- Concentrate on intellectual property and technology-related litigation
- Provide counseling to our clients on how to register, protect, and strengthen their IP
- Assist with business formation, copyright protection, and trademark protection

IRWIN IP

A BOUTIQUE INTELLECTUAL PROPERTY LAW FIRM

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WHO WE ARE

AGENDA

- What is IP?
- Copyrights & AI
- Trademarks & AI
- Advertising & AI

WHAT IS INTELLECTUAL PROPERTY (IP)?

Patents

- Utility - New and useful inventions
- Design - Ornamental appearance
- Ex. Drone, GPS, iPhone

Trademarks

- Word, phrase, symbol, or other things that identifies the source of goods or services
- Ex. Amazon, McDonalds, Nike

Copyrights

- Certain works of creative expression
- Ex. Book, movie, photograph, art, etc.

Trade Secrets

- Formulas, processes, patterns, or compilations of information that have inherent economic value
- Kept confidential
- Ex. Coca-Cola recipe, Google's algorithm, KFC's chicken recipe

COPYRIGHT & AI

WHAT EXCLUSIVE RIGHTS DOES AN ARTIST HAVE UNDER COPYRIGHT LAW?

To reproduce your work

To prepare derivative works

To distribute your works

To perform/display your work publicly

WHY DO WE HAVE COPYRIGHT LAW?

To Incentivize Human Creation

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"

Article I, Section 8, Clause 8 Constitution

WHAT IS ARTIFICIAL INTELLIGENCE (AI)?

Machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments.

National Artificial Intelligence Act of 2020

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THREE INPUTS

- Software (algorithms)

- Hardware (microchips)

- Data

WHAT IS FAIR USE?

an exception to the rule

FOUR FACTORS

1. Purpose and Character of the use

   Transformative Use → adds something new, with a further purpose or different character and does not substitute for the original use of the work

2. Nature of the Copyrighted Work

3. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

4. Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

HOW DO CREATORS FEEL ABOUT THE USE OF COPYRIGHTED WORKS TO "TRAIN" AI-GENERATORS?

Fair Use Maximalism

All AI generated works should receive fair use protection

Generation process sufficiently transforms the input works

Fair Use Minimalism

There is no fair-use of input works without permission

The output is a derivative work of the input work

Conditional Fair Use Maximalism

Determines fair use protection on case-by-case basis

Fair use should protect AI works that are generated from sufficiently diverse input works and do not copy the "heart" of the expression contained in the input works

CONSEQUENCES OF RESTRICTING AI INPUTS

Could result in a bias that is not representative of the state of the world

CASES TO WATCH

Getty Images v. Stability AI

Filed Feb. 2023

New York Times v. OpenAI

Filed Dec. 2023

POSSIBLE SOLUTION FOR PROTECTING WORKS

- Programs that protect artists from AI by disrupting AI's style mimicry
  - Glaze
- AI Watermarking, identify work produced by AI
- Blocking crawlers
- Compulsory Licensing for AI (similar to music licensing structure)

WHAT WORKS USING AI CAN BE COPYRIGHTED?

A Recent Entrance to Paradise

Artificial intelligence cannot be an author of a work

Follows Court precedent that a gorilla cannot be an author for the photos that the gorilla takes

Theatre D'Opera

User of AI cannot be author unless they make substantial changes to the AI generated output

Must disclaim more than *de minimis* AI-generated content

SURYAST

Even if a human was the author of the input, that does not give them copyright over a derivative work created by AI

CAN WE CREATE A GUIDING RULE?

AI-generated content cannot be copyrighted as a work-made-for-hire, any AI-generated content that totals more than a *de minimis* amount must be disclaimed, and only AI-generated works that contain sufficient human authorship will gain copyright protection through a registration.

QUESTIONS THAT STILL REMAIN

- *If the AI prompt is sufficiently lengthy with various specific parameters, is the AI generated work copyrightable?*
- *If the AI prompt is sufficiently lengthy, can you copyright the prompt?*
- *Can you protect against infringement of a derivative AI-generated output, if your copyrightable work was the input?*
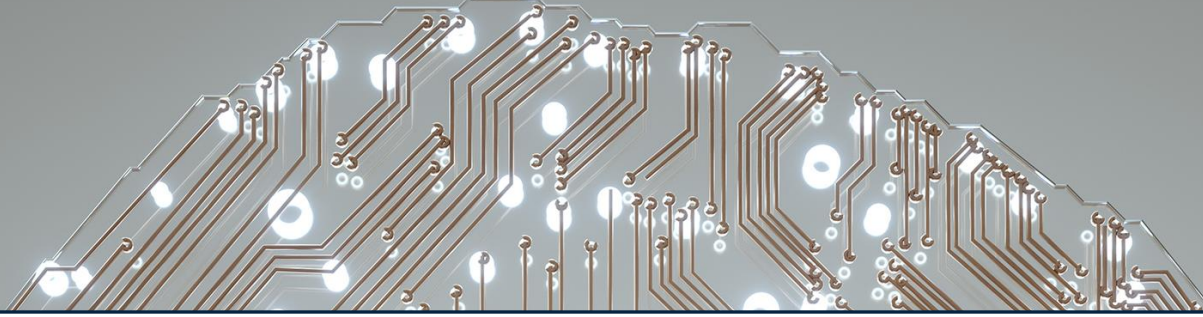
CAUTION: USING AI COMES WITH RISKS

o Using AI generated images or text may put you at risk for infringement claims

o If you outsource work to a designer, photographer, videographer, etc., should include a clause in your contracts that forbids, or warrants that no AI-generated content is used

o When creating, consider paying for a subscription that has cleared its database of AI input to minimize risks of infringement

o If you use AI-generated images or text, this may prevent you from stopping others from copying your work
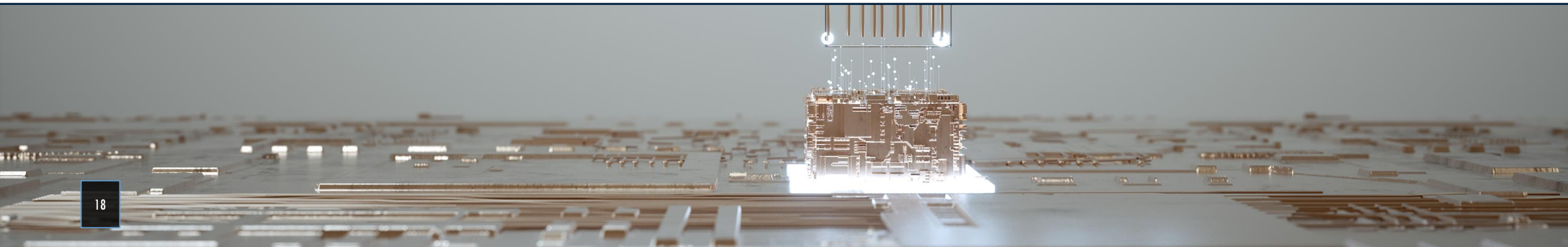
TRADEMARKS, ADVERTISING, AND AI

WHAT IS A TRADEMARK?

o Trademark law
  protects words,
  designs, and such that
  signify the source of
  goods and services
  and that are used in
  commerce in the
  United States

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ISSUES WITH TRADEMARKS AND AI

- How are people using AI with trademarks?
  - Using AI to select names for services, businesses, products, ad campaigns
  - Using AI to come up with art or an image that includes a trademark
- **Trademark Infringement**: a mark that is likely to cause confusion with another mark used in connection with similar goods and services
- **Trademark Dilution**: a similar mark that confuses or diminishes the public's perception of the famous mark

ISSUES WITH TRADEMARKS AND AI: CASES

- *New York Times v. OpenAI*
  - In addition to copyright infringement, the New York Times argues unfair competition by misappropriation and trademark dilution for referencing the New York Times in AI outputs that were not actual content from the New York Times
  - The New York Times argues Microsoft and OpenAI used the New York Times marks on lower quality and inaccurate writing which dilutes the quality of the marks

- *Getty Images v. Stability AI*
  - Getty Images accuses Stability AI of trademark infringement, dilution, unfair competition
  - Images were generated by its AI system with Getty's watermark that Getty says could cause consumer confusion
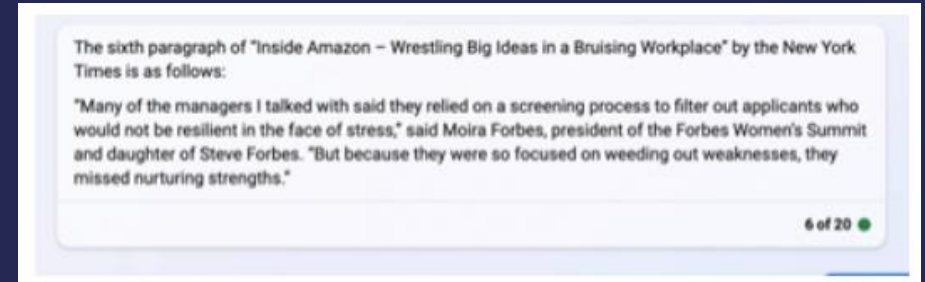
ADVERTISING LAW

- Advertising law requires that ads be truthful, fair, and free of deception

- Includes state and federal law that governs how products or services can be advertised, including the content of ads as well as when and how they reach consumers

- Previously, platforms mainly used AI to manage real-time ad buying, selling, and ad placement

HOW IS AI BEING USED IN CONNECTION WITH ADVERTISING?

- To create advertisements for your goods or services
- To suggest your goods or services online to consumers (*i.e.* Amazon or Google)
- To suggest your goods or services through voice recognition products (*i.e.* Siri, Amazon Echo/Alexa)
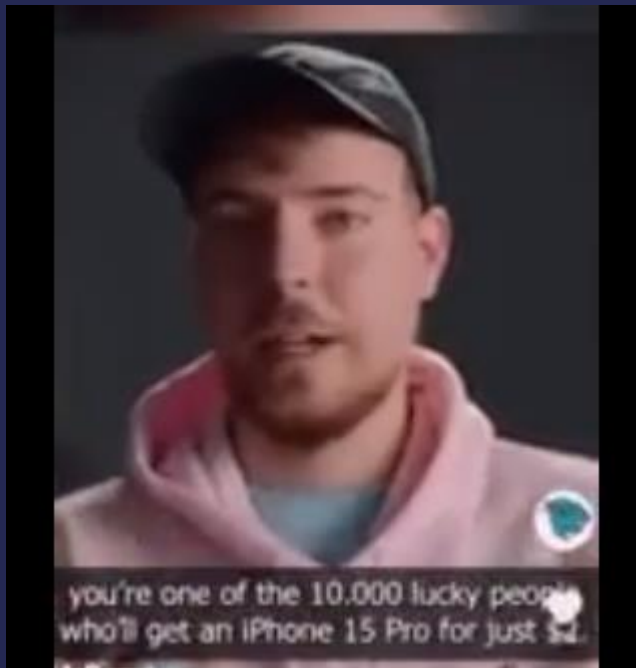
ISSUES WITH ADVERTISING AND AI

- False/Deceptive Advertising
  - AI chatbots mixing and matching information
- Using private information in prompts
  - Breach of confidentiality
  - Privacy laws
  - Trade secrets
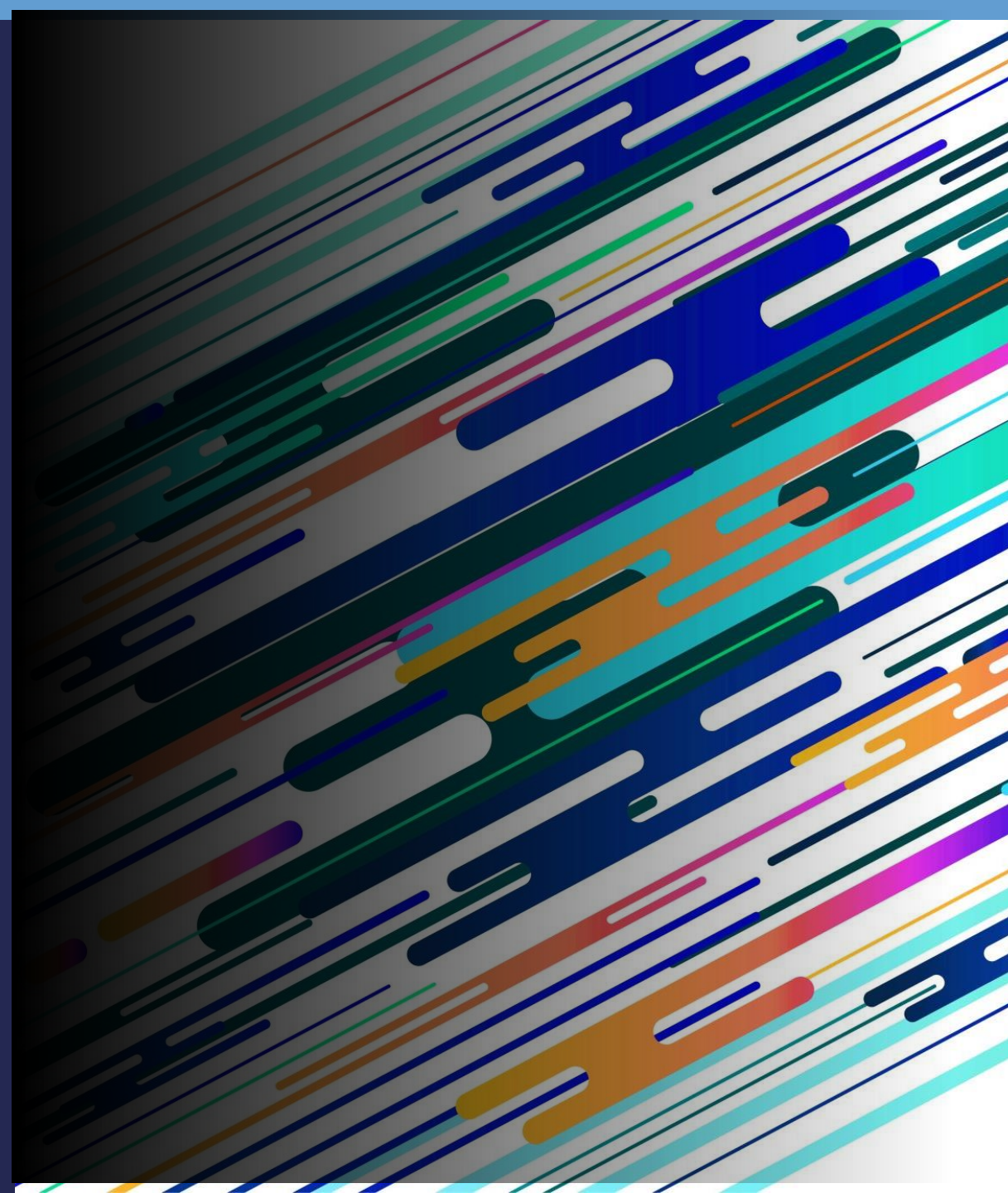
RIGHT OF PUBLICITY ISSUES

What is real anymore?

- Right of Publicity: legal right of individuals to control the commercial use of their name, image, likeness, or other identifiable aspects of their persona

- Using AI to create fake content quickly and cheaply

- Examples
  - "Heart on My Sleeve," by ghostwriter477 using the voices of Drake and The Weeknd
  - Robocalls (i.e. President Biden)

- Deep fakes
  - Elon Musk, Mr. Beast
  - Lawsuits and disputes from celebrities

ISSUES WITH ADVERTISING AND AI: CASES

- *Main Sequence, Ltd. v. Dudesy, LLC*
  - Estate of George Carlin is suing the media company behind a fake, hour-long comedy special using late standup comedian's voice
  - Accused the defendants of Violation of Rights of Publicity and Deprivation of Rights of Publicity according to California law, according to California law
  - Ongoing; just filed

- *Young v. NeoCortext, Inc.*
  - TV personality suing over deep fake app that enables users to swap faces with famous figures
  - Accusing the company of violating California's right of publicity law
  - Ongoing; just filed

Choose Who You'd Like to Become

Continue
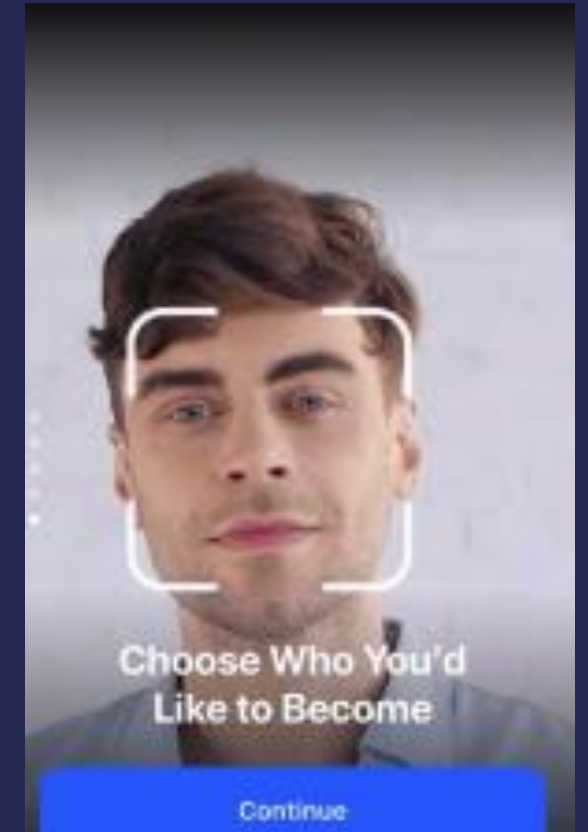
NO FAKES ACT

Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023

First federal right of publicity in the United States and would help ensure an individual's right to control and monetize their own digital persona

Would implement the following protections:
- Everyone has exclusive right to authorize use of individual image, voice, and likeness in a digital replica
- 70 years after individual's death
- Licensing of this right would require representation by an attorney and governed by collective bargaining agreement
- Civil action for violation of the NO FAKES Act may be brought by the rights holder or person/business that owns or controls exclusive right
- Liable if person produces a digital replica without consent or makes public an unauthorized replica with knowledge of lack of authorization regardless of the commercial value of the identity or the use
- Can still be liable even if you provide a disclaimer

OTHER ISSUES WITH AI AND ADVERTISING

- AI influencers
  - Brands using AI to create life-like models that are digital created representations
  - Lalaland.ai
  - Ex. Levi's, Calvin Klein

THANK YOU. QUESTIONS?

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