

DEMYSTIFYING IMPACT OF ARTIFICIAL INTELLIGENCE ON VALUE OF TRADE MARKS IN RESPECT OF CONSUMERS – INDIAN PERSPECTIVE

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Abstract

The fourth technological revolution has changed our lives completely. In today's time, each and every device is prefixed with the word 'smart' which signifies presence of the 'Internet of Things (IoT)' or 'Artificial Intelligence (AI)' in that device. From smart watches to smart refrigerators, we are witnessing a fundamental change in our lifestyles. The transition from 'Alexa! Play Bollywood Music!' to 'Alexa! Add Wheat Flour to my Cart!' was quick and convenient with this technological advancement. Here, a question that must be considered is who really is 'Alexa', the AI based virtual assistant of Amazon, is it the consumer or a fictitious character or is it acting as an agent placing orders for its principal, who is the end consumer. Further, when the customer is placing the order of a product through Alexa, does it choose the brand or in other words, the trade mark (TM), preferred by consumer or as per the preferences of the Amazon website or app. If there is no particular trade mark that the consumer has mentioned, does it translate to the fact that the choice of trade mark of the goods or services is now solely dependent on the AI assistant. In such a scenario, are trademarks losing the value as compared to the time when the consumers were predominately making the choices on their free will. As we progress into an era dominated by AI, the significance of trademarks for consumers becomes a pertinent question.

Keywords: Fourth Industrial Revolution, Artificial Intelligence, Trademarks, Value of Trademarks and IPR.

1. Introduction

Artificial Intelligence or AI is poised to be the driving force behind growth of digital economy of India, enhancing governance and increasing data-driven decision-making. Projections indicate that AI will contribute USD 967 billion to the Indian

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economy by the year 2035 and add USD 450–500 billion to the GDP by year 2025.¹ AI is a topic of discussion on policy agendas across the globe and undoubtedly, holds the potential to fuel innovation, create employment prospects, and significantly contribute towards the national growth.

The advancement of technology which commenced with the Fourth Industrial Revolution or 4IR has developed at an accelerated rate, wherein it is intertwined with our daily lives to an extent that we cannot live without it. The 4IR is considered to be a new phase in development, wherein the technology advances of the earlier (first, second and third) industrial revolutions converge in the physical, digital and biological domains collectively. The expression 4IR was described as “a technological revolution that will fundamentally alter the way we live, work, and relate to one another.”² Indeed, it has changed the way world functions. It was easier to identify the commencement points and focus areas of the earlier revolutions, like the first industrial revolution cloaked the textile manufacturing industry and the origination of steam engine, the second revolution enveloped the automobile industry and progression in the realms of electricity, third industrial revolution focused on digitalisation and automation, however, in the fourth industrial revolution, different fields are uniting in the form of AI, genome editing, augmented reality, nanotechnology, robotics, and the Internet of Things (IoT).³ The effects of the technological advancements can be observed across all sectors and in every industry.

The 4IR has caused immense cultural and societal changes across the world, which were never witnessed before and have led to redefining the way businesses are carried out, from creating new models to novel value chains to customer experiences, innovative business models are being created and applied with strategic thinking, as a result of which we are all connected across territorial boundaries.⁴ A more hastened

¹ Ministry of Electronics and Information Technology, Government of India, “India AI 2023” 5 (October 2023).

² Klaus Schwab, “The Fourth Industrial Revolution | Essay by Klaus Schwab”, *Encyclopaedia Britannica*, (2021), available at: <https://www.britannica.com/topic/The-Fourth-Industrial-Revolution-2119734> (last visited on February 15, 2024).

³ Min Xu, Jeanne M. David, *et.al.*, “The Fourth Industrial Revolution: Opportunities and Challenges”, 9(2) *International Journal of Financial Research* 90 (2018).

⁴ Lauren Goode, “Everything is Connected, and There’s No Going Back”, available at: <https://www.theverge.com/2018/1/17/16898728/ces-2018-tech-trade-shows-gadgets-iot> (last visited on February 15, 2024).

digital approach to bridge the space between physical and biological worlds was observed due to the recent global pandemic.

The increased integration of the intelligent systems into everyday lives has resulted in dependence of humans on smart devices of varied forms – smart watches, smart TVs, smart refrigerators and the list goes on, which has resulted in even developing of smart cities. This revolution has percolated deeply in daily routine lives of individuals to the extent that being constantly connected with smart devices is even affecting mental health in the form of smart device addiction.⁵ AI enabled devices or applications are an indispensable part of our lives and are changing the dynamics of human intervention in an unprecedented manner. An example to illustrate the same is the recommendations which is offered by NETFLIX after a series or movie ends. The viewer is offered recommendations for watching the next movie or series based on the data which it takes into consideration, that include not just the preferences of that user, but also considers other users who may have watched that specific series or movie. The AI enabled algorithm predicts choices for viewers in this scenario. What happens when an e-commerce website uses a similar algorithm and offers choices for purchase of branded products? These choices can exert a substantial influence on consumption of trade marks, which vests in the hands of a consumer. The primary question being that whether the usage and value of trademarks will be affected if the consumer is being replaced by AI as in the case of AI assistants (like Alexa).

This research paper delves into a study to analyse the impact of AI on value of trade marks in the new and altered meaning of the concept of ‘consumer’. In order to comprehend the same in detail, the second part of this paper throws light on the meaning and evolution of AI, to an extent that it has created a new world of devices, which is different from traditional ones. The next part of the paper specifically deals with the legal issues which may arise in respect to Trade Mark laws if ‘Alexa’, an AI assistant is given the task to assist in shopping and whether it can be termed as a ‘consumer’ in accordance with the existing principles of trade mark laws. The fourth part of the paper deals with the impact of these challenges on value of trademarks and the last part of the paper

⁵ Joshua Harwood, Julian J. Dooley, *et.al.*, “Constantly Connected – The Effects of Smart-Devices on Mental Health” 34 *Computers in Human Behavior*, 267-268, (2018).

provides recommendations to deal with possible implications of AI and road ahead. The ethical and social concerns affecting AI are beyond the scope of this paper.

2. AI and Creation of AI - Powered World

The transition from ‘Alexa! Play Bollywood Music!’ to ‘Alexa! Add Wheat Flour to my Cart!’ was quick and convenient at majority of the households due to the technological advancement and interaction between available devices, to the extent that AI assistants are considered as a companion.⁶ This development has been possible only because of the numerous breakthroughs in machine learning, which works on “training dataset” and using supervised, unsupervised or reinforcement learnings, creates an AI model. What really is the meaning of the term Artificial Intelligence (or AI)?

The idea of designing a computer which can exhibit intelligence has existed since the day first computer was invented and has captivated various inventors, ultimately, initiating the domain of AI, that embraces multiple definitions, researches and is still a mystified subject.⁷ AI is an array of technologies which empower machines to exhibit heightened levels of intelligence and mirroring the abilities of humans in sensing, comprehending, and even executing actions based on the learnings. It is true that AI is being considered as a significant building block for transformative technology, but it entails inherent risks. A significant inherent risk which is a matter of research is that of bias, which can cause undesirable outcomes and result in lack of trust on AI. Studies have further revealed that source of bias is the underlying or input data which used in training of AI models.⁸

The marriage of AI and IoT has resulted in such digital technologies which have intertwined in a manner where the virtual or digital space cannot be separated from the physical world. At the moment, it can be observed that plethora of devices are interconnected with each other and communicate not only with other devices, but also

⁶ Jihyun Kim, Kelly Merrill Jr., *et.al.*, “AI as a Friend or Assistant: The Mediating Role of Perceived Usefulness in Social AI vs. Functional AI” 64, *Telematics and Informatics*, 101694 (2021), available at: <https://www.sciencedirect.com/science/article/abs/pii/S0736585321001337> (last visited on February 16, 2024)

⁷ Joost N. Kok, Egbert J. W. Boers, *et.al.*, “Artificial Intelligence: Definition, Trends, Techniques, and Cases”, 1, *Artificial Intelligence*, 271-272 (2009).

⁸ Reva Schwartz, Vassilev Apostol, *et.al.*, “Towards A Standard for Identifying and Managing Bias in Artificial Intelligence” *NIST Special Publication 1/77* (2022).

humans.⁹ The best example to understand this scenario is a Smart TV, which has become a common product in the households and is used on a routine basis. It has the functions of a traditional TV and embraces advanced abilities to connect and communicate with other digital devices to provide a setting for watching TV content as well as online content, with also options for browsing the Internet, and gaming features. It is an AI enabled interactive device that can be coupled with other smart devices present at the house or linked by the user for smart devices present at other locations as well. For instance, it is possible to ‘mirror’ videos from a smart phone to any smart TV screen or login to any OTT platform, which user has access to. The smart TV can also be used to give commands to switch on or off the room lights if the same are connected and can interact with each other. The driving force behind this scenario is the seamless transmission of data between the inter-connected devices, which is now feasible solely due to the existence of big data.¹⁰

There are other examples of AI enabled devices which are now easily available and used in common parlance leading to smart environments where Human Computer Interaction (HCI) is not done in a traditional manner.¹¹ It is a fact that the society is moving towards ‘smart’ everyday objects with greater reliance on machine learning compared to human involvement.

The AI assistants are a good example like Siri from Apple, Alexa from Amazon, Cortana from Microsoft and Google’s assistant, which are not available only in the smart phones, but even have their own body (or device) and can interact seamlessly with other smart devices. Take the instance of Alexa, which. was introduced in the form of an independent device called Echo. At the time of launch, Alexa (or the Echo device) was described as a conversational computer to help listen to music, share the news updates, remember shopping lists and set timers. Alexa can work through its independent

⁹ Shin-yi Peng, Ching-Fu Lin, *et.al.* (eds), “Artificial Intelligence and International Economic Law: A Research and Policy Agenda” in *Artificial Intelligence and International Economic Law: Disruption, Regulation and Reconfiguration*, 6 (Cambridge University Press, 2021).

¹⁰ Alex Hills and David B. Johnson, “Seamless Access to Multiple Wireless Data Networks: A Wireless Data Network Infrastructure at Carnegie Mellon University”, 3(1) *IEEE Personal Communications*, 56-63 (1996).

¹¹ Stefan Poslad, *Ubiquitous Computing: Smart Devices, Environments and Interactions* 8 (John Wiley & Sons, 2009).

application and also, can be used with the Amazon credentials, via both application as well as the website.¹²

With increased usage and data processing, new skills have been added to Alexa on a regular basis and additional partnerships have led to even booking Uber through Alexa.¹³ Amidst all these developments, the brain of Alexa, which rests on a cloud server, is connected by the Wi-Fi device present at the user's house or establishment, is upgraded consistently by the developers.¹⁴ All these AI assistants work, more or less, in the same manner and for the ease of understanding, the name of Alexa and its example as an AI based assistant has been employed in the subject paper for further analysis.

When the user of Alexa does the simple activity of shopping using its assistance, the influence of AI may have an impact on choice of a product depending on its brand equity or trade mark. Is it possible that free choice of choosing a product based on a trade mark is no longer in the hands of user, but transitions to Alexa and in doing so will it not impact the rights of registered business owners. It is time to analyse this legal question that what happens when Alexa is doing the activity of shopping and consequently making an impact on trademarks, which are the legal equivalent to the branding of products (both goods or services) which is considered as a marketing term.

3. Alexa and It's Tryst with Trademarks

The meaning of trademarks was explained in the landmark judgement of *Mishowaka Rubber and Woolen Company v. S.S. Kresge Company*¹⁵ as "a merchandising shortcut which induces a purchaser to select what he wants". It was further explained that the purpose of trademarks is two-fold manner: firstly, to protect the public in choosing a favourable trade mark while purchasing a product, and secondly, ensuring that the rights of owner of a trade mark are protected. Thus, the significance of economic rights and protection for the registered business owners is a well-established notion and has resulted

¹² Brad Stone, "The Secret Origins of Amazon's Alexa", *available at*: <https://www.wired.com/story/how-amazon-made-alexa-smarter/> (last visited on February 16, 2024).

¹³ Chris Hall, "What is Alexa and What can Amazon Echo do?", *available at*: <https://www.pocket-lint.com/smart-home/news/amazon/138846-what-is-alexa-how-does-it-work-and-what-can-amazons-alexa-do> (last updated on August 22, 2023, last visited on February 16, 2024).

¹⁴ Danielle Campbell, "Amazon Echo: Inside Alexa's Brain", *available at*: <https://medium.com/@danicamp/cracking-open-amazon-echo-inside-alexas-brain-6d38552b91f0> (last visited on February 16, 2024).

¹⁵ 316 U.S. 203 (1942).

in robust regulations and jurisprudence when a trade mark is infringed or even in case of passing off of unregistered trademarks. On the other hand, the consumption or choice of trademarks for consumers is perceived as rising ‘consumerism’.¹⁶ However, it is imperative to understand that trademarks act as the intangible asset, which help the consumers in assigning significant value to the distinctive features of products that distinguish them from others present in the market. For instance, it is the trade mark “AMUL” which helps a consumer to distinguish milk from that of milk under the trade mark “MOTHER DIARY”. When the consumer asks ‘Alexa’ to add milk to the cart without specifying the brand what happens in that scenario?

3.1. Who Really is Alexa?

A significant question that must be answered for understanding the impact of Alexa on trademarks is that who really is ‘Alexa’. Is Alexa a fictitious character that we come across in science fiction or should it be considered as a person, is it a real consumer while doing purchases or is acting as an agent placing orders for its principal, who should be considered as the end consumer. To ensure that there are no legal ramifications, the developers of Alexa have clearly stated on the company website that this AI assistant should not be treated as a person. The text on the website indicates:

“Alexa isn’t a person, but has a persona — Amazon personifies Alexa as an artificial intelligence (AI) and not as a person with a physical body or a gender identity.”¹⁷

Therefore, Alexa is a mere AI based virtual or digital assistant, which is intended to be a support and companion for its users. The attributes of personhood in AI have been a matter of discussion since last few years. The internal functioning of AI is different from that of a human mind is one of the reasons of it not being considered as a person. On the other end of spectrum, the unitary theory has been extended to enable legal arguments to ensure that personality rights are granted to AI beings.¹⁸ This paper is limited to the extent of analysing whether Alexa can be considered as a consumer under the trademarks law of India.

¹⁶ Andrew Griffiths, “Trade Marks and the Consumer Society” 15(2) *Scripted* 209 (2018).

¹⁷ The Alexa Personality, Alexa Home (Alexa), *available at*: <https://developer.amazon.com/en-US/alexa/branding/alexa-guidelines> (last visited on February 18, 2024).

¹⁸ Shubham Singh, “Attribution of Legal Personhood to Artificially Intelligent Beings”, *Bharati Law Review* 198 (2017).

3.2. Is Alexa a Consumer?

The next question which must be answered is whether Alexa is the consumer of a product or not. The term ‘consumer’ is defined in Section 2 (7) of the Consumer Protection Act, 2019 as a person who either purchases goods or avails services against a consideration, which is paid or promised, in full or partial.¹⁹ Alexa is an AI assistant and is only extending its support in adding a product to the shopping list, which belongs to the registered user of Amazon (and, also to Amazon Prime subscriber). The shopping is completed using the payment done through the preferred mode of payment saved by the registered user and the products are shipped to the default address. Therefore, it is the registered user who falls under the definition of consumer and not Alexa and thus, it cannot be termed as a consumer.

Consequently, it should be ascertained whether Alexa is an agent of the principle (registered user). Alexa does not fall under the ambit of ‘agent’ as per the Indian Contract Act, 1872, which defines the relationship of agent and principal under Section 182 as ‘agent’ being a person, who is employed to do an act for the principal, or represent the principle in dealings with a third person.²⁰ The act which is being considered here is shopping, wherein Alexa does not represent its principal, therefore, it cannot be claimed that there is an agency relationship between Alexa and its registered user. Hence, it is aptly clear that Alexa is neither a real person nor is it an agent of a real person, however, it is the registered user who should be termed as a consumer in this regard.

Truly, Alexa has made shopping a very convenient task for the user, who just needs to give voice commands to keep on adding any products to the shopping cart. The pertinent question that needs attention is – what is the extent to which Alexa is assisting a registered user in shopping or making purchases using voice commands. Alexa is attempting to create an ecosystem where the user (who can also be termed as the customer or consumer) can make purchases easily and quickly. There are different possible scenarios in which such purchases can be made and are described as under:²¹

¹⁹ The Consumer Protection Act, 2019 (Act 144 of 2019).

²⁰ Indian Contract Act, 1872 (Act 9 of 1872).

²¹ “Shop with Alexa”, Alexa, available at: https://www.amazon.com/alexa-shopping-hub/b?ie=UTF8&node=21467932011&ref=pe_alxhub_aucc_en_us_NV_L1_15_HUB_SHOP (last visited on February 18, 2024).

- direct Alexa to choose the product as per the specification, which may include the name of a specific brand (or trade mark);
- reorder the products which registered user had purchased earlier; and
- find products similar to those products which were ordered earlier and add to products to the shopping list or cart.

The developers claim that the products are suggested based on the previous purchases of the customers or new suggestions are made by Amazon on its own. There is no information provided on the company website regarding how new users can choose the products where the user has no preferred choice of brand, or is unaware of the trade mark, or more so, if there is confusion over similar trademarks in the mind of the consumer.

4. Impact on Value of Trademarks

Trademarks, a noteworthy Intellectual Property Right (IPR), help to protect and maintain the quality of products or services under the registered brand of manufacturer or service provider. They function as a source-identifier and assurance of quality of products, in this manner diminishing the costs that a consumer may have spent on exploring for products which meet the desired requirements.²² But, when the consumer is not choosing the trade mark, but has delegated it to Alexa, can the trademarks still act as an important parameter for purchasing a product. The significant subject matter is to analyse that what really happens when Alexa is asked to choose a product for which there are no previous purchases or preferences provided by the registered user or in other words, there are no available trademarks for reference which Alexa should chose on behalf of the registered user, or the consumer.

The process which Alexa may follow for choosing a product can fall under any of these categories:²³

- AI influenced purchases (which may vary based on high or low involvement) – The purchase is influenced solely by parameters determined by AI based on machine learning.

²² Mark P. McKenna, “A Consumer Decision-Making Theory of Trademark Law”, 98(67) *Virginia Law Review* 76 (2012).

²³ Phil Klaus and Judith Lynne Zaichkowsky, “The Convenience of Shopping Via Voice AI: Introducing AIDM”, 65(3), *Journal of Retailing and Consumer Services* 4 (2021).

- AI decided purchases – Similar to AI influenced, the purchase is done solely by AI.
- AI predicted purchases – The predictive algorithm is deployed based on user choices or behaviour pattern to predict the products which user may wish to purchase.

In all of these three processes, the real customer or registered user is not choosing his desired brands (or trademarks) for the products that are being purchased as AI or Alexa in our example, is influencing the choices or deciding or predicting products which may be popular in their category or sponsored by the manufacturer. The power of choosing the trade mark accordingly is handed over from hands of registered user to Alexa, dependent on the category of influence for that particular transaction. Therefore, the customer of products here, cannot be equated with the consumer of a trade mark. In such a scenario, will trade marks lose their economic significance as compared to the scenario when the consumers predominately make choices on their free will.

Furthermore, there can be other determinants like cost or brand loyalty, which may affect the consumption of trademarks, however, it is not necessary that Alexa may use the same as parameters for choosing a product. For instance, when a consumer is shopping for a new phone, he can promptly visit an APPLE store and buy a latest version of an iPhone, which gives him the assurance of a good quality product and promise of cutting-edge technology. The trade mark “APPLE” empowers the consumer to choose while saving cost towards searching for new products in the same segment. When Alexa chooses a product for the user, it may not find this cost to be a factor for influencing or deciding for the customer. Considering the fact that the choice of trade marks may have no influence on the sale of products, is it prudent for manufacturers or service providers to continue incurring expenses for any branding exercises, which include the advertising, marketing, and other promotional activities undertaken to improve brand positioning.

An ordinary customer, belonging to the rational consumer society, can be influenced by ‘values, attitudes and lifestyles’ (VALs) of a brand, which are used as a marketing strategy to cultivate a brand. Owing to brand loyalty, the consumer may want to try new products launched by an existing trade mark, say, a new carbonated drink can be launched by Coca Cola Company Limited, which may not feature in preferred or predicted options by Alexa. In this scenario, the registered trade mark owners will not be

able to reach the ultimate consumer because the predictive algorithm of Alexa may act as a barrier or due to any other possible algorithm bias, which may be present.²⁴ By such restraint on marketing or branding, are the trade mark owners not losing market power and the economic worth of brands in substantial amounts.

With a drastic alteration in the freedom to choose a trade mark, which has been handed over from an average consumer to Alexa, will the key doctrines of trademarks law like average consumer, brand loyalty, confusion amongst trademarks, initial interest confusion, trade mark dilution and infringement still remain in practice. The most critical concept that needs to be analysed is that of an ‘*average consumer*’ with ‘*imperfect recollection*’. The trademarks, which help an ‘average consumer’ to identify the goods or services belonging to a specific manufacturer or service provider, also serve the purpose of marketing the product and create an impression in the minds of this consumer.²⁵ However, it needs to be assessed whether Alexa can be treated as an average consumer or not.

The term ‘average consumer’ does not have a legal definition in the Trade Marks Act, but has legal jurisprudence in India. This term is used interchangeably with the phrases ‘reasonable consumer’ or ‘ordinarily prudent consumer’. These terms together form part of general public or public at large, or in reference to the trademark laws, known as ‘relevant public’, which comprises of real and potential consumers of specific goods and/or services, which is more specialised in nature as compared to the general public.²⁶

The concept of ‘average consumer with imperfect recollection’ was explained in the landmark matter of *Amritdhara Pharmacy v. Satyadeo Gupta*,²⁷ wherein the Appellant (Amritdhara Pharmacy) claimed exclusive proprietary rights on the trade mark “AMRITDHARA” and contended that the same was in use since the year 1901 for medicinal preparation, which had gained considerable goodwill due to extensive and

²⁴ Mitra Best and Anand Rao, PWC, “Understanding Algorithmic Bias and How to Build Trust in AI”, available at: <https://www.pwc.com/us/en/tech-effect/ai-analytics/algorithmic-bias-and-trust-in-ai.html> (last visited on February 18, 2024).

²⁵ Lisa P. Lukose, “Consumer Protection vis a vis Trademark Law” 1 *International Journal on Consumer Law and Practice* 94 (2013).

²⁶ Carolina Tobar, “Do Androids Dream of Trademarks? The ‘Average Consumer’ Notion in the Artificial Intelligence Context”, available at: https://pravo.hse.ru/data/2019/07/11/1478976186/Tobar%20Carolina_Do%20Androids%20Dream%20of%20Trademarks.pdf (last visited on February 19, 2024).

²⁷ AIR 1963 SC 449.

continuous use. They opposed the trade mark application for registration of the mark “LAKSHMANDHARA” for medicinal preparations in the name of respondent, Satyadeo Gupta. The opposition was filed on the ground of deceptive similarity of these two trademarks claiming that there could be confusion among the consumers due to phonetic and visual similarity of these marks. The respondent claimed honest and concurrent user. The Honourable Supreme Court decided that both these marks were similar to each other and opined that comparison of two marks must be done from the perspective of an ordinary man or consumer, with average intelligence and an imperfect recollection. The same is known as the “Average Consumer Test” and has been applied in innumerable TM cases in the country.

The concept of average consumer was also considered in an earlier matter of *James Chadwick & Bros. Ltd. v. The National Sewing Thread Co.*²⁸ wherein, a Division Bench of the Bombay High Court observed that “*It is impossible to accept that a man looking at a trademark would take in every single feature of the trademark. The question would be, what would he normally retain in his mind after looking at the trade mark? What would be the salient feature of the trade mark which in future would lead him to associate the particular goods with that trademark?*” In other words, the consumer may not be able to perfectly recall all the distinctive features of two marks for comparison.

In the notable matter of *Cadila Healthcare Ltd. v. Cadila Pharmaceuticals*,²⁹ the Supreme Court clearly stated that that ‘an unwary purchaser’ may possess ‘average intelligence and imperfect recollection’. In another prominent matter of *Hamdard National Foundation (India) and Anr v. Sadar Laboratories Pvt. Ltd.*,³⁰ the Delhi High Court held that the registered trade mark “ROOH AFZA” of the plaintiff, Hamdard National Foundation (India) was not similar to the mark “DIL AFZA” as an ‘average consumer with imperfect recollection’ does not comprehend the terms ‘Dil’ and ‘Rooh’ as same since the average consumer does not follow the approach of direct comparison, but relies on the ‘imperfect picture of the products that he/she has stored in mind’.

On applying this explanation to Alexa, can a similar response be recorded and can it be stated that Alexa has average intelligence and imperfect recollection. Alexa,

²⁸ AIR 1951 Bom 147.

²⁹ 2001 (2) PTC 541 SC.

³⁰ CS(COMM) 551/2020.

being an AI, is intelligent enough to distinguish between two or more similar of confusing trademarks, since it will look at the minutest of differences between a trade mark and cannot be confused or even need overall comparison or test for likelihood of confusion.³¹ Alexa is bound to be more intelligent than an average man and additionally, it has perfect recollection. Therefore, it is prudent to opine that Alexa is not covered under the ambit of an ‘average consumer with imperfect recollection’ in respect to trademarks.

Furthermore, in relation to trademarks, the response of average consumers is examined at a public level (i.e. in plural form) and not at an individual level (i.e. in singular form). Alexa does not pass this test as well. When the fundamental tenet of average consumer is being threatened by the shopping being done by Alexa, it can be summed up that there is a significant negative impact possible on the value which is conventionally appended with concept of consumers under the trademarks.

5. Conclusion and Recommendations

4IR has undoubtedly changed the world and made Artificial Intelligence an integral part of our lives. With changes in Human Computer Interactions, there are bound to be revisions in existing legal framework and thus, trade mark laws must also adapt to these changes in future.

Undeniable, the average consumer till the present date is considered to be a human. Alexa or any other form of AI tools, which are dominant in the AI world are mere instruments, which were created to only assist the customers, however, this support does not appear to be limited and is converting to influence, persuasion and other forms which may affect the decision-making of the consumers. Going forward, it is possible that humans may not have complete freedom to choose their desired trademarks at the time of purchase, but they may have the freedom to remove this barrier by understanding the biases and consciousness.

The rapid pace at which these AI tools are multiplying and enlarging their circle of influence, it is imperative to gear up for the future. The procedures and rules related to manipulating the purchasing preferences of consumers need to be defined.

³¹ Khurana & Khurana Advocates and IP Attorneys, “Artificial Intelligence: A Looming Threat to Trademark Law?”, *available at*: <https://www.khuranaandkhurana.com/2021/01/18/artificial-intelligence-a-looming-threat-to-trademark-law/> (last visited on February 20, 2024).

Besides, it is significant to analyse the meaning and ambit of average consumer and create inclusive taxonomy for trademarks owing to the fact that when two or more trademarks are visible to a potential customer and he has to choose from confusing or similar trademarks, it is the imperfect recall of an average consumer which comes into play and is even used as a test by judiciary to answer the issues related to 'likelihood of confusion' between two trademarks.³² It is a generally accepted principle that all distinct and pivotal components of a trade mark – visual, phonetic along with conceptual should be assessed cumulatively for comparing the overall impression of two trademarks to test the likelihood of confusion on the part which can occur in the minds of the average consumer.³³ Therefore, when Alexa is given a voice command to choose between two distinct trademarks, the applicability of such a test is improbable as the probability of confusion is minimum for Alexa. It is a pertinent fact that till the freedom of choice is not being passed over to the AI, there may not be any negative effect on the economic significance of trade marks for consumers and registered owners alike.

Furthermore, it is crucial to grasp that AI has firmly established its presence in our lives and is transforming every walk of life with myriad of applications already available in different forms. Be it Alexa, self-driven cars, AI powered drones or medical devices, AI is taking over diverse facets of human activities. The existing regulatory framework needs to be reviewed and revamped to ensure that AI related liabilities and obligations are evidently defined and strategised, which may not be possible with a 'one size fit all approach'. The human awareness and consciousness will play an equally significant role in road of future growth.

On the other hand, if AI tools are deployed as a check to compare two similar trademarks, it may work as a solution and result in decreasing the search costs of a trade mark and help in saving expenses related to the phenomenon of initial interest confusion. Therefore, the newer technologies can be an aid in economic growth.

³² *Interflora Inc & Another v. Marks and Spencer Plc* [2014] EWCA Civ 1403.

³³ *SABEL BV v. Puma AG, Rudolf Dassler Sport* C-251/95 (1997), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0251> (last visited on February 20, 2024).