Response on behalf of the Intellectual Property Lawyers Association ("IPLA") to the UKIPO Open consultation entitled "Artificial intelligence and intellectual property: call for views"

This paper addresses the questions raised by the UKIPO in relation to Trade Marks and AI.

As a preliminary point the use of AI in purchasing decisions is in its infancy. There are existing examples of how it operates but both its capability and use are likely to change over time. Trade Mark law has developed historically to deal with changes in technology relating to the advertising and purchasing of products, for example, search engines and keywords (see line of European and UK case law culminating in the CJEU decision in *Interflora v Marks & Spencer*). To date this has not required legislative change to trade mark law, rather the Courts have applied the law to the technology on a case by case basis.

We think this should continue rather than there being legislative change, particularly when the impact of AI (and its capability) is not yet fully known. However, the situation should be reviewed at a later stage when the use and development of AI has become clearer and to assess whether the Courts are addressing any problems that arise quickly enough.

For the purpose of this paper we have adopted the definition of AI as "narrow AI" set out in WIPO's R*evised Issues Paper on Intellectual Property Policy and Artificial Intelligence* dated 21 May 2020:

"Artificial intelligence (AI)" is a discipline of computer science that is aimed at developing machines and systems that can carry out tasks considered to require human intelligence, with limited or no human intervention. For the purposes of this paper, AI generally equates to "narrow AI" which is techniques and applications programmed to perform individual tasks. Machine learning and deep learning are two subsets of AI. While the AI field is rapidly evolving it is not clear when the science will advance to higher levels of general artificial intelligence which is no longer designed to solve specific problems but to operate across a wide field of contexts and tasks.

We understand this to be the same as the definition adopted by the UKIPO.

1. **If AI technology becomes a primary purchaser of products, what impact could this have on trade mark law?**

The difficulty in answering this question is that whether an AI uses a trade mark in making its purchasing decisions will vary depending on its programming and the information it has available to make purchasing decisions.

Trade marks are used as shorthand by human consumers to provide information as to the origin or characteristics of a product. It saves the consumer considerable time in testing/researching the product each time he or she purchases it.

An AI may have a large amount of information about the product or category of products that it can use to make a purchasing decision e.g. serial numbers, product reviews, consumer ratings, likes, images of packaging, etc.

In circumstances where AI only has the brand name, given its perfect memory an AI is much less likely to be misled into buying a product with a confusingly (to a human) similar name.

Consequently, the need for a law to prevent use of confusingly similar names is likely to be less necessary (although see comment at 2. below). However, our view is that laws protecting trade mark proprietors from the use of confusingly similar trade marks should be maintained because it is likely that there will always be some humans involved in purchasing products.

2.Are there, or could there be, any difficulties with applying the existing legal concepts in trade mark law to AI technology?

A large proportion of the legal concepts employed in trade mark law such as the test for likelihood of confusion, the definition of "average consumer" and the degree of attention by the purchaser have been developed by the Courts. As such, in general, we think it can be left to the Courts to make any changes to these concepts needed to deal with the advent of AI.

For the reasons explained above we think the type of confusion that arises when humans are involved in purchasing decisions is unlikely to arise with AIs who will not suffer from human conditions such as imperfect recollection.

However, it is conceivable that AI's could be "confused" into buying different products by some form of technical means which mimics the trade mark in some way. This may cause the Courts difficulties given that s.10 TMA refers to *a likelihood of confusion on the part of the public*. We think it should be kept under review whether an amendment is needed to the legislation to ensure that technical confusion by an AI is included within "the public".

3.Does AI affect the concept of the "average consumer" in measuring likelihood of confusion?

See answer 2. above.

4. What is the impact of AI on the drafting of section 10 of the TMA? Can AI "use in the course of business" a sign which may be confusingly similar or identical to a trade mark?

Section 10 TMA refers to "use in the course of trade". There are two general circumstances in which we think AI is currently involved in the process of purchasing products by consumers:

(i)   Where the AI is linked to a retail platform of some type and helps consumers find products or helps in the purchase process.

An example is Amazon's *Alexa* or the operation of the technology at issue in the *Cosmetic Warriors Limited and Lush Limited v Amazon [2014] EWHC 181 (Ch)*.

(ii)   where the AI is not linked to a retail platform – such as Apple's *Siri*.

On the narrow question of whether these two types of AI use are "use in the course of trade", we think the answer is "yes" in relation to both. In both cases the AI is providing paid for services (e.g. via subscription).

A more difficult question in relation to (ii) is whether the use is in relation to the goods and services covered by the trade mark proprietor's registration. This is something the Courts are likely to have to explore on a case by case basis.

5. Can the actions of AI infringe a trade mark?

Again, the answer to this will depend on the circumstances in which use of the trade mark by the AI is made but in general the answer to this question is "Yes".

One example of the actions of a limited form of AI infringing trade marks was explored in the English Court decision *Cosmetic Warriors Limited and Lush Limited v Amazon [2014] EWHC 181 (Ch)*. The Judge in that case described the operation of the technology as follows:

> 21. *Amazon has become a successful online retailer because, in part, of the software it has developed based upon consumers' use of its website and the browsing and*

purchasing that has taken place. This analysis of consumer behaviour on the amazon.co.uk website has been used in two ways.

22. *In connection with third party search engines such as Google, and predominantly based on a detailed analysis of consumer behaviour on its own site and the likely value which will be generated from any purchase, Amazon has created software which will automatically decide on which AdWords to bid. Thus, at some point in time Amazon software has decided it is commercially advantageous for it to bid on 'lush' and 'bath bomb' as an AdWords in third party search engines. The consequence is that, for example, whenever the word 'lush' or 'bath bomb' is typed into Google, an Amazon sponsored ad appears on the consumer's screen. The content of that ad is decided upon by Amazon; I understand it is done automatically following a template, but the precise way it is done is not material. In the first class of complaints the word Lush is used in the ad (as in the example in paragraph 8 above), in the second class it is not.*

23. *In connection with the search engine on its own site, Amazon has also used analyses of consumer behaviour. Thus for example, if a consumer types Squiffo into the search box and that term has not been typed in previously, no results will be shown and the screen may ask if the consumer meant 'squiff' and display some results for squiff products. However, if the consumer who originally typed in squiffo goes on to purchase some goods, these goods might be suggested to the next consumer who types in squiffo. It is for reasons like this that consumers who type Lush into the amazon.co.uk search facility are shown products such as Bomb Cosmetics products – previous consumers who typed in Lush have gone on to browse and/or purchase such products. Thus, Amazon has built up and uses a behavior based search tool to identify an association between a particular search word and specific products. Amazon uses this tool to present products to consumers which it hopes will be of interest to them. In the present case, this tool has used the word Lush to identify products which Amazon believes a consumer searching for Lush products might wish to buy instead of Lush branded product.*

24. *It is common for search engines to return a 'no results found' or similar response to a search when no results precisely corresponding to a search entry are returned and I consider the average consumer will be aware of this practice. Amazon do not return*

such a response to a search item if that search item has been input previously and a consumer has gone on to purchase products. Thus, although it is not possible to buy, for example, Lush Bath Bombs on Amazon, because that search term has previously been used on Amazon and goods purchased subsequent thereto, the consumer is not told that the item he is looking for is not available.

The Judge found that the actions of the AI in this case did infringe a trade mark.

6. If AI can cause trade mark infringement, does this change who could be liable? Should it be the owner, the operator, the programmer, the trainer, the provider of training data, or some other party?

This is likely to depend on the circumstances and how the AI is deployed.

At present there is likely to be some human or corporate entity that has deployed the AI to perform particular tasks which lead to the infringement.

In the case of *Cosmetic Warriors Limited and Lush Limited v Amazon [2014] EWHC 181 (Ch)* the Court found Amazon liable for the use of the mark by its AI.

In other circumstances there could be other actors which have caused the AI's actions to infringe trade marks. Our view is given the different possible scenarios and that the technology is still developing it is best to leave it to the Courts to decide who is liable for the AI's actions on a case by case basis.

 30 November 2020

IPLA