



## Competition Law Association

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### WEBINAR

## A Quiet Revolution? AI in Trade Mark Registration and Enforcement

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**Speaker:** Dev Gangjee, Professor of Intellectual Property Law at Oxford University

### Introduction

- Whilst the application of AI to IP rights has, to date, mainly been considered in relation to patents and copyright, it is already having a big impact on trade mark registration and enforcement at scale. AI has demonstrated that it is effective at increasing efficiency and improving consistency with respect to particular aspects of trade mark law and practice, although limitations continue to exist.

### Policy background

- A WIPO Revised Issues Paper in May 2021 highlighted that the use of AI during a consumer's online product selection process could knowingly or unknowingly affect brand recognition. This longstanding issue has been evidenced by the logic behind keyword advertising and item recommendations. A more recent example relates to the rise in virtual shopping assistants on e-commerce platforms, which influence the manner in which consumers buy things by controlling the information they receive and framing their choices.
- It will be important to monitor the increasing use of AI to determine whether traditional principles of trade mark law, such as distinctiveness, recollection, likelihood of confusion and the concept of the average consumer, need to be re-evaluated. Where consumers increasingly ask for products verbally via digital assistants, it may be appropriate to place greater emphasis on oral and phonetic similarity of marks when assessing confusion.
- Where AI recommends counterfeit products to consumers, third party infringers are likely to remain solely liable unless the AI explicitly skews consumers' decisions towards infringing items. To the extent AI is deemed responsible, safe harbour principles could also be applied to AI providers, otherwise recourse to tort law may be required to determine liability.
- Distinctions may also need to be drawn between AI-generated and AI-suggested processes.

## **Registration process**

- AI has significantly impacted and continues to facilitate trade mark registration by (i) automatically classifying goods and services; (ii) using chatbots to streamline filings and provide preliminary feedback on the likelihood of successful registration; (iii) adopting visual image recognition to detect fraudulent filings; (iv) applying natural language processing to help examiners identify previous registry decisions; and (v) offering machine translations.
- Advances in image classification due to AI (demonstrated via WIPO's Vienna Classification Assistant) have been utilised to correctly designate codes for figurative and other visual marks. The UKIPO's pre-application service, powered by AI, further helps applicants identify NICE classes and avoid falling foul of the absolute and relative grounds for refusal.

## **Prior rights conflicts**

- The increasing quantity of new registrations has resulted in a very large corpus of trade marks, which is becoming increasingly impractical for all types of stakeholders to search physically. AI is becoming increasingly effective at, for example, distinguishing word marks with phonetic and semantic similarities and reverse image searching visual marks. Machine learning algorithms are also being used to detect product similarity.
- In an increasingly crowded environment, AI is also being used to carry out risk assessment and generate viable trade marks by reference to consumer search trends, in addition to identifying the availability of corresponding domain names and social media handles.
- Whilst technology is improving, constraints remain. AI struggles to address concepts such as dilution and reputation. It also fails to take into account whether prior marks are actually being used, the level of protection that should be afforded to marks of different strengths and the relevance of prior designs and copyright material. Biasing of training datasets is also a concern. Human analysis and input therefore continue to be important.
- Whereas AI should result in greater consistency across trade mark registrations, it may also make trade marks more difficult to obtain.

## **Enforcement**

- In addition to traditional reporting and take-down mechanisms, AI-powered automated detection tools are being exploited to respond to trade mark infringement and inaccurate online content. E-commerce platforms are taking steps to prevent new unauthorised selling accounts through various methods including identity verification, payment tracing and continuous monitoring. In part, advanced machine learning algorithms are being deployed for this purpose. However, accuracy rates have not been published. AI is also being used to proactively address social media promotion strategies.
- A key consideration is to ensure that the interests of trade mark proprietors are effectively balanced against genuine sellers to avoid abuses of process and the algorithmic implementation of the equivalent of unwarranted preliminary injunctions.