



Artificial Intelligence Update

May 2024

Don't Overlook Trademark Law When Considering Generative Artificial Intelligence

Key Notes:

- When addressing generative artificial intelligence and intellectual property, much of the focus has been on patents and copyrights.
- Generative artificial intelligence is also relevant to trademark rights and trademark infringement, particularly if your company is using chatbots to develop brand names or to interact with customers on your website.
- To avoid potential pitfalls, your company needs to develop policies regulating the use of generative artificial intelligence by employees and independent contractors.

Trademarks, though, are conspicuously absent from the litigation and commentary. This may be because trademarks work somewhat differently from patents and copyrights. A trademark is a logo, symbol, word, or phrase a company uses to denote its specific goods and services. An example would be Coca-Cola using Coke in connection with selling soft drinks. A company obtains trademark rights by using the trademark in business transactions related to specific goods or services. Unlike with patents and copyrights, it does not necessarily matter who invented or authored the trademark. As a result, you might conclude that generative AI is not particularly relevant to trademark rights and trademark infringement. You would be mistaken.

Generative Artificial Intelligence Has Unsettled Intellectual Property Law

The advent of generative artificial intelligence (generative AI) has unsettled intellectual property (IP) law worldwide. This is particularly true of patents, which safeguard novel inventions, and copyrights, which protect creative works like books and artwork. The highest courts of several nations have deliberated on whether naming a generative AI program as an inventor on a patent is permissible. Most have concluded that it is not. Courts have likewise struggled with the issue of whether a generative AI program can be named as an author on a copyright registration. Separately, authors and artists have sued the owners of AI programs, alleging that they infringe copyrights when their programs use copyrighted works to generate outputs.

Generative AI is Relevant to Trademark Rights and Trademark Infringement

Many commentators have noted that generative AI can help develop marketing content. Chatbots, such as ChatGPT, can be prompted to generate text for social media posts, webpages, or advertisements, and other generative AI programs can create images for the same purposes. These programs could also be used to generate brand names or product logos.

However, if your company uses generative AI to develop trademarks, this could lead to trademark infringement. Generative AI works by “ingesting” large amounts of information and then generating content based on that information. Thus, if you ask a generative AI program to develop a brand name or logo, it will review large volumes of existing brand names and logos for reference.

The problem is that studies have found that generative AI programs sometimes plagiarize. That is, they regurgitate source material with very few changes, if any. Thus, if you asked a generative AI program to create five brand names for you to use in selling film, it might give you Kodak as one of the five brand names, or it might give you a slightly revised name, such as Kodap. If you subsequently choose to use that brand name, you will likely face accusations of trademark infringement. Claiming inadvertence or blaming a chatbot will not serve as a defense against such accusations.

You would probably know better than to adopt the name Kodak or Kodap for use in selling film, but other examples might not be as obvious. The generative AI program might, for instance, copy a less familiar brand name. Thus, you cannot assume you would easily catch any problematic outputs.

A second scenario further shows how generative AI is relevant to trademark rights and trademark infringement. Some companies have begun to use generative AI chatbots on their websites to interact with consumers and answer their questions about products and services. Chatbots can be somewhat unpredictable and can provide erroneous information, called hallucinations. A chatbot could conceivably commit trademark infringement by, for instance, representing that your company, which sells athletic supplies, is affiliated with Major League Baseball when this is not true. Major League Baseball could consider this trademark infringement.

Guarding Against Trademark Issues in Your Company's Use of Generative AI

Your company could simply choose not to use generative AI to avoid the issues outlined above. But this is not a viable option long-term. Generative AI promises greater efficiency. If you do not use it, you will fall behind your competitors who do.

Furthermore, your employees and contractors may already be using generative AI to develop marketing and branding materials. So, you cannot adopt a wait-and-see approach. It is imperative to address this now. You can insulate your company against potential trademark issues (as well as other legal pitfalls) by developing policies that regulate the

use of generative AI at your company and by including clauses in your contracts with external contractors that regulate their use of AI. Those policies should include a requirement that someone in your (internal or external) legal department run a search for any new trademarks or brand names to ensure that they are not already in use by another company. If you are considering incorporating a chatbot into your website, collaborate with the developer, whether that person is internal or external, to ensure the chatbot does not engage in any activity that could be deemed trademark infringement.

If you need further advice or assistance with these issues, please reach out to Jesse Jenike-Godshalk at Thompson Hine.

FOR MORE INFORMATION

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