

AI AND THE *NEW* TRADEMARK LAW: ADAPTATION V. ENDING

SOFÍA BERTOSSI

INTRODUCTION

Over time, the process of general purchasing has changed. Initially, the seller was the only one who had the necessary knowledge about the product being purchased. Over the years, consumers acquired more and more decision-making power; they gained information access and the power of selling due to the use of the internet.

Shopping habits are being modified every day with the introduction of artificial intelligence (“AI”) applications (e.g., Amazon Alexa, Google Home, and chatbots), AI personal shopping assistants (e.g., Mona and Amazon Dash), and AI robot assistants (e.g., Pepper). In many ways, the introduction of AI applications has meant that the purchasing process has reverted to an old Victorian model, with some important differences.

With these new AI tools in mind, this article aims to answer arising questions regarding how trademark law may be affected. Could virtual assistants confuse brands? How do we apply the doctrine of likelihood of confusion when the buyer is not a person?

REVIEW OF TRADEMARK LAW

Firstly, we might consider that trademark law aims to protect consumers by way of preventing deception in the market. The overall function of trademark is originality. This means that the consumer, through their senses,

identifies the brand and tries to make a personal decision over the purchasing of the product or service. For this reason, trademarks must be distinguishable and must not lead the consumer into error. Without these guidelines, the consumer may mistake one brand for the other.

When a third party is able to intercept the information channel by using a brand remarkably similar to one with priority (i.e., prior registration or use), it mainly affects the consumer, who might end up mistakenly purchasing one item for another. It can also affect the owner, who loses a sale of their product. The third-party imitator makes a false representation which defrauds the consumer and could lead to a definitive loss of a client for the trademark owner.

Likelihood of confusion can be a question of law, a question of fact, or both. As a question of fact, the trademark conflict must be evaluated based on the consumer's criteria, that is, the person who acquires the product. Therefore, the main question is whether the 'average consumer' would be confused, even though there are more qualified consumers and AI tools available to help answer the question.

To determine whether there is a likelihood of confusion, one must put oneself in the shoes of the average consumer who uses his or her senses. Consequently, the trademark comparison focuses on categories of similarity (i.e., grammatical similarity, phonetical similarity, and ideological similarity).

In the context of new AI tools, courts must now determine what happens if the purchase of the product or service is made by an AI system and not a natural person. How would the likelihood-of-confusion criteria, which are based on human senses, be applied? Would confusion still occur?

TRADEMARKS AND AI

AI is changing the way humans interact with technology and reality. John McCarthy offers the following definition of AI in his 2004 paper: “AI is the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to methods that are biologically observable.”

Every day we use AI in a lot of ways: purchasing, social networking, streaming, etc. A new report on the state of the retail industry has released key findings that 89% of U.S. millennials and 91% of Generation Z prefer to purchase online. Meanwhile, 96% of Chinese respondents feared about counterfeits, and 94% expect deliveries in no more than two days. Additionally, 43% of UK millennials and 53% of UK Generation Z order online, and Statista confirmed that 38% of consumers depend upon AI guidance for the purchasing process.

It could be said then that AI is influencing the public consumers’ choices and slowly replacing the natural consumer. This has happened with multiple types of AI technology. For example, Amazon Echo is a device that works with a voice recognition software called Alexa. It works as Siri does for Apple, but the difference is that it has the capability to order products automatically based on the market and the specific information about the shopper. Also, Dash, another Amazon application, automatically reorders products that have run out at home. In these instances, there is no human interaction when purchasing. How does the AI know which brand to choose? Does AI get confused by two similarly named products?

In 2017, it was reported in the press that a six-year-old child from Texas asked her parents’ Amazon Echo, “Alexa can you play dollhouse with me and get me a

dollhouse?” This prompted Alexa to order a dollhouse and, oddly, a bag of cookies. The little girl was not involved in the product selection or product purchase decision. Further, when this story was reported on local news, it was claimed that upon hearing the report, other Amazon Echo products were triggered to order dollhouses as well. Presumably, different dollhouses were ordered based on the individual parameters of each Alexa system in each home. In this scenario, there was no human involvement in the product suggestion and purchasing process beyond the initial general product request made by the little girl.

There are other examples of AI in the retail field, such as bots and chatbots. eBay offers a chatbot that helps users find the best deals. Another virtual assistant is ‘Mona’ which works in fashion retail and suggests clothes to the user based on their preferences. Mona has the potential to replace an entire wardrobe someday.

Currently, there has been only one relevant case involving trademark law and AI: *Cosmetic Warriors Ltd. and Lush Ltd. v. Amazon.co.uk Ltd.* In this case, the High Court ruled that Amazon infringed Lush’s trademark by using Lush’s mark in keyword advertising as well as on Amazon’s own site. In other words, the Court said that the use of a third-party trademark in the search engine of a website, which does not offer the goods associated with that trademark, will constitute infringement. This case could result in wide-reaching implications for e-commerce. Trademark and AI matters are starting to be analyzed in the judicial system at an increasing rate, and the number of these cases will only continue to rise.

Based on consumer studies, one-third of the U.S. population uses voice search functions, and 71% of consumers prefer to make general inquiries by voice instead of typing. For the online consumer, 40% of consumers use their voice to order or buy something every month, and for those that own voice-enabled devices, 43%

of owners use their devices to make online purchases. One can only assume that by the end of 2024, there will be a huge number of consumers buying through voice-enabled devices. Now that the consumer is changing, and AI is the one who chooses, suggests, and buys the product or service, trademark law must be adjusted.

CONCLUSION: ADAPTATION V. ENDING

Assumptions and questions related to these issues have been made for years, but there are no concrete solutions yet. The consumers should be responsible for the final selection. I think that all purchases should be approved by a human person to avoid a misunderstanding. AI might hear “Avidas,” but the consumer intended to say “Adidas.” In this case, AI probably detects the mistake; however, if the consumer had said “Avidas,” AI might still modify the consumer’s request based on reputation and statistics.

For that reason, this article posits that phonetic marks should be eligible for registration to be appropriately applied to these new AI situations. Additionally, AI must consider that the use of a third-party trademark in a search engine of a website—regardless of whether the website offers goods associated with that trademark—can constitute trademark infringement.

Regarding counterfeit products, Amazon, Google, Apple, and the other companies that are responsible of virtual assistants must put special emphasis on the detection of third-party trademarks. AI could be used as a tool to help consumers avoid paying damages for infringement.

On the other hand, considering that more AI suggestions are based on the product characteristics and consumers’ opinions, the brands and their reputations are losing relevance. The consumer wants the best product

(based on reviews) within a certain price range. Keeping this in mind, is this the beginning of the end for trademark law? In my opinion, it is not the end, but the trademark law perspective should adapt. There are other agents and processes that intervene in the product or service purchase; it is no longer the classic buyer who chooses a product from a shop window or follows the seller's advice. A consumer's senses are less relevant when AI is involved. Purchases are now being made automatically, chatbots are assisting consumers with buying decisions, and brands are losing relevance. This is not a foreshadowing of the future; the AI dilemma is happening now and is here to stay.

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