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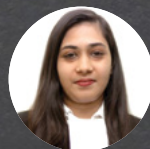Associate Partner
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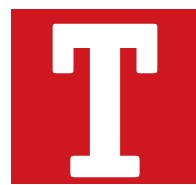
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YOUR WITNESS PLEASE!

Has Artificial Intelligence Overruled the Trademark Law?

■ **Sudeep Chatterjee & Ankita Pawar**

The term "Artificial Intelligence" (hereinafter referred to as AI) is omnipresent nowadays and has indeed got a revolutionary impact on our ways of life. The term was first coined by John McCarthy in 1956, the thought behind his idea of the same was 'thinking machines'. Eventually, the meaning of AI has evolved with time concentrating more on the ability of the machine to emulate human intelligence. According to Oxford English Dictionary, 'artificial intelligence is "The theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages"[1]. However, one can believe that there are too many definitions of AI, but this basic definition gives us a mere understanding to examine the legal implications surrounding the field. AI systems categorized into many classifications, the central one being Strong AI (systems think and perform tasks exactly like a human) and the other Weak AI (systems focusing just on one narrow task. Earlier, the "intellectual" part of

"intellectual property" was designated to human intellect. However now since the machines have become intellectual and proficient in making inventive alternatives based on unclear algorithms, the "intellectual" in "intellectual property" turns out to be perplexing[2]. Hence AI brings into question, the rising various challenges to the existing Intellectual Property (IP) regime, and one such challenge is faced by the trademark law.

The basis of trademark law was laid down back in the nineteenth century where one would enter a shop for requisite assistance from shop assistants, and product purchase was based on their suggestion. But now the mode of buying and selling products has become revolutionary and it has brought about vital modifications in the development of trademark law as well[3]. Since trademark law is all about humans and their association with brands and their purchasing process, therefore fundamental concepts of trademark law such as phonetic, conceptual, and visual similarity as well as confusion between the logos and the average consumer all revolve around human beings and their interaction with brands. Hence AI has either effectively reduced or

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removed human beings from the product suggestion and product purchasing process.

Presently, the usage of AI by consumers in product suggestion and purchasing processes is quite new and limited. For instance, some of us often use devices like Amazon Echo, Google Home, and Apple Home-Pod to serve us as personal assistants. Hypothetically if an individual uses these AI-based devices to buy a product based on the predetermined standards for buying and the product ends up being simulated, or there is a significant inconsistency in the preferred quantity or quality of the product, will these techno devices be liable for secondary infringement along with the infringing product manufacturer? If yes then how will the standards of 'likelihood of ambiguity', 'imperfect recollection', and 'average consumer' be applied to AI? All these questions are quite tormenting, and hence demand responses to these questions to justify this conjunction of artificial intelligence and trademark law. Another Amazon device that is power-driven by AI, is used as a corresponding replenishment service which is known as the Amazon Dash Replenishment Service (DRS).[4] Presently it is used as a Wi-Fi-linked button that can restore consumable products. This system permits you to order physical goods automatically from Amazon when supply is low. The customer first selects the products and then opts for an automatic delivery system and then the DRS system places the order and then later Amazon ships the product to the customer. However maybe in the future, this service may have the discretion to choose the product as well. At present, this service is firmly constrained by the brand owners who have signed up with this
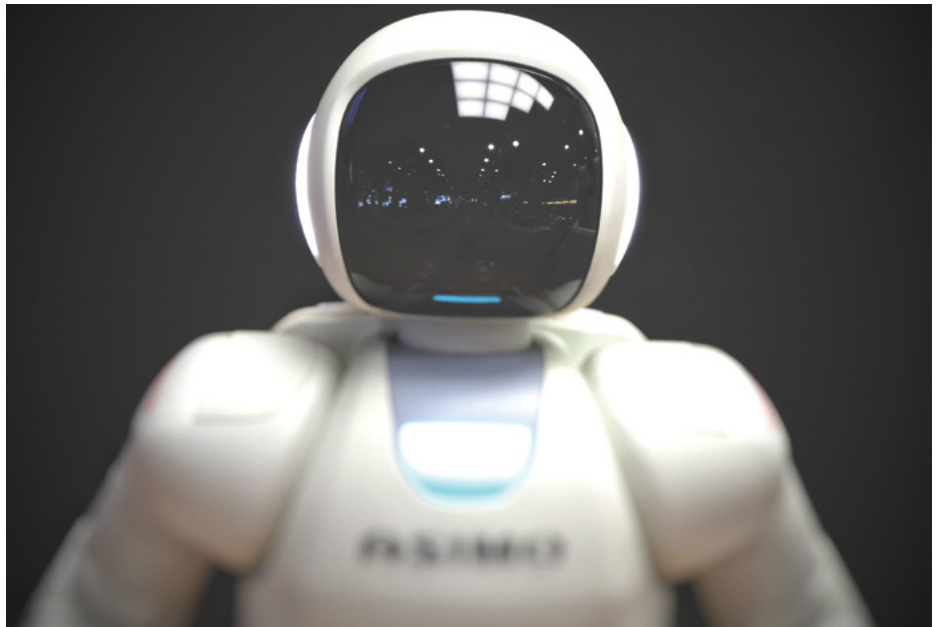
Dash Replenishment Service. However, if it becomes more widely accessible or if more suppliers enter the market, then there are chances of more products being accessible to the consumers, and hence AI will no doubt be making all such decisions. Also, depending on prior lists of products would create a gap in the protection offered by trademarks and the owners could find that their go-to condition doesn't conceal to the core aspects of a new offering.

Although the knowledge regarding the issue of Artificial Intelligence and trademark liability have not found predominance in the courts of law as yet, several cases presented before the Court of Justice of the European Union (CJEU) in the past decade, could be considered to shed some light on this question in the light of this new technology. In the case of **Louis Vuitton v Google France,** where the issue of concern was keyword advertising and the automatic choice of keywords in Google's AdWords system. It was held that Google would not be

liable for trademark infringement unless they took an active part in the keyword advertising system. In **Cosmetic Warriors Ltd and Lush Ltd v Amazon.co.uk Ltd and Amazon EU Sarl (2014)**[5], the United Kingdom High Court reprimanded Amazon for infringing Lush trademarks. The dispute regarding this case arose when Amazon brought the keyword "Lush" from "Google", through a bidding process. This means that when the keyword LUSH was Googled, customers were directed to Amazon's website based on that keyword. But the projected results on the site showed similar results but did not show the original "Lush" brand products. Since Amazon did not sell Lush products though due to the AI, it was showing similar products based on that keyword, it became a clear case of infringement where Amazon was held accountable though there was no sale of "Lush" products on the Amazon website.

Artificial Intelligence is on the increase and to a certain extent, its influence on trademark law and other

IP laws cannot be overlooked as of now. It is very much possible that some of the significant ideas and basic tenets of trademark law will no longer be related in the marketplace, or more likely will have to be interpreted differently to reflect the new retail reality which shall be slowly taken over and driven by AI programs. Hence one can believe that this condition is indeed quite fearful because there are few instances where such e-commerce platforms which run on these AI-based algorithmic systems are playing substantial roles in the manipulation of brands and there shall be no surprise that the courts would also treat AI in a similar way as the internet service providers which is clearly shown in the case laws discussed above. The only possible way to avoid this situation is if the AI or the operators behind the AI are put on notice of the potential infringing activity. Only under such a situation, they will be liable under trademark law. Moreover, only time will unfurl how courts will interpret principles of trademark law like "likelihood of confusion" and "average consumer", and also assess the consequences that follow. For instance, the Supreme Court of India in the case of "**Cadilla Healthcare Ltd. v. Cadilla Pharmaceuticals Ltd**"[6] had explained the term "average consumer", as one who possesses average intelligence and carries the tendency of "imperfect recollection". However, this explanation completely contradicts the essence of AI application which has been stated above. That an AI is neither capable of imperfect recollection nor possesses average intelligence. It has been

proven by the courts that along with the advancement in technology its interpretations and legal jurisprudence of the jurisdiction changes and evolves with it. As of now, courts while deciphering the basic tenets of trademark always takes a reference to the imprudent "consumer". However, gradually it is going to be the "artificial consumer" which will constrain the courts to take into consideration such technological creations in its reference, at least in the context of algorithmic systems.

In conclusion, with the present AI modification that is taking place, all IP laws will be affected and trademark law would also not be spared. As a result, one needs to understand that there is no doubt that the impact of AI on all intellectual property laws, including trademark law, will continue to increase as AI programs become more advanced and sophisticated. At present, nobody can recommend how solutions to these issues are likely to unfold. Therefore, it will be injudicious to force AI to adapt to existing trademark laws or other intellectual property laws. Hence, the focus should be that trademark laws should be interpreted and even amended, if required to cater to the new aspects of trademark disputes which AI provides. Also one must not forget to emphasize the fact that these technological advancements should not become a hindrance in reduction of monopoly, increasing competition, and also ensuring quality products for the consumer which serve as a mere purpose of trademark law should serve as a tool to facilitate these practices. 🅦

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[1]OXFORD, OXFORD ENGLISH DICTIONARY (Oxford University Press, 3rd ed., 2010)

[2]Grynberg, Michael (2019) "AI and the "Death of Trademark"," Kentucky Law Journal: Vol. 108 :Iss. 2 , Article2

[3]Lee Curtis and Rachel Platts, AI is coming and it will change trade mark law, MANAGING IP (Jul. 9, 2020)

[4]Amazon Alexa Team, Amazon Dash Replenihment, AMAZON DEVELOPERS (Jan. 26, 2021)

[5]Cosmetic Warriors and Lush v Amazon.co.uk and Amazon EU, [2014] EWHC 181 (Ch).

[6]Cadilla Healthcare Ltd. v. Cadilla Pharmaceuticals Ltd, 2001 (2) PTC 541 SC