

# Legal and IP Implications of Generative AI



Cooley

# Disclaimer

These materials are intended as an introduction to the subject matter covered in the presentation. The presentation and the materials contained herein do not attempt to provide legal advice for any particular situation. Each situation must be analyzed individually in light of all of the surrounding facts and circumstances. Because of the complexity of the legal issues related to the subject matter hereof, it is critical that counsel be involved. These materials are provided for educational and discussion purposes only and are not to be copied, used or distributed outside of this seminar without the express written consent of the presenters. The views herein, if any, do not belong to any client or company of the presenters.

# Agenda Overview

- Industry developments
- IP litigation+ updates
  - Copyright etc.
  - Trademark
  - Right of Publicity
  - Defamation



“Photograph of a man in a suit standing on a sandy beach. He is facing the ocean, and only his back is visible. The tide has receded hundreds of yards. In the distance a large tsunami is approaching.” – via Midjourney



... and via Runway Gen-2

# Checking the Pulse of the AI Revolution

Cooley

# Where we were six months ago...

The New York Times

NEW YORK

Intelligencer

SCREEN TIME | SEPT. 19, 2022

AI Art Is Here and the World Is Different How we work — even changes when we can instantly convincing images into existence

By John Herrman



## OpenAI Rival Anthropic Funding at \$4.1 Billion Valuation

By Kate Clark | March 8, 2023 1:37 PM PST

Photo: Dario Amodei, CEO and co-founder of Anthropic. Photo: YouTube/Centre for Effective Altruism.

GatesNotes THE BLOG OF BILL GATES

LOG IN

SIGN UP



PERFECT

THE HIGHLIGHT

MORE

Give



A NEW ERA

## The Age of AI has begun

Artificial intelligence is as revolutionary as mobile phones and the Internet.

By Bill Gates | March 21, 2023 • 14 minute read



In my lifetime, I've seen two demonstrations of technology that struck me as revolutionary.

more widely available to the public in the coming weeks, a Monday blog post stated.

## Let the AI Gold Rush

US Edition Your Account

Subscribe

Economics Industries Technology Politics Wealth Pursuits Opinion Businessweek Equality More

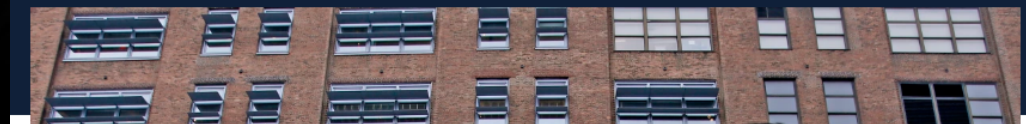
## Targeted in FTC Complaint about GPT Rollouts

After AI experts called for a temporary pause this week to look closely at growing AI industry

and Edward Ludlow

1:36 PM PDT Updated on March 30, 2023 at 6:38 AM

technology to "trusted testers" ahead of making it



# Where we were six months ago... (cont.)



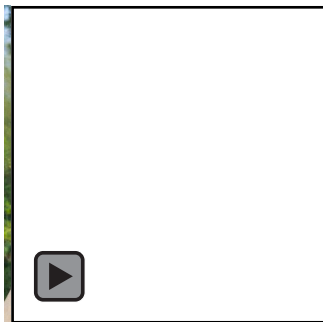
“A photograph of an adorable English Bulldog puppy wearing a raincoat.” – via Midjourney



“Detailed, high resolution photograph of an elephant in a kayak on the high seas.” – via Stable Diffusion



“Oil painting representing the societal impact of Generative AI.” – via DALL-E



“Photograph of an elderly British nature documentary narrator.” – via DALL-E

J Write an explanation of the themes of *Bartleby, the Scrivener*



Certainly! "*Bartleby, the Scrivener*" by Herman Melville is a rich text filled with multifaceted themes. Here's a breakdown of some of the story's primary themes:

1. **The Dehumanizing Effects of Capitalism and Modernization:**

Set against the backdrop of Wall Street, Melville offers a critique of a burgeoning capitalist society. The repetitiveness of Bartleby's job as a copyist serves as a metaphor for the mechanized, rote tasks of modern workplaces, which can strip individuals of their humanity and individuality. Bartleby's eventual refusal to work can be interpreted as a silent protest against this dehumanization.

2. **Isolation and Alienation:**

Throughout the story, Bartleby becomes increasingly isolated, both physically and emotionally. This isolation underscores the broader theme of alienation in the urban environment. Even as cities become crowded, individuals can feel more alone and disconnected. Bartleby's silent presence in the law office, and later in the prison, serves as a powerful symbol of this urban solitude.

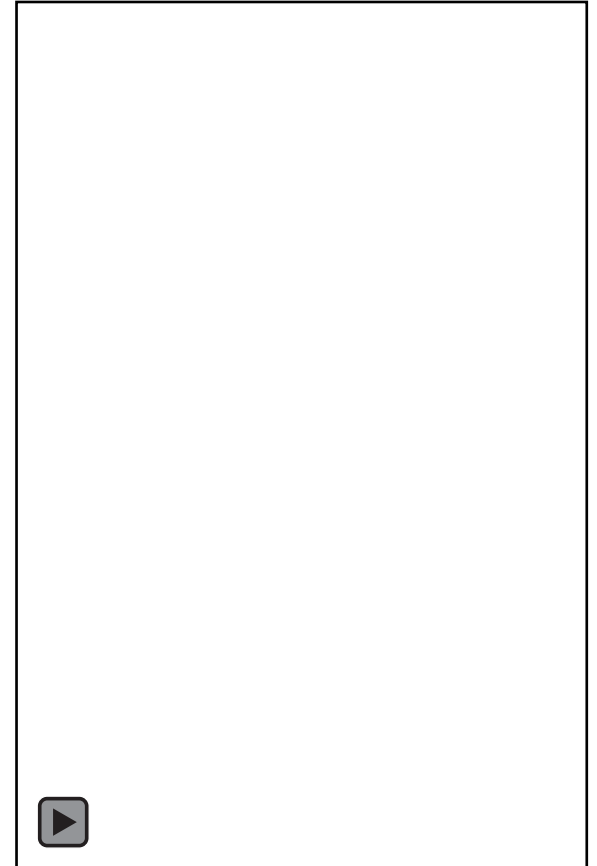
3. **Resistance and Non-conformity:**

Bartleby's consistent response of "I would prefer not to" whenever asked to perform a task is an act of passive resistance. It's a quiet refusal to conform to societal expectations. His non-conformity is not loud or aggressive but is perplexing and powerful in its consistency, highlighting the inherent human desire for autonomy and the tensions that arise when individual will clashes with societal norms.

4. **The Limits of Empathy and Charity:**

The lawyer's response to Bartleby is complex. On one hand, he demonstrates patience and a certain degree of empathy, attempting to understand and help Bartleby. On the other hand, he is also motivated by a sense of guilt and even fear. The story raises questions about genuine altruism and the boundaries of charity.

Stop generating



# What's happened since...



## Europeans Take a Major Step Toward Regulating A.I.

A draft law in the European Parliament has become the world's most far-reaching attempt to address the potentially harmful effects of artificial intelligence.

Share full article



REUTERS World Business Markets Sustainability More Register

My View Following Saved

### Getty Images lawsuit says Stability AI misused photos to train AI

By Blake Brittain  
February 6, 2023 9:32 AM PST Updated 8 months ago

RollingStone

Log Out Log In

CHAT COURT

### ChatGPT Is Making Up Lies — Now It's Being Sued for Defamation

A Florida radio host alleges that OpenAI's software concocted a story about him being accused of fraud and embezzlement, and he's seeking damages

BY MILLES KLEE

ON BUSINESS

### OpenAI, maker of ChatGPT, hit with proposed class action lawsuit alleging it stole people's data

By Catherine Tomback, CNN  
Published 5:05 PM EDT, Wed June 26, 2023

REUTERS World Business Markets Sustainability More Register

My View Following Saved

### Google hit with class-action lawsuit over AI data scraping

By Blake Brittain  
July 11, 2023 6:09 PM PDT Updated 3 months ago

REUTERS World Business Markets Sustainability More Register

My View Following Saved

### Pulitzer winner Chabon, other authors sue Meta over AI program

By Blake Brittain and Katie Paul  
September 12, 2023 11:13 AM PDT Updated 18 days ago

REUTERS World Business Markets Sustainability More Register

My View Following Saved

### John Grisham, other top US authors sue OpenAI over copyrights

By Blake Brittain  
September 21, 2023 3:34 AM PDT Updated 10 days ago

LAW360

### Reality Star Claims Deepfake App Violates Publicity Rights

Los Angeles Times

### Bestselling authors Mona Awad and Paul Tremblay sue OpenAI over copyright infringement

REUTERS World Business Markets Sustainability More Register

My View Following Saved

### Sarah Silverman sues Meta, OpenAI for copyright infringement

By Jack Queen  
July 10, 2023 9:37 AM PDT Updated 3 months ago

REUTERS World Business Markets Sustainability More Register

My View Following Saved

### More writers sue OpenAI for copyright infringement over AI training

By Blake Brittain  
September 11, 2023 12:33 PM PDT Updated 19 days ago

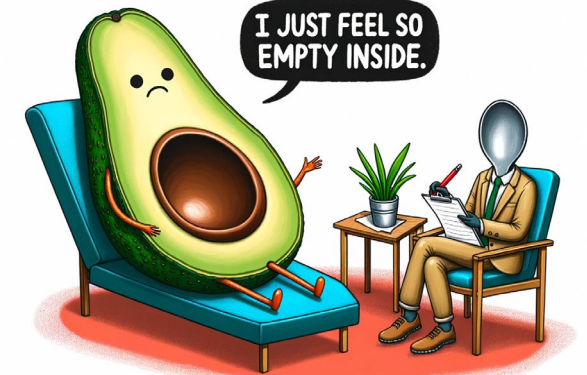
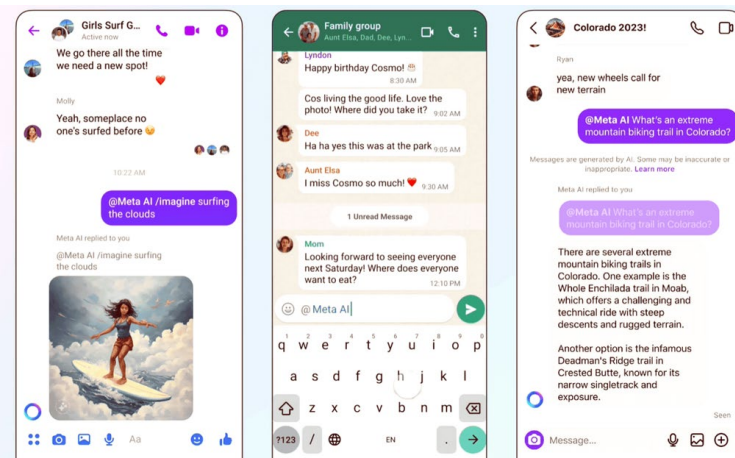
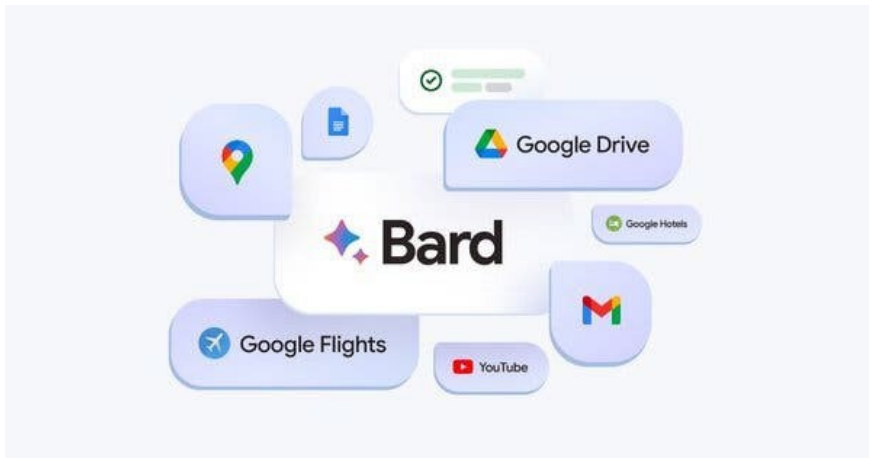
REUTERS World Business Markets Sustainability More Register

My View Following Saved

### OpenAI, Microsoft hit with new US consumer privacy class action

By Blake Brittain  
September 6, 2023 12:52 PM PDT Updated 24 days ago

# What's happening now...



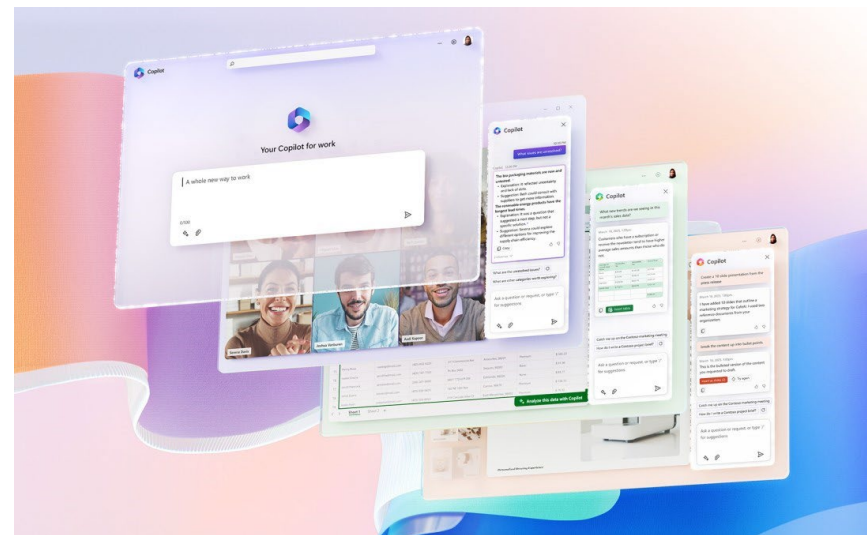
**Zoom AI Companion**

## Zoom's smart AI assistant empowers you

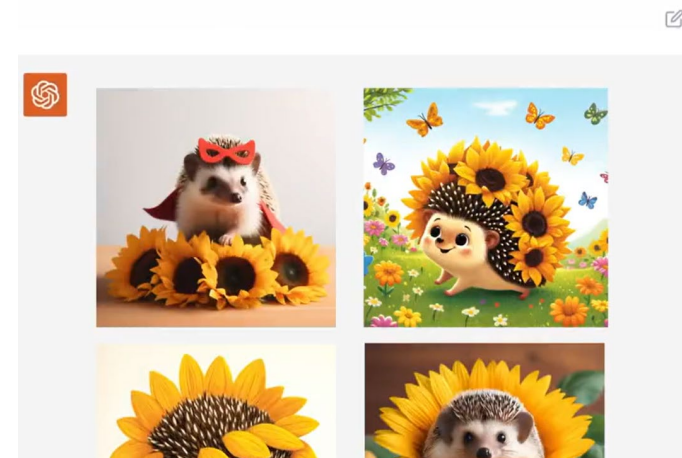
Zoom AI Companion empowers you to increase productivity, improve team effectiveness and enhance your skills. With Zoom's unique federated and responsible approach to AI, you can expect high-quality results and transparency when it comes to how Zoom AI Companion capabilities handle your data. Get help drafting emails and chat messages, summarizing meetings and chat threads, brainstorming creatively and much more – all in the simple, easy-to-use Zoom experience you know and love.

Included at no additional cost with the paid services in your Zoom user account\*

[Try it today](#) [Our approach to AI](#)

The Zoom AI Companion logo is a blue circle with a white starburst. The background is a vibrant, abstract design with blue, purple, and green wavy lines.

MI My 5 year old keeps talking about a "super-duper sunflower hedgehog" -- what does it look like?





Copyright

Cooley

# © Authorship

- Copyright protects expressive works (e.g., books, paintings, movies, computer code, etc.).
- Ownership vests “in the author[s] of the work.” 17 USC § 201.
- “To qualify as a work of ‘authorship’ a work must be created by a human being.” U.S. Copyright Compendium (3rd ed. 2017)
  - *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018) – “[T]his monkey—and all animals, since they are not human—lacks [] standing under the Copyright Act.”
  - Copyright Office 3/2023 Guidance: “[T]he term author, which is used in both the Constitution and the Copyright Act, excludes non-humans.”



# © Authorship – *Thaler v. Perlmutter* (D. D.C.)

- **Claim:** AI should be regarded as the “author” of a work it creates without human input
- **Copyright Office:**
  - Copyright does not extend to non-human authors
    - History and language of the Copyright Act
  - “Creativity” of the image is irrelevant
  - “Work-made-for-hire” doctrine does not address the underlying authorship issue
- **District Court:** “The Copyright Office acted properly in denying copyright registration for a work created absent any human involvement.”



# © Authorship – AI user as author?

- **Argument:** AI is like a camera or other tool that facilitates creation of works by a human author. But:
  - *Zarya Of The Dawn* – *Zarya* creator “lack[ed] sufficient control over generated images to be treated as the ‘master mind’ behind them.” – Copyright Office
  - *Theatra D’Opera Spatial* – “Mr. Allen’s actions as described do not make him the author of the Midjourney Image because his sole contribution to the Midjourney Image was inputting the text prompt that produced it.”
  - Authorship may depend on how involved human participant is, e.g.:
    - Degree of expressive content in the prompt
    - Extent to which the creation process is iterative
    - Modification of output (using other tools)



Midjourney Image



The Work



# AI user as author?

- What if the artist inputs a copyrighted work into the AI—is the resulting modified output a protectible derivative work?



Rose Enigma: Kris Kashtanova using Stable Diffusion

# © Authorship – WGA Agreement

- AI can't write or rewrite literary material, and AI-generated material will not be considered source material, meaning that AI-generated material can't be used to undermine a writer's credit
- A writer can choose to use AI when performing writing services, if the production company consents and provided that the writer follows applicable company policies, but the company can't require the writer to use AI software (e.g., ChatGPT) when performing writing services.
- The production company must disclose to the writer if any materials given to the writer have been generated by AI or incorporate AI-generated material.
- The WGA reserves the right to assert that exploitation of writers' material to train AI is prohibited by the agreement or other law.

# © Infringement

- Infringement is the exercise of an exclusive right without permission, e.g.: reproduction, preparation of derivative works, public distribution, performance, and display
- Requires “substantial similarity” of protectable expression
- Protected expression does not include content in the public domain, ideas, facts, scènes à faire
- Fair use balances exclusivity v. free expression/innovation.
  - *Google LLC v. Oracle America, Inc.*, 593 U.S. \_\_\_\_ (2021)
  - *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009)
  - *Authors Guild v. Google*, 721 F.3d 132 (2d Cir. 2015)
- Context matters



“Sketch of Alice from Alice in Wonderland, by Lewis Carroll. Alice is sharing a Coca Cola with the Queen of Hearts.” – via DALL-E 3

# © Infringement

- **Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc.**, Case No. 1:20-cv-00613-SB (D. Del. filed May 6, 2020, amended July 15, 2022)
- **Andersen et al. v. Stability AI et al.**, Case No. 3:23-cv-00201 (N.D. Cal. filed Jan. 13, 2023)
- **Getty Images (US), Inc. v. Stability AI**, Case No. 1:23-cv-00135 (D. Del. filed Feb. 3, 2023)
- **J.L. et al v. Alphabet**, Case No. 3:23-cv-3440-AMO (N.D. Cal. filed Jul 11, 2023)
- **Tremblay et al. v. OpenAI**, Case No. 3:2023-cv-03223 (N.D. Cal. filed June 28, 2023) / **Silverman et al. v. OpenAI**, Case No. 4:2023-cv-03416 (N.D. Cal. filed July 7, 2023)
- **Kadrey et al. v. Meta Platforms**, Case No. 3:2023-cv-03417 (N.D. Cal. filed July 7, 2023)
- **Chabon et al. v. OpenAI**, Case No. 3:23-cv-04625 (N.D. Cal. Sept. 8, 2023) (N.D. Cal. Sept. 8, 2023)
- **Chabon et al. v. Meta Platforms**, Case No. 3:23-cv-04663 (N.D. Cal. Sept. 12, 2023)
- **Authors Guild et al. v. OpenAI**, Case No. 1:23-cv-8292 (S.D.N.Y. filed Sep 19, 2023)

## Common themes

- Attacks on unauthorized use of copyrighted works to train AI models
- Fair use as an asserted or presumptive defense
- \*\* Allegation that AI models are infringing derivative works
- \*\* Allegation that outputs are infringing derivative works
- \*\* Assertions of violations of the “copyright management information” provisions of the DMCA
- \*\* Assertions of violations of state laws against unfair competition, negligence, and/or unjust enrichment



# © Infringement – *Thomson Reuters v. ROSS Intelligence* (D. Del.)

- On September 25, 2023, the District of Delaware denied cross-motions for summary judgment on copyright infringement and fair use
- Court recognized the relevance of “intermediate copying” to fair use analysis in the context of AI
- Acknowledged that the purpose of copyright is to encourage creative expression by protecting creators while permitting room for others to fairly copy
- Ultimately determined that the record left unresolved too many factual issues to determine fair use on summary judgment

# Trademarks

Cooley

# TM Infringement

- **Trademark infringement:** Must prove that an appreciable number of reasonable consumers is likely to be confused regarding the source, sponsorship, or affiliation of goods and/or services
  - Courts evaluate a variety of common factors, e.g., (1) the strength of the senior mark, (2) the similarity of the marks (sight, sound, and meaning), (3) relatedness of products/services, channels of trade, (4) sophistication and care of consumers, (5) intent, and (6) actual confusion.
- **Trademark dilution:** Must prove that use of a mark diminishes its unique association with a particular product or service
  - Only applies to “famous” trademarks (i.e., household names)

# TM Infringement – *Getty Images v. Stability AI* (D. Del.)



- **Claims:** Images generated using Stable Diffusion that incorporate the “Getty Images” water mark infringe and dilute Getty’s trademark rights
- **Stability:** TBD
- **District Court:** TBD

# Looking Ahead

- Generate new trademarks?
- Conduct clearance?
- Assist infringement analysis?
- Evidence of “confusion” or “secondary meaning”?



Shape: Both logos are circular.

Font: Both logos use a similar font style, which is bold and sans-serif.

“Photograph of a man giving a woman a box from Tiffany.” – via DALL-E (left) and Midjourney (right)

Expression: The dog in both logos has a similar playful and mischievous expression on its face.

Overall Tone: Both logos have a similar retro and fun-loving tone.

Overall, I would say that the two logos are very similar in terms of their overall design, style, and tone.

If you are considering using this logo for a commercial purpose, I would recommend that you make some changes to the logo to make it more unique and to avoid any potential copyright infringement. For example, you could add a different element to the logo, such as a hat or a collar, or you could change the color of the dog's fur.

# Publicity Rights

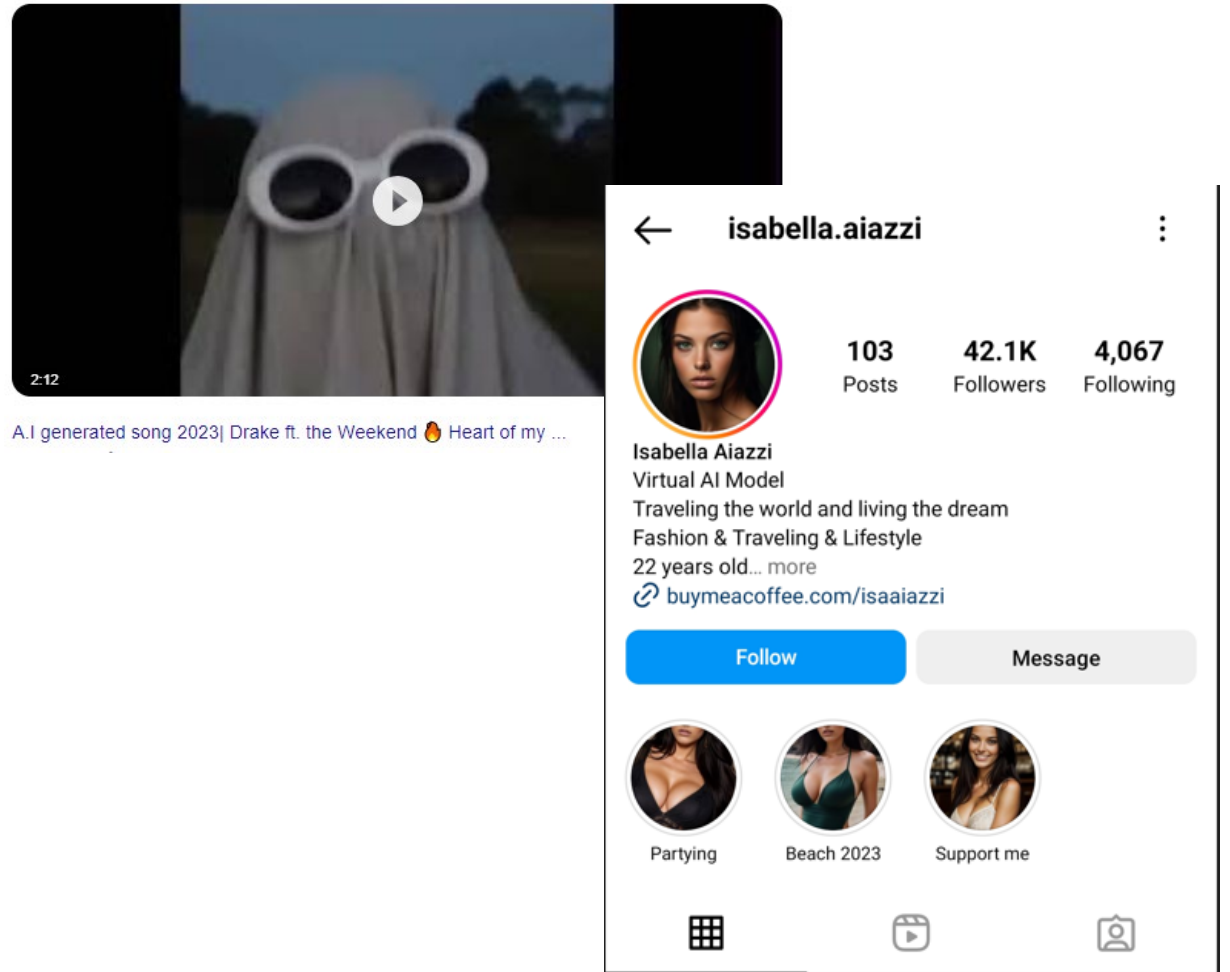
Cooley

# Right of Publicity (“RoP”)

- Protects an individual’s identity or persona (e.g., name, likeness, signature, voice, etc.)
- Determined by state law – there is no federal right of publicity
- Common elements:
  - Use of an individual’s identity or persona
  - For a commercial purpose / purposes of endorsement
  - Without consent
  - In a manner causing injury to the individual

# AI x RoP

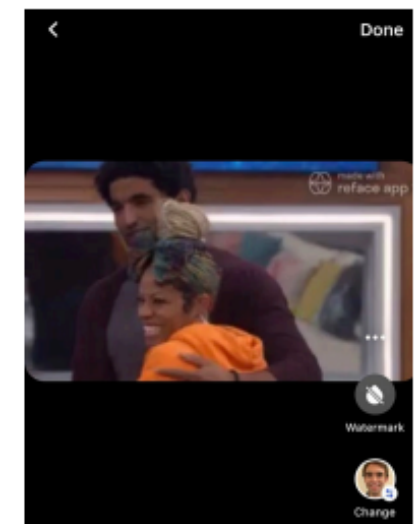
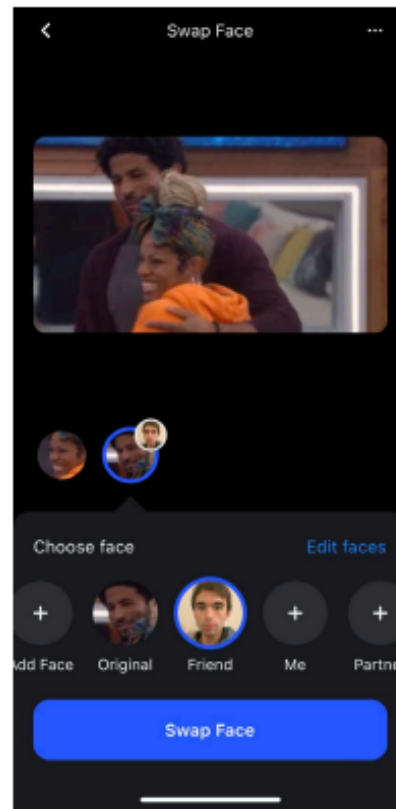
- Deep fakes
- AI music
- Virtual models on IG
- Voice emulators





# RoP – *Young v. Neocortex, Inc.* (C.D. Cal.)

- **Claim:** Neocortex exploits class members' identities to promote paid subscriptions to the Reface app
- **NeoCortex:**
  - Claims preempted
  - Claims seek to suppress protected speech
- **District Court:**
  - Adequately pleaded use of Young's name and likeness for promotional purposes
  - Reface concerns protected speech and matters of public interest, but no showing that Young was unlikely to prevail



# RoP – *Andersen et al. v. Stability AI et al.* (N.D. Cal.)

- **Claim:** “In the style of” prompts violate the plaintiffs’ rights of publicity in their names and artistic styles under California law
- **Defendants:**
  - No actual use of the plaintiffs’ names or styles was alleged in the complaint
  - Claim is pre-empted by the Copyright Act
  - Claim improperly seeks to suppress protected speech
- **District Court:** TBD

# Defamation

Cooley

# Defamation

- Defamation is a statement that injures a third party's reputation.
  - Encompasses libel (written statements) and slander (spoken statements)
- Determined by state law
- Common elements:
  - False statement purporting to be factual
  - Communication of that statement to a third person
  - Party making the statement was negligent in determining the truth of the statement or, with respect to statements about public figures, acted with malice
  - Harm to reputation as a consequence

# Defamation – *Walters v. OpenAI* (N.D. Ga.)

- **Claim:** Radio host was defamed when ChatGPT responded to a reporter’s questions with a false summary of a lawsuit, stating that Walters had embezzled money
- **OpenAI:**
  - Reporter didn’t and couldn’t read the statements as defamatory
    - ChatGPT includes disclaimers regarding accuracy of information
    - When ChatGPT was prompted to summarize the suit, it responded that it could not access the complaint and indicated that the reporter needed to consult a lawyer for “accurate and reliable information”
    - Reporter told ChatGPT that its responses were “complet[e]ly ... false” and “ha[d] nothing to do with the content of” the complaint.
  - There was no “publication” of defamation to the reporter
    - OpenAI’s Terms of Use state that ChatGPT is a tool that assists the user in the writing or creation of draft content and that the user owns the content they generate with ChatGPT
  - There was no “actual malice” by OpenAI – OpenAI had no knowledge of these particular statements
- **District Court:** TBD

# Cooley Contacts

Cooley

# Bobby Ghajar



Bobby is an intellectual property trial attorney with a practice across the US. Although he represents companies across a wide range of complex commercial litigation issues, his practice is primarily focused on advising companies in trademark, trade dress, copyright, right of publicity and false advertising litigation. He has handled dozens of high-stakes litigation and appellate matters for global brands, celebrities, and unicorn companies. Many of his cases have helped to shape and create legal precedent.

Bobby has successfully tried cases to jury and litigated on behalf of clients in temporary restraining order (TRO) and preliminary injunction proceedings and at summary judgment, and handled appeals before various appellate courts across the US. He also is experienced in all aspects of practice within the US Patent and Trademark Office (USPTO) and has argued before the Trademark Trial and Appeal Board.

**Bobby Ghajar**  
**Partner**

+1 310 883 6404  
bghajar@cooley.com

# Judd Lauter

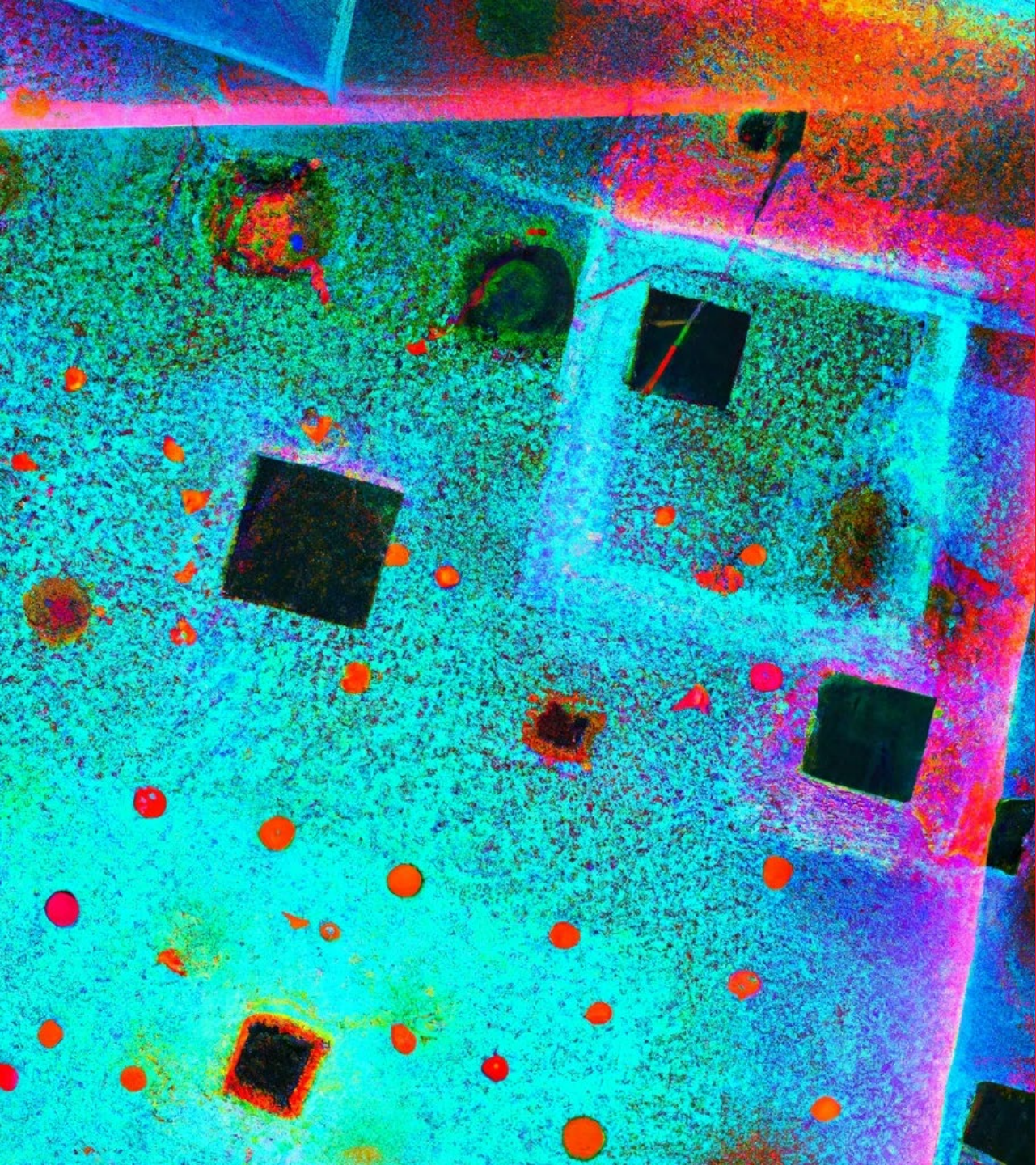
Judd is a seasoned copyright and trademark practitioner with extensive experience managing all aspects of federal litigation and proceedings before the Trademark Trial and Appeal Board (TTAB) at the US Patent and Trademark Office (USPTO). In addition to litigation and dispute work, Judd advises clients on copyright, trademark, and advertising issues and actively manages global trademark and copyright portfolios for startups and household names alike.

**Judd Lauter**  
**Special Counsel**

+1 415 693 2915  
jlauter@cooley.com







# Legal and IP Implications of Generative AI



Cooley