AICP Guidelines for the Use of Generative Artificial Intelligence in Production and Post Production Services Agreements

As generative artificial intelligence (AI) continues to reshape the production and post production landscape, standard terms and conditions in production/post production services agreements may not fully address the risks and complexities associated with its use. In response, these guidelines have been developed to help production/post production companies and agencies/advertisers navigate the incorporation and use of AI in a clear, practical, and contractually sound manner.

The guidelines are intended to promote transparency, clarify ownership, and allocate risk appropriately when AI is incorporated into projects—or used to create content entirely. Key considerations include:

1. Define the Use of AI Clearly

In general terms, the use and intended purpose of generative AI and any applicable caveats should be set out in the agreement. If particular uses will be prohibited entirely, those should be set forth in the agreement as well.

2. Agree on the Criteria for AI Platforms

The criteria for AI platform(s) to be used should be agreed upon in advance with the agency or advertiser.

3. Appropriate AI Platforms

When choosing an AI platform, look for one that:

(i) provides either enterprise or commercial licenses or terms of use that indemnify the user for intellectual property infringement;
(ii) does not train on inputs or outputs;
(iii) permits the advertiser to use the output without restriction; and
(iv) does not use the output for any purpose other than to provide it to the user.

Discuss any agency/advertiser AI platform requirements vs. AI platform creative capabilities with the agency/advertiser in advance. If possible, have the agency/advertiser acknowledge in writing if the AI platform that you must use does not meet any of the above.

4. Establish Ownership of Inputs and Outputs

Ownership of inputs and outputs should be explicitly stated. The producer should retain ownership of its inputs/prompts, while the advertiser will have use of and typically seek to retain ownership of the final output.

5. Protect Producer Prompts as Confidential Information

The parties should agree that the producer's prompts/inputs constitute producer's intermediate materials and confidential information.

Following is an example of an Intermediate Materials provision in a post production agreement or PO that includes inputs/prompts:

> *"Notwithstanding anything to the contrary contained herein, Supplier shall at all times be the owner of its "Intermediate Materials," defined to include, without limitation, the proprietary tools, methods or methodologies,* ***prompts/inputs,*** *software (in object code and source code form), systems, know how, concepts, technology, information, materials, techniques, expertise, equipment, workflows, and processes, project files, bins, transcodes, 3D data, non-essential code and all other metadata files, all used or improved by the Supplier in rendering the services and/or providing the Material."*

Following is an example of a definition of Confidential Information that includes inputs/prompts:

> *"Producer's confidential information includes, but is not limited to, non-publicly available business and financial information, advertising, marketing, post-production, editorial and production plans, ideas, concepts, scripts, storyboards, treatments, pitches, bids, budgets and pricing, relationships with employees, independent contractors, and suppliers, know-how, methods, techniques, processes,* ***prompts/inputs*** *and trade secrets ("Producer's Confidential Information")."*

6. Clarify Lack of IP Protection for AI Outputs

The producer should make no warranties regarding copyrightability or any other intellectual property ownership or protection. Following is an example of language to amend the standard terms of the post production or production agreement:

> *"Notwithstanding anything to the contrary contained herein, agency and advertiser acknowledge and agree that [materials] created by generative AI may not, in whole or in part, be subject to copyright or other intellectual property protections."*

7. Leverage Platform Indemnification Protections

When using an AI tool that provides indemnification to users, inquire or confirm whether such protections extend to end users (i.e., the advertiser).

8. Clarify Producer Liability for AI Outputs

One way to clarify liability is to make representations and warranties regarding producer's use of generative AI and then indemnify for breach of those representations and warranties.

Following are examples of possible producer representations and warranties and possible representations and warranties based on the AI tool used for the project:

Possible producer representations and warranties:

i. Producer will not use any inputs reasonably likely to result in infringing outputs (e.g., prompts referencing copyrighted characters, specific artists, distinctive styles or well-known brands), unless instructed to do so by agency/advertiser.
ii. Producer has performed a commercially reasonable human review of the outputs. However, agency/advertiser shall be responsible for final clearance of AI generated materials.
iii. Producer will not input any agency or advertiser confidential information into an AI tool without prior permission.

Possible additional producer representations and warranties based on the AI tool used and the applicable AI tool's terms of use:

i. Producer has an enterprise or commercial license for the applicable AI platform.
ii. The AI platform's terms of use say it will not use the inputs and outputs for training.
iii. The AI platform's terms of use say it will not use the output for any purpose other than providing it to the user.
iv. The AI platform's terms of use allows for the advertiser's use of the outputs for commercial purposes.
v. The AI platform's terms of use allows for the advertiser's ownership of the outputs.

If producer is comfortable with any of the representations and warranties above, then producer should consider indemnifying for the following:

a. Breach of the selected representations and warranties.
b. To the extent of the indemnification provision provided by the applicable AI platform, if any.

Under these circumstances, if producer is not in breach of the representations and warranties, it should not be responsible for intellectual property claims arising from AI generated materials.

9. Allocate Risk for Agency or Advertiser-Designated Platforms, Inputs, and talent.

Provided producer has not violated its representations and warranties, responsibility for claims arising from the use of an agency or advertiser-designated AI platform should rest with the advertiser. In addition, the agency/advertiser should indemnify the producer for the following:

i. Content, prompts, inputs, or data provided by or on behalf of the agency or advertiser.
ii. Disclosure requirements, including the disclosure of AI generated humans or synthetic performers in commercial advertisements.
iii. Use of talent's performance, image, likeness, voice, and all other physical attributes in an AI tool.

iv. To the extent that producer is not in breach of its representations and warranties, the use of an agency or advertiser designated platform and any third party claims that may arise from such use.
v. Final clearance of AI generated materials.

10. Restrict Agency/Advertiser's Use of Producer's Work for AI Training

Since the deliverables contain the producer's confidential information, the agency/advertiser should be prohibited from using/reverse engineering the producer's deliverables to train AI platforms. Additionally, any AI manipulation of the deliverables should be limited to post production for the applicable project only, and not for the creation of new advertisements.

11. Maintain Documentation of AI Processes

The producer should maintain internal records of prompt history (i.e., archive prompts/inputs in their entirety) to protect itself from IP infringement and other claims. If there is a legal action, the producer may need to share the inputs/prompts with the agency or advertiser if relevant to the legal claim, subject to legal process and confidentiality obligations.

12. Talent Issues

Federal and states laws and talent union rules regarding the creation of digital replicas of a person and synthetic performers are evolving. Talent release language for the creation of any digital replica should be provided by the agency or advertiser.

i. Talent release. If the agency/advertiser wants to manipulate the talent's performance, permission should be granted in advance and use of the talent's image, voice, etc., should be defined in the talent release, e.g. for this project only and not in perpetuity.
ii. Disclosure. The agency/advertiser should be contractually bound to comply with all applicable disclosure laws and union agreements regarding the use of digital replicas and synthetic performers in commercial advertisements.

As the use of generative AI continues to expand, these guidelines provide a practical framework for addressing key legal and business considerations. As a living document, they will continue to evolve alongside the technology, law, and application within the industry.

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AICP has prepared these Guidelines for consideration by its individual member companies as a working tool to be used at that company's option. While the Guidelines do not represent agreement among Association members to apply any particular terms, through adoption by individual producers, the Guidelines reflect, and have over time become, part of the industry's "custom and usage."