial intelligence could uniquely modify business models within the media and entertainment industry with far reaching economic implications.

The use of artificial intelligence in the media and entertainment industry includes text and data mining for development of content catalogs and other ancillary uses as well as generative artificial intelligence used in the creation, editing, and production of content in the industry. As with other revolutionary technologies, there is limited regulation in this area. Therefore, many companies in the industry have begun a process of addressing artificial intelligence considerations contractually and through updated business practices.

General Commercial Transactions

This new reality for the media and entertainment industry requires dealmakers to consider a plethora of new issues when negotiating transactions. Many of which may apply to most industry related commercial transactions, including agreements in connection with production and distribution deals. Production companies may consider expanding their relationship with vendors who can provide technological expertise and they must negotiate the rights and obligations of each of those parties to maintain control over each of the production projects. Pricing terms and pricing adjustments for service providers should be structured to account for the possible changes in production budgets as well as the opportunity to base compensation on additional revenue that may be generated by content created using generative artificial intelligence. Provisions related to exclusivity become increasingly significant. The parties will need to determine whether content created for each project is to be exclusive for the specified project or portions of the content may be used or modified for use in other projects utilizing artificial intelligence technology. Performance requirements for talent may also take on a whole new meaning depending on whether a party's physical presence is required, or a digital replica may be used.

SAG-AFTRA has been very intentional about protecting its members in connection with the use of artificial intelligence in the industry. As a result, parties to any transaction in connection with projects associated with SAG-AFTRA members should be prepared to comply with the terms and conditions of SAG-AFTRA contractual agreements which contain provisions designed to protect its members from unauthorized use of artificial intelligence. Members have a right to "informed consent" for use of any digital replica of themselves, whether it is a digital version of them while they are physically present or created through generative artificial intelligence. The informed consent must be reasonably specific, and it must be clear and conspicuous in each of the contractual agreements.

Mergers, Acquisitions, and Joint Ventures

Many companies may seek to structure business deals to take advantage of the expertise or technology based assets of entities with advanced technology platforms in order to arrange their business model effectively. The possible deal structures could span from equity or asset acquisitions, vertical or horizontal mergers, product extension mergers, to joint ventures. Dealmakers must be cognizant of these changes in the industry.

Due diligence in these types of transactions must be expanded to include all factors to quantify and evaluate the technological assets and related intellectual property owned by the target entities. Representations and warranties will likely be heavily negotiated provisions. Provisions should be included in these transactions to ensure the acquiring or surviving entity has adequately confirmed the ownership of the technological assets, the authenticity of the content assets, and the value of the content assets. Indemnification provisions should be carefully crafted to protect against any claims of infringement, fraud, or any other acts by a party in connection with the expansive new technological assets, including those digital replicas resulting from generative artificial intelligence.

Joint ventures and subcontracting arrangements have their own set of necessary considerations. Clear descriptions of the products and services are imperative in such transactions. The parameters of the parties' obligations must be identified succinctly in order to differentiate between those responsibilities that are performance driven versus technology driven. Intellectual property ownership and rights may not be as clear when determining whether content includes a voice or likeness from a talent that is physically present, or content created through generative artificial intelligence.

A New Era in Media and Entertainment Dealmaking

Media and entertainment companies must prepare for both the opportunities and the risks associated with the use of artificial intelligence in the industry. The new business models that evolve from the rapid changes in technology will be tested. Of course, the creative transactional approaches to gain economic advantage and to protect against risks will likewise be tested as well. Therefore, it will be extremely important to manage and negotiate media and entertainment transactions with all of these important developments in mind understanding the vital role the structure of these transactions play in the economic viability and success of all companies in the industry.