

## KEY TAKEAWAYS

# Using Generative AI in an IP-Driven Business: Practical Tips and Legal Risks

Kilpatrick's [Dan Englander](#) and [James Trigg](#) recently presented to clients and colleagues on the topic of "Using Generative AI in an IP-Driven Business: Practical Tips and Legal Risks" at the firm's annual **2024 Advanced Trademark Law Seminar** in New York City. Mr. Englander focused on how AI is impacting the area of trademark law while Mr. Trigg provided insight on this fast-evolving technology's effect on copyright law.

### Here are Mr. Englander's key takeaways from his presentation:

1

AI-powered tools are finding new applications in trademark law, particularly in trademark searching and clearance. These tools can assist with advanced similarity searches, considering factors like phonetics, visual similarity, and semantic analysis to identify potential conflicts with existing trademarks. Additionally, some offer risk assessments and can even update themselves automatically to improve accuracy and efficiency.

2

While promising, current AI tools in the trademark search and clearance field still have limitations. They cannot yet replace the expertise and judgment of an experienced trademark attorney. These tools often lack the ability to conduct robust searches that consider various legal nuances and case law. Additionally, they may not be able to analyze the full picture beyond simple comparisons of trademarks and goods/services.

3

Generative AI, which focuses on creating new content like text or images, is not yet widely used in industry-leading trademark tools. Existing applications that incorporate Generative AI often require significant human input due to limitations in their ability to understand legal context and generate truly unique and relevant suggestions.

4

Many AI-powered trademark search and clearance tools have limited functionality, which is important to understand. They may require advanced users who can critically interpret their results and navigate potential shortcomings of these tools, such as limited geographic coverage, limited ability to handle complex multi-class trademark searches, or limited training on trademark case law.

5

Despite limitations, AI tools in trademark search and clearance offer different functionalities at varying price points. Understanding the specific needs and budget will help users select the most suitable AI tool for their trademark practice. It may be the case, for example, that a trademark search tool that may not be capable of doing a full comprehensive search may be a viable option for knockout searches or for narrowing down a long list of candidate names in a clearance project.

### Here are Mr. Trigg's key takeaways from his presentation:

1

At the moment, United States copyright law does not recognize AI-generated works as copyrightable. This is the view of the United States Copyright Office, as affirmed by the United States District Court for the District of Columbia. "Mixed" works combining human authorship and AI-generated content can be protectable to the extent there is human authorship.

2

Content owners have brought more than 18 cases in various districts throughout the United States, contending that different generative AI platforms, including ChatGPT, Stable Diffusion, and others, are engaging in copyright infringement by "ingesting" copyrighted works to use in their large language models. The AI platforms are expected to argue in their defense that such copying constitutes copyright "fair use."

3

Content owners also assert that generative AI tools are capable of generating outputs that infringe copyright. The New York Times's lawsuit against OpenAI and Microsoft includes this as a central allegation.

4

The copyright landscape remains uncertain with respect both to the ingestion of copyrighted content to train AI models, and with respect to the potential for generative AI outputs to infringe; accordingly, creators and businesses seeking to incorporate the use of generative AI to generate text and image-based content should proceed carefully for the time being. Uses of generative AI for internal purposes and ideation will be safer and less risky than incorporating generative AI in public-facing materials.