



acts on the memory of an image or perception. It is upon this assumption of imperfect recollection in human beings that an assessment of similarity or likelihood of confusion and infringement is conducted.

However, with the rise of AI technologies, the structure of how we traditionally shop has also changed; AI assistants, search engines, chat bots and online marketplaces have begun to play a significant role in consumers' purchasing preferences.<sup>3</sup> In this context, we have started to encounter situations where, either these preferences are determined according to the results presented by AI, or the shopping action itself is directly and automatically carried out by AI itself, with the consumer's voice commands or perhaps even without any command at all.

These developments are transforming shopping processes from making purchase decisions based on physically encountering the products on shelves and the emotional, cultural, social and other similar type of bonds between the brand and the consumer, to a process where the choices are guided directly by AI. In some cases, the shopping itself is directly carried out by AI. Faced with this context, the necessity arises to reconsider concepts developed in trademark law, such as the "average consumer" and the "likelihood of confusion", shaped according to the imperfect recollection of a human being.<sup>4</sup>

Another issue is that, in case of trademark infringement situations that may occur through the use of these technologies, it is not yet clear who should be held responsible and how.

Although there is no case law on the above-mentioned points under discussion, in the decision of "Cosmetic Warriors and Lush v Amazon.co.uk and Amazon EU",<sup>5</sup> it was considered as trademark infringement when, on Amazon's website, a search for the word

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<sup>3</sup> WIPO Conversation on IP and AI, Second Session, Revised Issues Paper on IP Policy and AI, p.12.

<sup>4</sup> Kalyan Revalla, Intelligent Trademarks, p.16

<sup>5</sup> Cosmetic Warriors and Lush v Amazon.co.uk and Amazon EU [2014] EWHC 181 (Ch)

"Lush" related to cosmetic products resulted in similar items being presented to users in a manner that could lead to confusion, even though these products were not sold on the site. In this context, it is evident that the level of involvement of AI in relevant purchasing processes and their contribution to direct the consumer preferences will be crucial in determining their responsibility on a case-by-case basis.

In light of the above, it is of great importance for trademark owners to closely monitor the opportunities that this increasingly prevalent technology can offer while determining their commercial strategies and taking preventive measures to avoid situations that may lead to infringement.