



# IS IT REAL??

# Gen-AI and Right of Publicity

Coexistence or Collision?

Challenges and Opportunities for IP in the Artificial Intelligence Era

June 3, 2024

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NETFLIX

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S BRAND NEW DRAMA

# JOAN IS AWFUL

100% Match TV-14 1 Season CGC

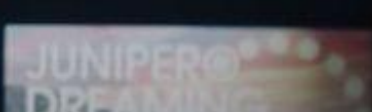
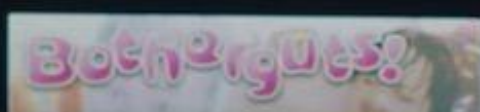


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## Recommended For You



## New To Streamberry



# Agenda

- Legal Structures
- Right of Publicity
- AI Laws
- Cases & Developments
- Risk Mitigation



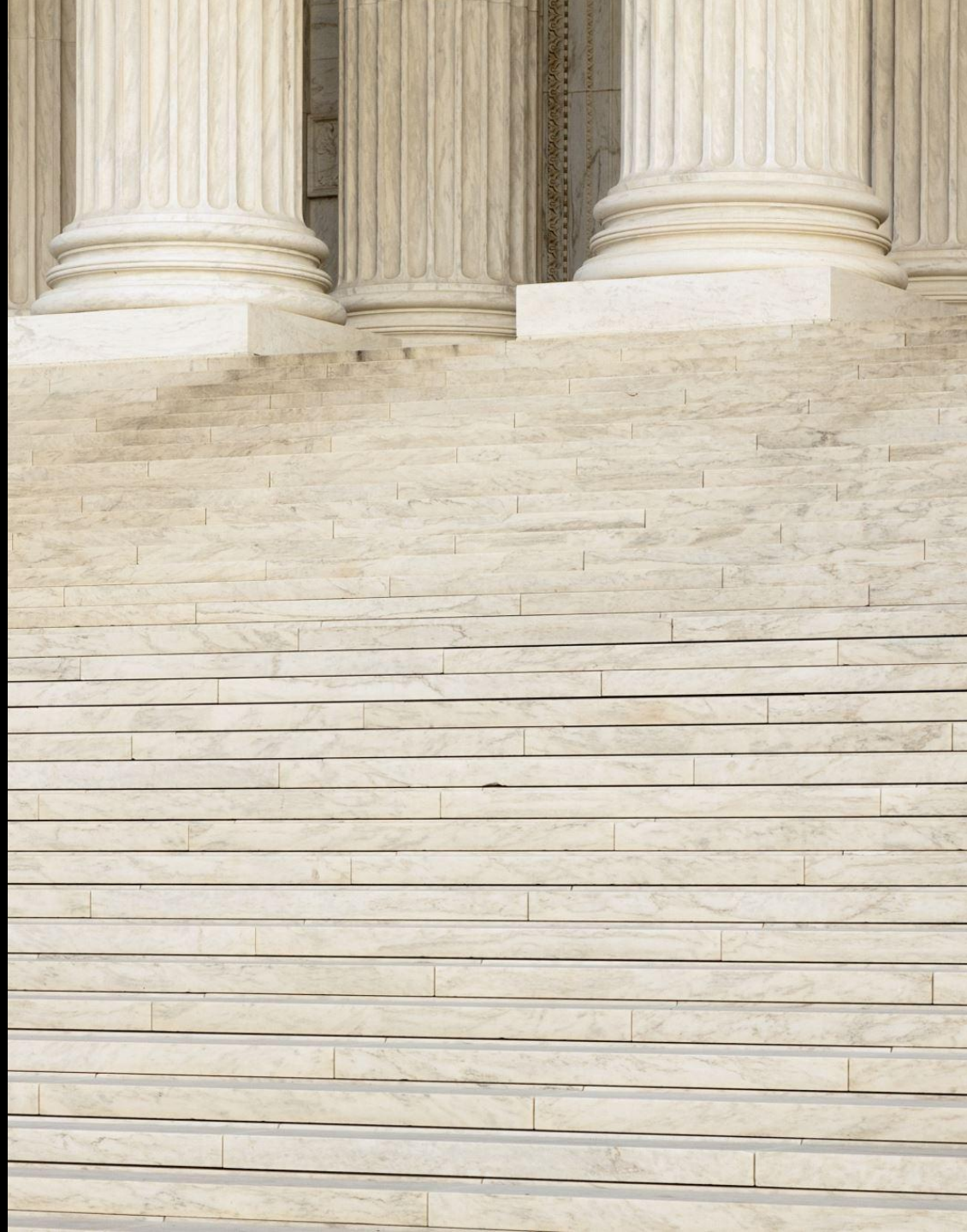
# Legal Structures: Canada

- Federal country, so have federal and provincial statutes, jurisdiction defined in our Constitution
- Mostly a common law/English country, predominantly British colonization
- One civil law province (Quebec), from French colonial history
- Laws in this area are both statutory and judge-made



# Legal Structures: U.S.

- Also a common-law English country, pre-dominantly British occupation
- Federal and State statutes
- Statutory and case law
- Louisiana State has a civil code – remanent of French occupation



A woman with long dark hair, wearing a grey and white checkered blazer, is shown from the chest up. Her hands are raised in front of her face, with fingers spread, in a gesture of surprise or confusion. The background is dark. The text is overlaid on the image.

WHAT IS  
THE

RIGHT OF  
PUBLICITY?

# Right of Publicity: Generally

- Name, Nickname, Professional Name
- Picture, Portrait, Photograph
- Likeness, Image
- Voice
- Persona?



# Right of Publicity: Canada

- Misappropriation of personality (economic-based)
  - Common law tort in some provinces
  - Statutory cause of action in some provinces
- Additional privacy torts (human rights-based)
  - Intrusion upon seclusion
  - Public disclosure of embarrassing private facts
  - Publicity placing person in false light in public eye

# Right of Publicity: Canada

- Misappropriation of Personality
  - Common law (ON, others)
    - (a) use of another's personality, (b) without consent, and (c) for commercial gain
  - Statutory (BC, MB, NL, SK, QC)
    - (a) use of another's personality, (b) without consent, and (c) for the purpose of advertising, the sale of goods/services, or any other purposes of gain

# Right of Publicity: Canada

- Privacy Tort Examples

- Intrusion upon seclusion

- (a) intentional or reckless conduct, (b) invasion of plaintiff's private affairs, and (c) invasion is highly offensive, causing distress, humiliation or anguish

- Public disclosure of embarrassing private facts

- (a) publicity concerning another's private life, (b) without consent, (c) matter or publication highly offensive, and (d) no public interest

- + Defamation, Publicly placing a person in false light, +++

# Right of Publicity: U.S.

## New York

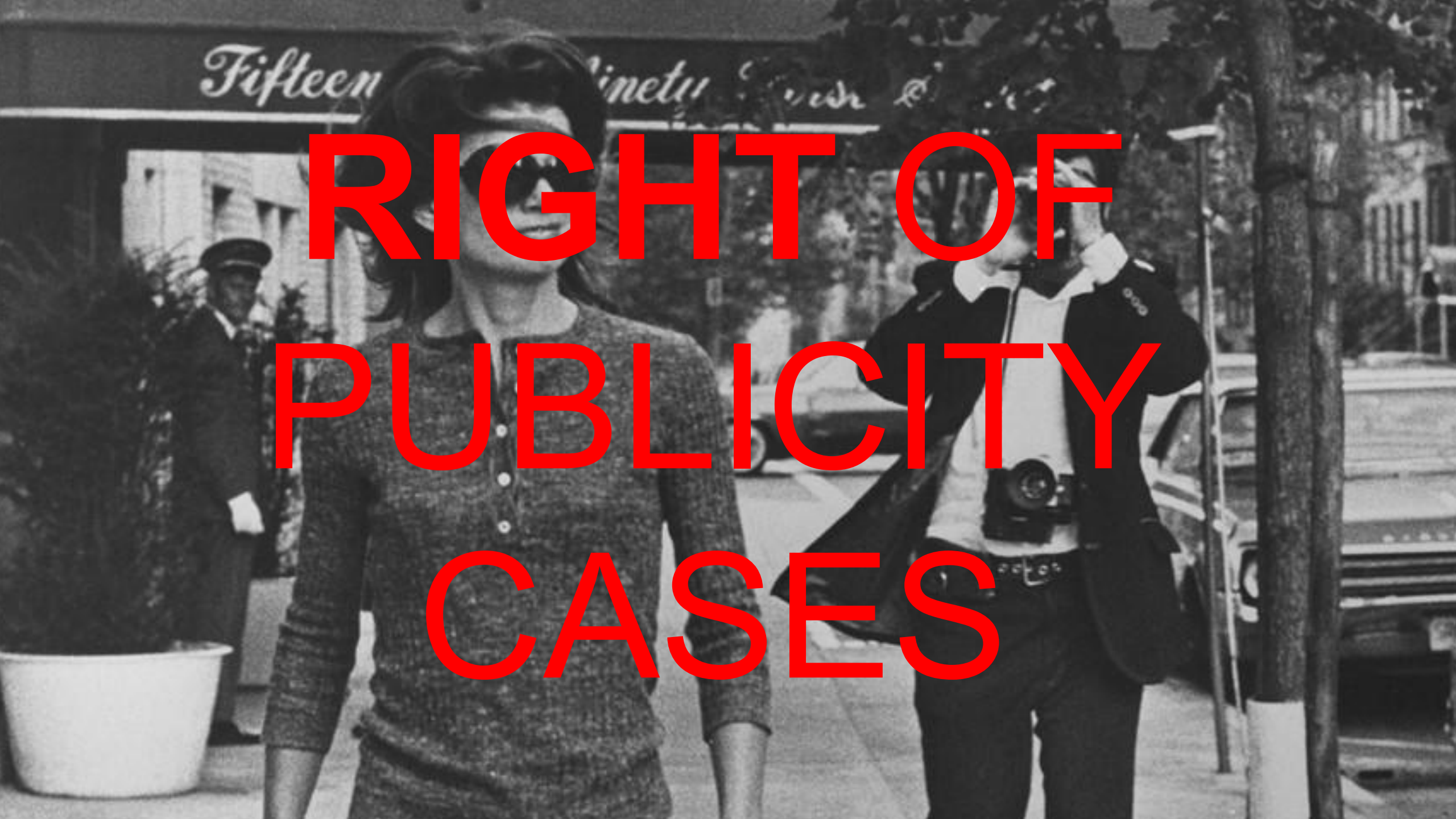
- Name
- Portrait
- Picture
- Voice
  
- No broad right of “persona”
- Written consent required

## California

- Name
- Voice
- Signature
- Photograph
- Likeness
  
- Plus a broad right of “persona” under CA common law
- Any form of consent required

# Right of Publicity: U.S.

- You may be subject to most restrictive state law
- Potential reach of right only limited by First Amendment
- Damages can be high



**RIGHT OF  
PUBLICITY  
CASES**

# Right of Publicity: Canada


CANADIAN FOOTBALL LEAGUE


SIXTH DIVISION

WESTERN DIVISION


EASTERN DIVISION

PLAYING IN A FOOTBALL STADIUM... makes it. Playing with great... makes it. In 1970, Plymouth... makes it with an all... the average... to avoid you... off to put the... game!


**Plymouth** 




Plymouth... makes it. In 1970, Plymouth... makes it.




Plymouth... makes it. In 1970, Plymouth... makes it.



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Plymouth... makes it. In 1970, Plymouth... makes it.



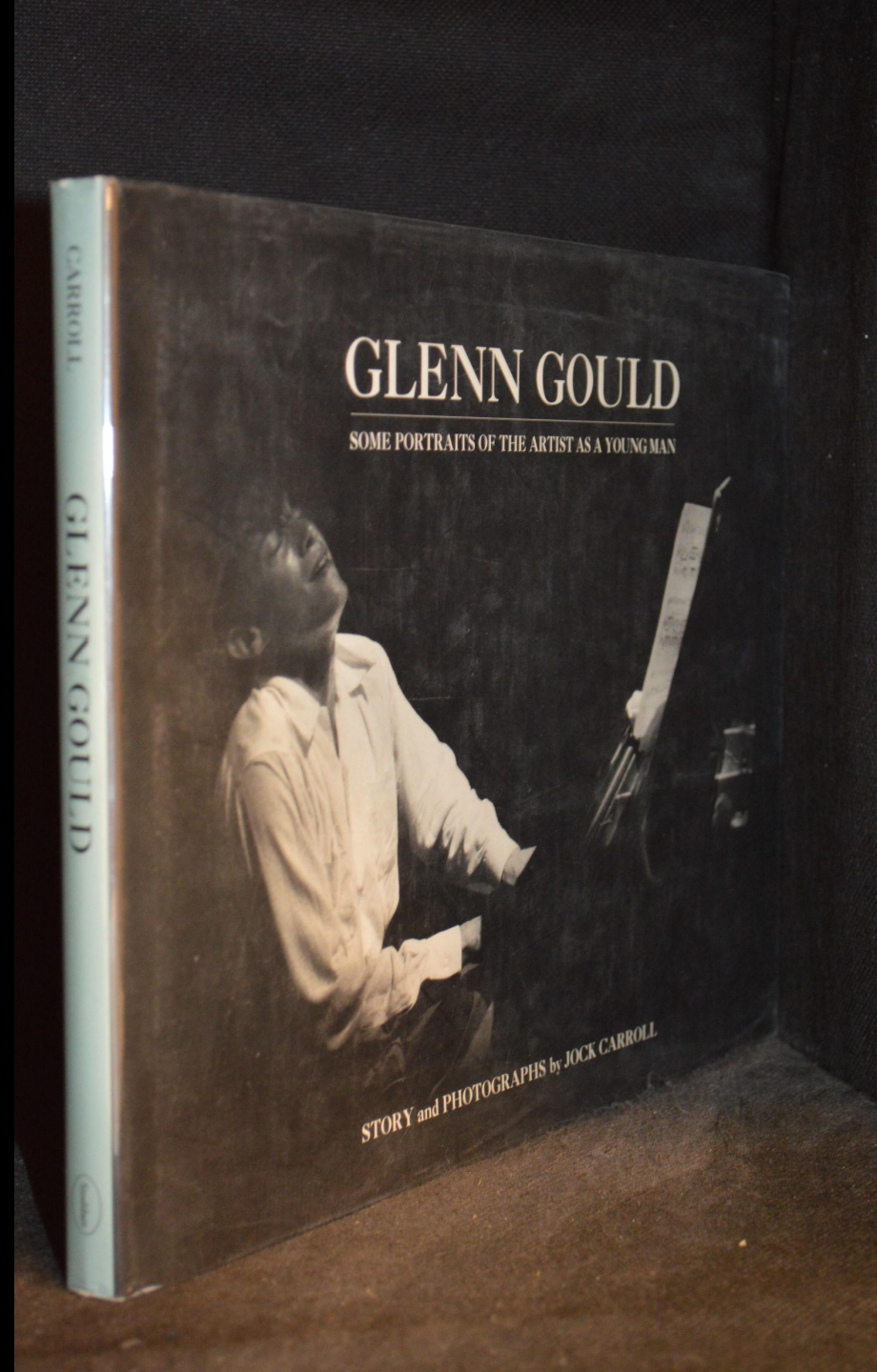
The 1970 Valiant Duster. Cut of sounds down's make it. Cut of eight make it. Plymouth... makes it.

## PLYMOUTH PRO FOOTBALL SPOTTER.

# Right of Publicity: Canada



# Right of Publicity: Canada



# Right of Publicity: U.S.



## Most diets pretend cellulite doesn't exist.

If you have lumpy lumps and bumps that won't go away... it's not of a woman's dream... it's cellulite. You know what cellulite looks like. It's lumpy, rippled, textured, lumpy pockets of fat. Cellulite is stubborn. It's never been getting rid of cellulite using ordinary dieting methods. By now you may be ready to give up. Don't be discouraged, because now there is an easy alternative. Now there is Au Natural.

Au Natural is a 100% natural lipid program specifically formulated for your cellulite problem. Au Natural is easier than starving yourself or becoming an exercise fanatic. Tens of thousands of women have used Au Natural successfully, with diet and exercise **WELL, NOT** successful. It's amazing how fast and easily you get results when you understand the problem instead of continuing to torture yourself with

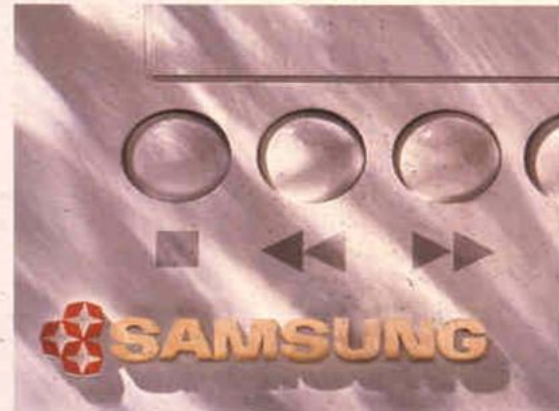
# Right of Publicity: U.S.



# Right of Publicity: U.S.



Longest-running game show.  
2012 A.D.



The VCR you'll tape it on.  
2012 A.D.

*Samsung. The future of electronics.*

# Right of Publicity: U.S.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 6/23/08

ROBERT BURCK d/b/a THE NAKED  
COWBOY,

Plaintiff,

- against -

MARS, INCORPORATED and CHUTE  
GERDEMAN, INC.,

Defendants.

OPINION

08 Civ. 1330 (DC)

CHIN, District Judge

This is the case of The Naked Cowboy versus The Blue  
M&M.




Plaintiff Robert Burck is a "street entertainer" who performs in New York City's Times Square as The Naked Cowboy, wearing only a white cowboy hat, cowboy boots, and underpants,


# Right of Publicity: U.S.

**A Shoe In!**  
After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.

**Jewel-Osco**  
*Good things are just around the corner.*




*Congratulations,*  
**MICHAEL JORDAN**



**YOU ARE A CUT ABOVE**

Dominick's COUPON Exp. 11/31/06



**\$200 off**  
RANCHER'S RESERVE STEAK

**Dominick's**

# Right of Publicity: U.S.

Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore [bit.ly/1gLHctI](http://bit.ly/1gLHctI) [pic.twitter.com/uGTc3k1Mii](http://pic.twitter.com/uGTc3k1Mii)

Reply Retweet Favorite More



RETWEETS  
74

FAVORITES  
181



# Right of Publicity: U.S.



14 Sofia Vergara  
ergara/Instagram

whosay

# AI & ROP



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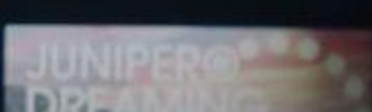
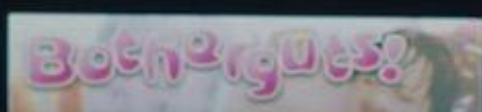


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## Recommended For You



## New To Streamberry



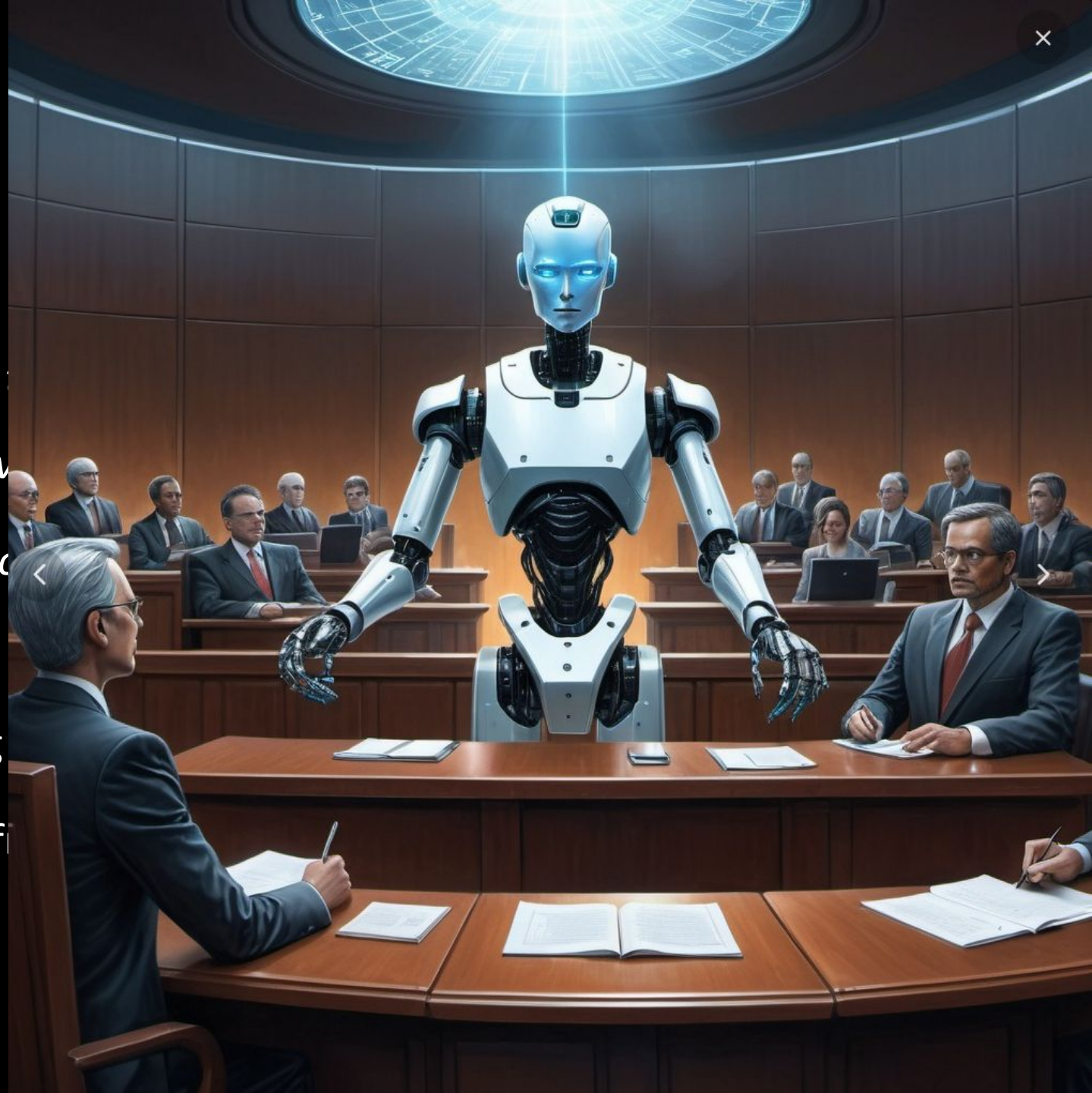
# AI Statutes: Canada

- Draft federal legislation, June 2022
- Places responsibilities on those responsible for “high impact” AI systems
- Transparency requirements
- New AI commissioner
- AMPs



# AI Statutes: Canada

- AI Regulation Currently In Force
  - ISED “*Voluntary Code of Conduct on Responsible Development and Management of Advanced Generative Systems*” (September 2023)
  - Federal Privacy Commissioner, “*Principles for responsible, trustworthy and privacy-protective generative AI technologies*” (December 2023)
  - Quebec automated decision-making requirements (September 2023)
  - Professional-specific guidance (e.g. for courts, law societies)



# AI Statues: U.S.

## Federal Law

- No Federal AI statute (ROP or otherwise)
- July 12, 2023 – Subcommittee on Intellectual Property, “Artificial Intelligence & Intellectual Property – Part II: Copyright.” Potential federal right of publicity, with focus on federal anti-impersonation rights (dubbed “FAIR Act”).

## Executive Orders

- Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence
- Blueprint for an AI Bill of Rights

# AI Statutes: U.S.

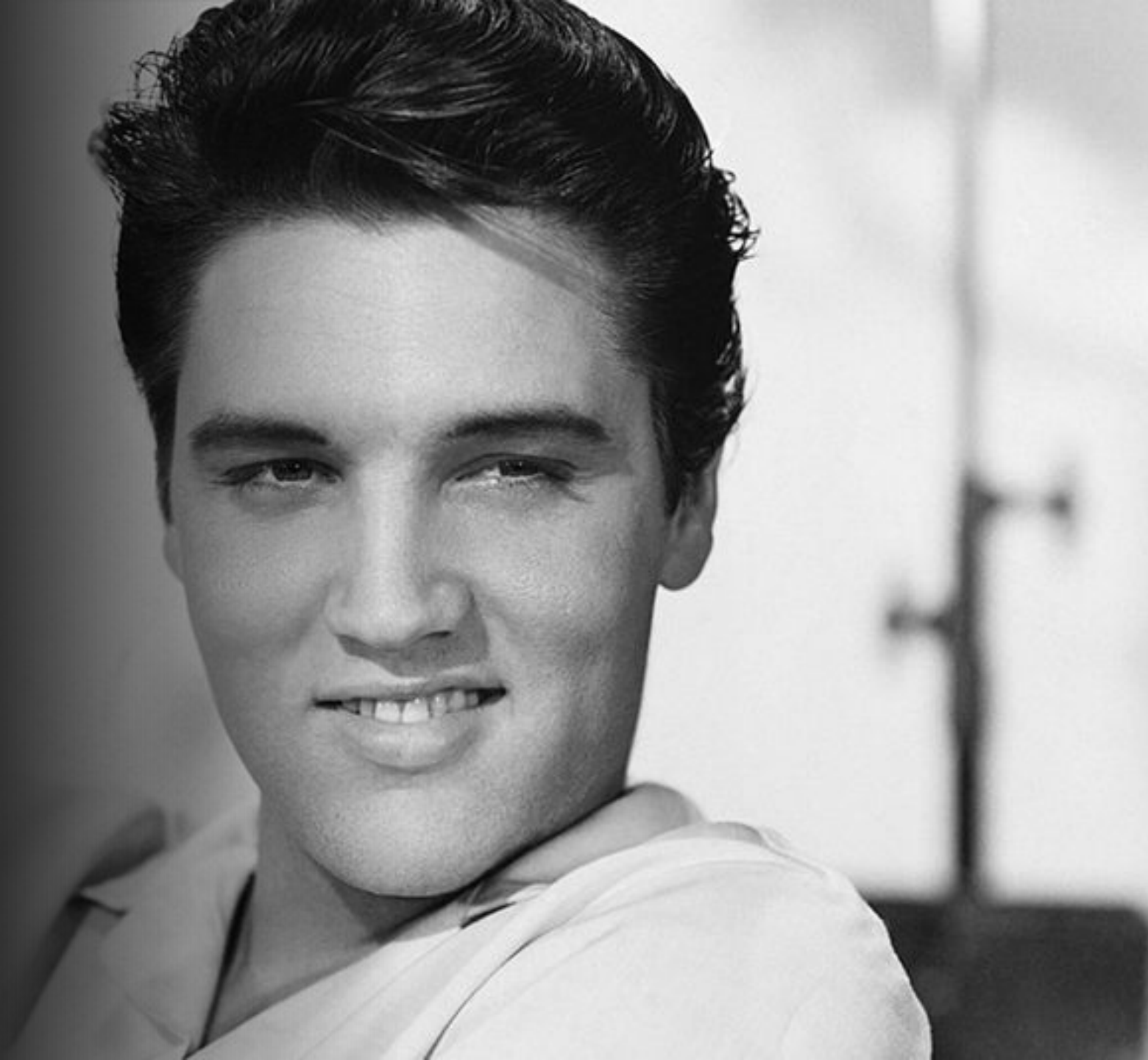
FTC Notice of Supplemental Rule Making



# AI Statutes: U.S.

Tennessee's Ensuring Likeness Voice and Image Security Act

The ELVIS Act



# Cases & Developments



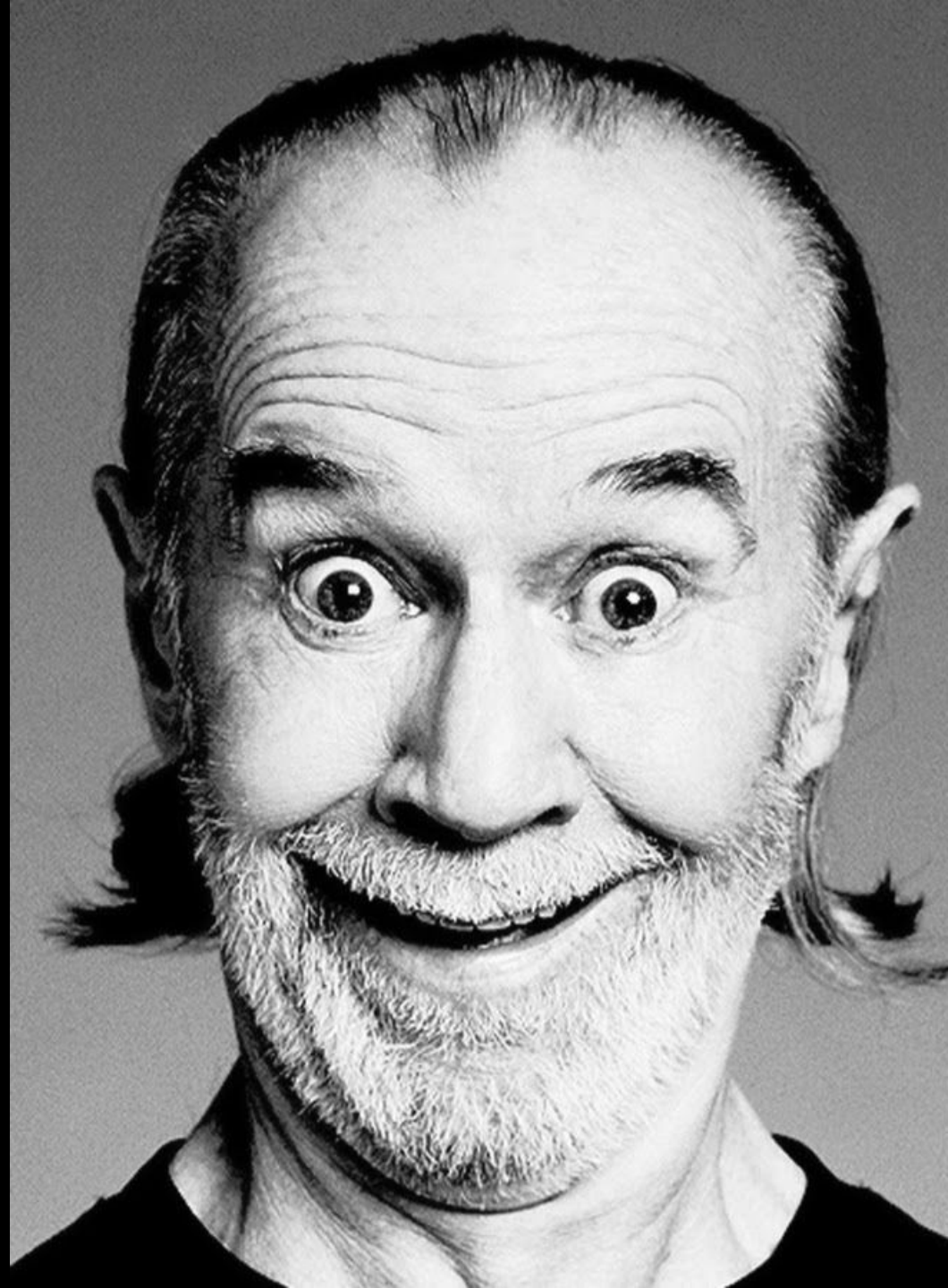
# Cases & Developments: Canada

[AI](#) Tupac vs [Real](#) Tupac



# Cases & Developments: U.S.

Jan. 25, 2024: Main Sequence, et al. v. Dudesy LLC, et al.

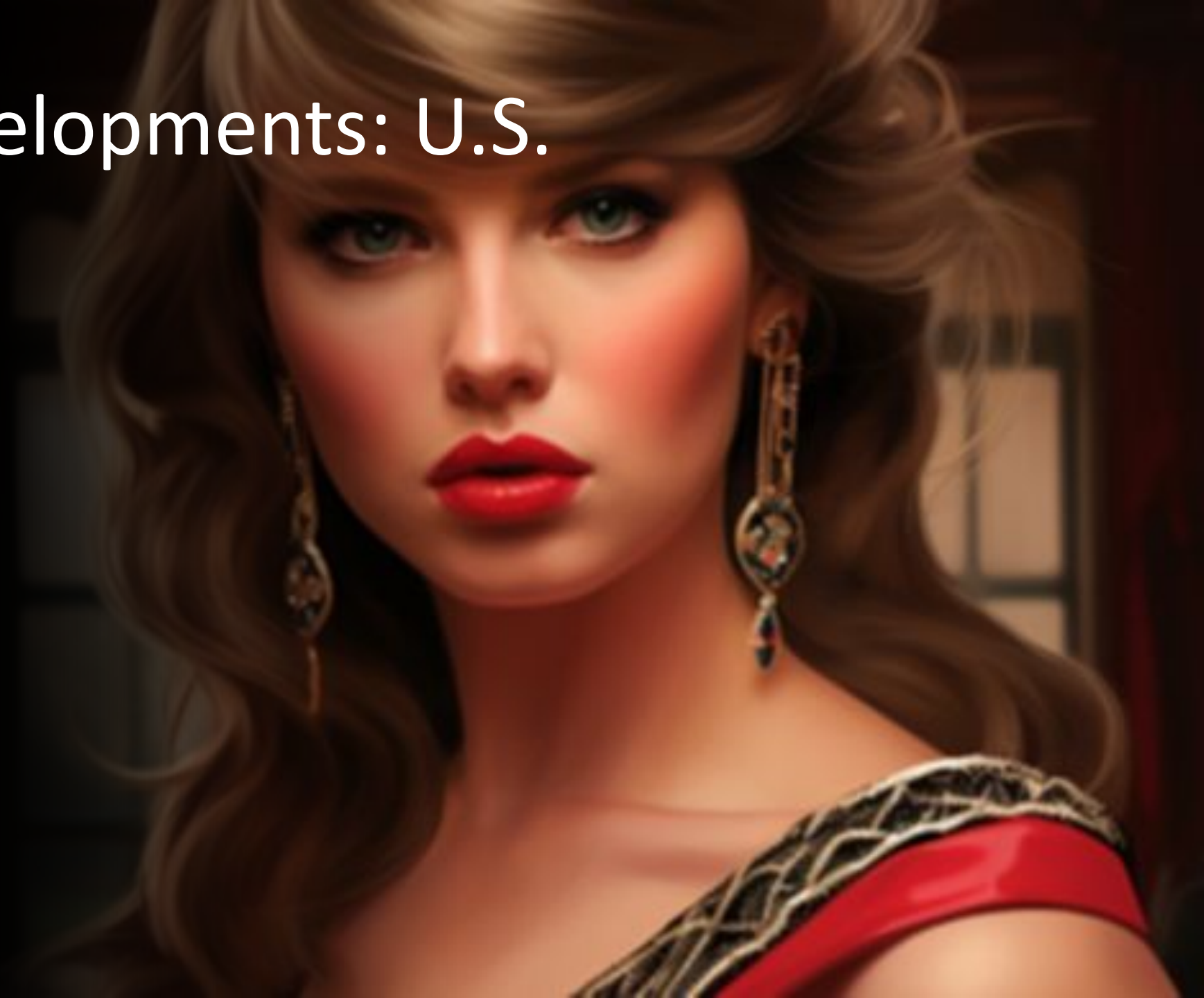


# Cases & Developments: U.S.

May 16, 2024: Lehrman, et al. v. LOVO, Inc.



# Cases & Developments: U.S.



# Cases & Developments: U.S.



# Cases & Developments: Performer Unions



# Risk Mitigation

- Is a “personality” actually being depicted?
- How famous are they?
- Are they dead? If so, is their estate active?
- Is it a commercial use?
- Is the use embarrassing or offensive?
- Do they have (other) damages?
- Do you own or have a license to use the image?
- Can you take it down quickly if there is a complaint?



# Questions?

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[dthomas@fkks.com](mailto:dthomas@fkks.com)