



BEFORE THE U.S. COPYRIGHT OFFICE

Artificial Intelligence and Copyright

Docket No. 2023–6

United States Copyright Office

Submitted December 6, 2023

**REPLY COMMENTS OF THE INDEPENDENT FILM & TELEVISION ALLIANCE**

The Independent Film & Television Alliance<sup>®</sup> (IFTA) is the worldwide trade association of the independent film and television industry., IFTA appreciates the opportunity to submit the following reply comments in response to the Notice of Inquiry and request for Comments and Reply Comments published by the U.S. Copyright Office in the Federal Register on August 30, 2023 (“NOI”)<sup>1</sup> and supplemented by the extension of the comment period on September 21, 2023<sup>2</sup>, with Reply Comments extended to December 6, 2023<sup>3</sup>.

Headquartered in Los Angeles, IFTA is the only organization that represents the independent film and television industry globally. IFTA was formed more than 40 years ago and remains dedicated to protecting and strengthening the Independents’ ability to compete effectively in an ever-changing and challenging global marketplace. IFTA Members, which are based in more than 20 countries, are the world’s foremost independent production and distribution companies,

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<sup>1</sup> Federal Register Notice of Inquiry. Vol. 88, No. 167 at 59942 (Wednesday, August 30, 2023)  
<https://www.govinfo.gov/content/pkg/FR-2023-08-30/pdf/2023-18624.pdf>

<sup>2</sup> Federal Register Notice of Comment Extension Vol. 88, No. 182 at 65205 (Thursday, September 21, 2023)  
<https://www.govinfo.gov/content/pkg/FR-2023-09-21/pdf/2023-20480.pdf>

<sup>3</sup> Federal Register Notice of Comment Extension Vol. 88, No. 219 at 78393 (Wednesday, November 15, 2023)  
<https://www.govinfo.gov/content/pkg/FR-2023-11-15/pdf/2023-25128.pdf>

financiers, and sales agents. The Independents are those companies that create films and TV programming outside the vertically integrated studios and global distribution networks.

IFTA Members are primarily small and medium sized businesses, many owner-driven, entrepreneurial companies that take on the individualized risk of every project, seek financing through equity investors and individual advance distribution commitments, and distribute the film or program by licensing to local theatrical, television, and online services around the world. This is a vastly different model than that of the major studios, broadcasters, and online platforms that reach audiences through their own affiliates. “Independent” is the prevalent model around the world and Independents generate more than 70% of the films produced in the U.S.

IFTA Members have produced, distributed, and financed many of the world's most prominent films, including 26 of the last 41 Academy Award® winners for Best Picture, most recently *Everything Everywhere All at Once*, *CODA*, and *Parasite*. Collectively, IFTA Members produce more than 500 independent films and countless hours of television programming each year which generate more than \$4.1 billion in sales revenues annually while creating hundreds of thousands of jobs and millions of dollars in economic impact.

Among its other services to the industry, IFTA develops the IFTA Model International Licensing Agreements which set the standards and definitions for licensing international rights in motion pictures and television programming to assist the industry in memorializing written exclusive licenses for copyright content which they negotiate through face-to-face negotiations, and which establish an exclusive bundle of rights under Copyright Law.

The Copyright Office’s public consultations regarding copyright law and policy issues raised by artificial intelligence (“AI”) systems including: (1) “generative AI” (which IFTA generally understands as content generated by an AI system when prompted) and (2) “training” or

“ingestion” of copyrighted content into an AI System (which IFTA generally understands as the input of copyrighted content into an AI system to enhance its ability to generate further content) are an important avenue by which multiple perspectives are brought to the Office’s evaluation of how to best accommodate the use of artificial intelligence in the making of a copyrighted audio-visual work.

We have reviewed and support the Comments filed by the Copyright Alliance and the Motion Picture Association representing stakeholders who are similarly situated as producers and creators of audio-visual works and who rely on the protectability of copyright and the enforceability of exclusive rights to protect their investment in content and to raise funding for ongoing production and creation of further content. IFTA’s Reply Comments will focus on the unique and current perspective of the small to medium sized production and distribution enterprises (and those creators that contribute to the development of content as partners, employees, and collaborators) that make up the worldwide, independent film & television industry.

IFTA Members rely on Copyright Law and registration of ownership with the Copyright Office to protect creative activity, enable financing and expand distribution and licensing opportunities so producers can continue to provide more diverse content. Copyright Owners also rely on the freedom to license face to face for the market value of each exclusive right in the bundle of copyright under Section 106 of the Copyright Act<sup>4</sup> to support their creation of further content and their small businesses.

Our industry looks to the Copyright Office to provide certainty about the underlying rights for each production and provide an efficient, transparent registration process. The Office’s guidance including the Copyright Registration Guidance: Works Containing Material Generated

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<sup>4</sup> 17 U.S.C. 106. Exclusive rights in copyrighted works at <https://www.copyright.gov/title17/92chap1.html#106>

by Artificial Intelligence<sup>5</sup> are significant tools for our industry. We look forward to any additional guidance that the Office may issue. However, we urge that such guidance, rules, or regulations look specifically at the need to adopt clear definitions distinguishing the various types of AI uses, recognize the different uses to which AI may be put in the production and distribution process, and avoid adopting any new requirements that are unduly burdensome for small businesses or that impede the financing and licensing of independent productions.

Most importantly, IFTA urges the Office to recognize that there is no current need for new legislation or special rules to apply Copyright Law to AI as it is used in the creative, production, and distribution of audiovisual content. Current Copyright Law provides the solid foundation by which key questions about what is copyrightable, the application of the fair use factors, and ongoing protection of the exclusive rights of the copyright owner must be analyzed by the courts as they arise in this new context.

### **IFTA Responses to certain Notice of Inquiry Questions**

The Notice of Inquiry asked, **“What are your views on the potential benefits and risks of [AI] technology?” (Question 1). “How is the use of this technology currently affecting or likely to affect creators?”, and “Does the increasing use or distribution of AI-generated material raise any unique issues for your sector or industry as compared to other copyright stakeholders?” (Question 2).**

IFTA Members have a particular interest in the Copyright Office’s policy statement and guidance regarding registration for works involving generative AI, which may be potentially

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<sup>5</sup> 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) (“AI Registration Guidance”).

problematic for small business, independent creators and the worldwide motion picture and television industry at large. IFTA producers both create copyrighted works acquiring exclusive rights for any underlying rights so that a wide variety of stories can be produced for theaters or consumer screens and license those works to multiple third-party distributors. It is vital for this independent business model that the exclusive rights granted in the licenses are protected throughout the cycle from development to exploitation of the work. The use of AI technologies to enhance the expression and monetization of the creative work should not undermine Copyright Law, copyrightability and the registration process, the right of copyright owners to negotiate the value and terms of license agreements, or the protection of those exclusive rights.

Independent producers create their copyrighted works by creating a “chain of rights (title)” (usually by copyright assignment, exclusive license, or work made for hire agreement) for each of the pieces of underlying materials they produce based on those rights. Producing copyrighted content is a substantial financial investment which depends on timeliness of production and distribution and the established principles of Copyright Law. Producers must secure and comply with Errors & Omission Insurance coverage for the production and distribution of copyrighted content by documenting each “link” of copyright in the chain of rights. AI technology is usually part of this process today and is primarily tasked with repetitive actions or help alleviate expensive and time-consuming, post-production activities allowing the budget to be spent on human talents or creativity.

IFTA agrees with the Copyright Alliance’s Comments (“*When formulating new AI laws and policies, it is essential that the rights of creators and copyright owners be respected.*”)<sup>6</sup>

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<sup>6</sup> Copyright Alliance Comments at pages 16-18 at <https://www.regulations.gov/comment/COLC-2023-0006-8935>

The Notice of Inquiry asked, “**whether there are any statutory or regulatory approaches that have been adopted or are under consideration in other countries that relate to copyright and AI that should be considered or avoided in the United States? How important a factor is international consistency in this area across borders?**” (Question 4).

IFTA’s Members are based in over 20 different countries, and they produce and distribute copyrighted content throughout the world. While other countries, with different legal traditions, are quickly establishing exemptions to copyright to address certain uses associated with AI under the broad umbrella of so-called “text and data mining” (“TDM”), IFTA believes that the United States Government should play a strong role in establishing international standards that support copyright owners and their exclusive rights as established under U.S. Copyright Law.

IFTA agrees with the MPA Comment that “*in its current state, the existing U.S. fair use framework ought to be fit to handle this analysis. There is no need at this time for U.S. law to adopt special copyright exceptions for AI.*”<sup>7</sup>

The Notice of Inquiry asked, “**Is new legislation warranted to address copyright or related issues with generative AI?**” (Question 5).

IFTA believes that new copyright legislation pertaining to generative AI is unnecessary at this time and that the Copyright Act and well-established case law including the doctrine of Fair Use are strongly positioned to handle questions as they arise given the facts of each case. With respect to the “ingestion” of copyrighted works into an AI system for “training” of that system, IFTA believes that use must be licensed from the copyright owner and that the AI company must secure a license agreement. IFTA Members are small businesses and the

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<sup>7</sup> Comments by the MPA, Inc. at pages 12 - 15 at <https://www.regulations.gov/comment/COLC-2023-0006-8970>.

licensing of their copyrighted content for AI “training” is an evolving revenue stream that flows from the exclusive rights of copyright.

IFTA agrees with the Copyright Alliance Comments (*“The ingestion of copyrighted material by AI systems implicates the right to reproduce copyrighted works. Section 106(1) of the Copyright Act vests copyright owners with the right to prevent the reproduction of their copyrighted works”; and “Longstanding copyright laws and policies must not be cast aside in favor of new laws or policies obligating creators to essentially subsidize the development of AI technologies.”*)<sup>8</sup>; and (*“The ingestion of copyrighted material by AI systems is not categorically fair use. Determining whether a particular use qualifies for the fair use defense to infringement requires a fact-specific inquiry that is considered on a case-by-case basis.”*)<sup>9</sup>

IFTA agrees with the discussion of Fair Use in the MPA Comments (*“Given the intensely fact-intensive nature of fair use, it is neither feasible nor appropriate to define ex ante the circumstances in which the defense would apply to uses of copyrighted works to train AI models.”*)<sup>10</sup>

The Notice of Inquiry asked, **“whether the affirmative consent of the copyright owner is required for use in AI ‘training’”** (Question 9); and **“if copyright owners’ consent is required to train generative AI models, how can or should licenses be obtained?”** (Question 10).

As stated above, IFTA believes that the copyright owner should have the right to negotiate for the value of the exclusive rights they are willing to grant in their copyrighted content and a

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<sup>8</sup> Copyright Alliance Comments at pages 16–18 at <https://www.regulations.gov/comment/OLC-2023-0006-8935>

<sup>9</sup> Copyright Alliance Comments at pages 16–18 <https://www.regulations.gov/comment/COLC-2023-0006-8935>

<sup>10</sup> MPA, Inc. Comments at pages 15–26 at <https://www.regulations.gov/comment/COLC-2023-0006-8970>.

written license agreement should always be required for the AI system to use any of the exclusive rights of copyright including the right to make derivatives or reproduce the copyrighted content, regardless of whether the use is commercial. Direct licensing between copyright owner and the user is essential, especially as this marketplace evolves, and compulsory licensing should only be considered in the extreme circumstances in which direct negotiations are unable to protect the copyright owners' interests.

IFTA agrees with the MPA Comments (*“in the AI context as in others, voluntary direct licensing is usually preferable.”*)<sup>11</sup>

IFTA agrees with the Copyright Alliance Comment (*“AI companies should license works they ingest. No AI-copyright policy should be adopted in response to generative AI that interferes with the free market or the freedom to license. It is essential that the licenses be respected by any copyright or AI legal regime. Obtaining a license to use copyrighted works is the best way for developers to ensure they avoid infringement liability. Further, if licensing markets exists or are being developed, it can weigh against a finding that copying without the permission of the copyright owner is excused by the fair use defense.”*)<sup>12</sup>

The Notice of Inquiry asked, **“Under copyright law, are there circumstances when a human using a generative AI system should be considered the “author” of material produced by the system?” (Question 18).** IFTA believes AI is a valuable tool for production, its use to relieve producers of burdensome tasks or to introduce scenery and special effects, etc., has been in place for years. While “generative AI” can enhance a production, where the storytelling and creativity is firmly in the hands of human creative teams and as long as a human is directing the

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<sup>11</sup> MPA, Inc. Comments at page 31 at <https://www.regulations.gov/comment/COLC-2023-0006-8970>

<sup>12</sup> Copyright Alliance Comments at pages 16–18. <https://www.regulations.gov/comment/OLC-2023-0006-8935>



whole project and deploying AI to enhance human creativity, that person(s) should be recognized as authors. IFTA does not believe that small business owners, or any copyright owner should have to document and disclaim when AI technology has been used.

IFTA agrees with the MPA Comments (*“Humans are, and will, remain at the heart of the creative process. At the same time, AI, including potential uses of generative AI as it continues to develop, can be a powerful tool in the hands of human artists and those involved in creating motion pictures to enhance and serve the filmmaking process.”*)<sup>13</sup>, and (*“creators who use AI as a tool to assist them with their creation of original expression do produce human-authored copyrightable works.”*)<sup>14</sup>; and that the Office should not require producers (*“to disclaim aspects or portions of motion pictures that use AI as a tool in the hands of human creators, both because such aspects are copyrightable material, as well as for practical reasons.”*)<sup>15</sup>

The Notice of Inquiry asked, **“What legal rights, if any, currently apply to AI-generated material that features the name or likeness, including vocal likeness, of a particular person?” (Question 30).**

Many states in the U.S. have codified “publicity” rights in state law. For example, California Civil Code’s Section 3344<sup>16</sup> protects certain rights of individuals against the unauthorized use of their name, biography, likeness, or voice. This protection may be extended to those features of “dead celebrities”. These statutory state rights are considered “publicity rights” and cleared by producers by obtaining written consent of the person holding the rights. These rights are not and should not be intertwined with Copyright Law. IFTA believes that any state or federal

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<sup>13</sup> MPA, Inc. Comments at pages 37-52 at <https://www.regulations.gov/comment/COLC-2023-0006-8970>.

<sup>14</sup> MPA, Inc. Comments at page 37 at <https://www.regulations.gov/comment/COLC-2023-0006-8970>.

<sup>15</sup> MPA, Inc. at page 52 at <https://www.regulations.gov/comment/COLC-2023-0006-8970>

<sup>16</sup> Ca Civ. Code Section 3344 (Current as of January 1, 2023) <https://codes.findlaw.com/ca/civil-code/civ-sect-3344/>

digital replica right should be maintained separately from Copyright Law as each jurisdiction determines whether and how to protect these types of publicity rights from AI “ingestion”, “training”, or “generative” uses. If there is to be a federal digital replica right, we will work with Congress to develop an appropriate mechanism (and to consider arguments for the preemption of state law) by which to protect and license these types of publicity rights.

IFTA thanks the Copyright Office for continuing to include IFTA and the Independent film and television industry in its consultations and we look forward to providing input and IFTA’s unique perspective as we together resolve these important and evolving matters related to AI and Copyright Law.

**Submitted by INDEPENDENT FILM & TELEVISION ALLIANCE**

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