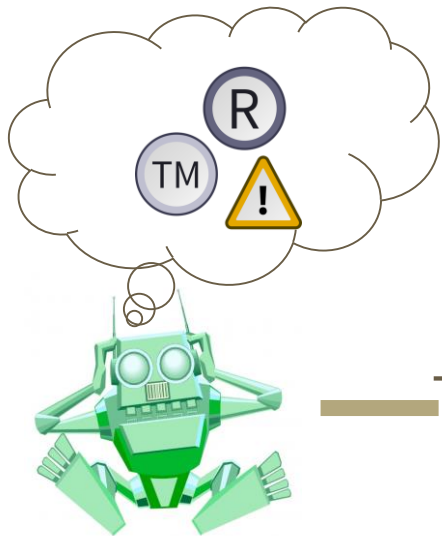

Do Androids Dream of Trademarks?

— The 'Average Consumer' Notion in the —
Artificial Intelligence Context

Carolina Tobar



Why do this? 1/2

Purpose: *differentiate* the goods or services from one particular **source** from those of others.

Goal: *help* consumers choose goods/services and *protect* them from confusion.

Solution: National Laws have provisions against *registration* of potentially confusing signs (relative grounds) and against their *use* (infringement).

Criteria: i) identical or similar sign to a registered trademark;
ii) for identical or similar goods and/or services.

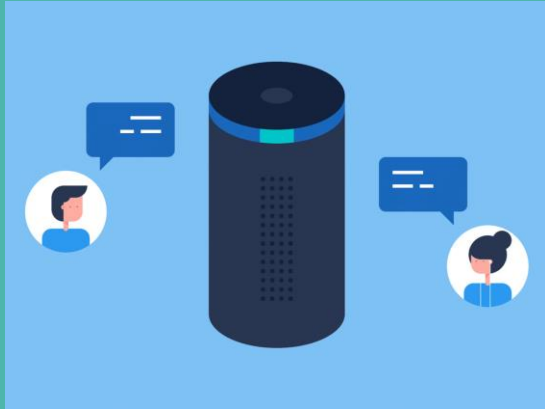
Judges and examiners ⇒ in the shoes of the ‘**average**’ or ‘**reasonably prudent**’ consumer, and abstraction which is said to represent the **state of mind** of the general public that buys a **certain good or service**.



Why do this 2/2



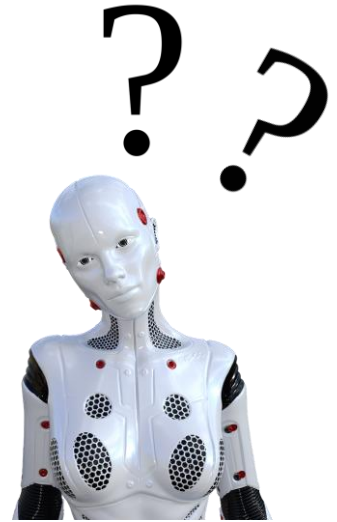
Type of good/service and the way they are acquired (**channel of trade**) is key for finding who is the average consumer and what his/her state of mind is.



Now the consumer is not alone in the purchasing process!

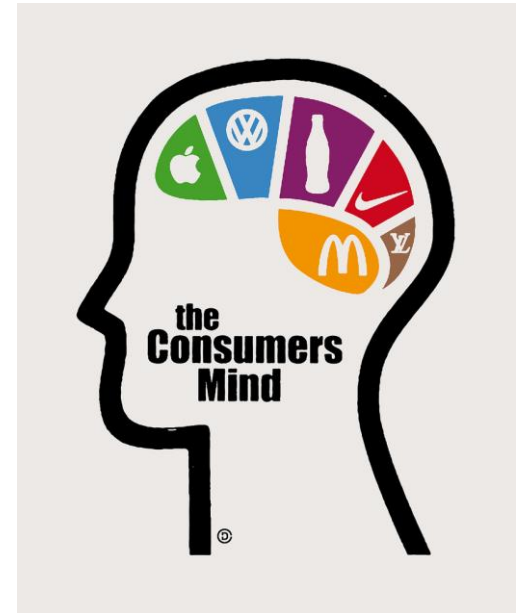


How can the new ways of purchasing
online (AI) change the notion of the
'average consumer'?



Who is the 'Average Consumer'?

- ❑ The Protagonist of TM Law
- ❑ Fiction, Abstraction, Legal Construct
- ❑ Test for judges and examiners
- ❑ Key of the Likelihood of Confusion analysis
- ❑ Not meant to represent every single individual
- ❑ Related to the concept of relevant public
- ❑ Comprises both actual and potential customers
- ❑ Of specific types of goods/services
- ❑ Principles provided *ex ante* - Rule
- ❑ Factual evidence might be provided



EU

- ❑ **Normative Framework:**
 - Articles 4(1) and 5(1) of Regulation No. 40/94 (CTM) and Articles 8(1) and 9(1) of Directive No. 2008/95
 - Preamble 11 of Directive
- ❑ Normative framework and then jurisprudence
- ❑ **Lloyd C** reasonably well-informed observer
- ❑ However: "imperfect recollection"
- ❑ **EUIPO Guidelines:** depending on the type of product - level of attention of consumer varies



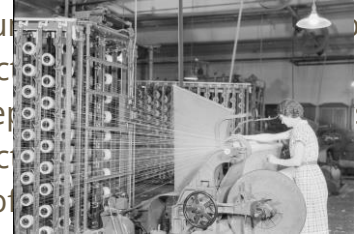
US

- ❑ **Normative Framework:**
 - § 1052 (d) and § 1125 of 15 U.S.C. - Chapter 22 (Lanham Act).
- ❑ LA principle - statutory measure - strong LoC
- ❑ 'Reasonable prudent buyer' of care
- ❑ **Sophisticated** type of product
- ❑ Vulcan PRODUCTIONS v. MWERKS (C v. SKG STUDIO SKG)
- ❑ Evidence and empirical facts



AC

- ❑ **Normative Framework:**
 - Article 136 a) and Article 155 of Decision 486 of 2000 + Likelihood of Association
- ❑ (Like EU) Normatively constructed and jurisprudentially developed
- ❑ Consumer protection on TM
- ❑ Concept of protection is a living standard and purchasing power of the one who usually "request, uses or consumes".



No significant difference between the different systems. Although, the US system is perceived as more factual-based, infringement cases do not reflect that.

Criticism

The criteria accurately portray the perception of the consumer and the way he/she behaves in the market when faced with purchasing decisions?

1. Highly subjective interpretative process
2. Current principles are prone to finding confusion
3. Contradictory: at the same time, the consumer is reasonably well-informed, but has a bad recollection of trademarks (easily confused)
4. Monolithic and unchanging - Awareness of changes through the ages

Humans are not very good at putting themselves in another's shoes, judges are not Vulcans, and examiners cannot relate to 'ordinary' consumers.

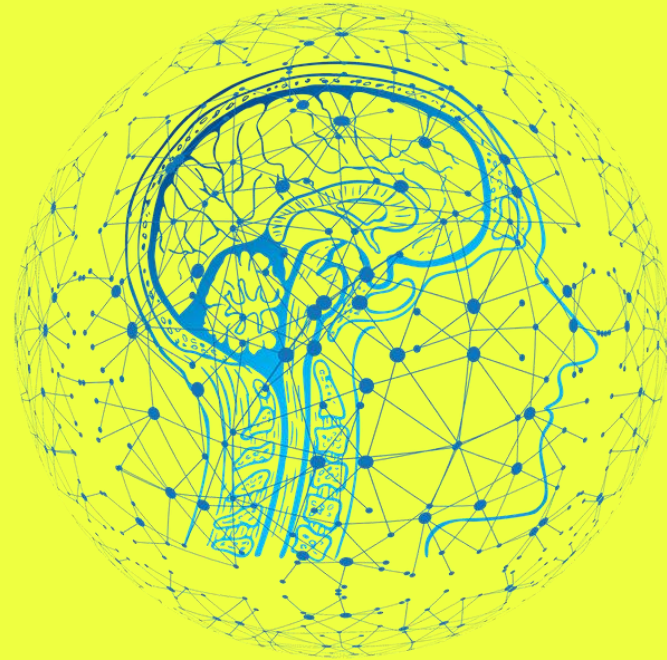
Artificial Intelligence

“Goal of AI as a science is to make machines do things that would require intelligence if they were to be done by humans”

Can machines do it better?

Are they expected to perceive TM the same way as humans, imperfect recollection and all?

Could they make the purchasing process less prone to confusion?



New ways of purchasing thanks to AI

-Product Suggestions



E-commerce platforms are investing on product suggestion software, based on the buyer's own personal shopping history, background, location, other buyer's experiences, among others.

Digital marketing and marketing automation make up 50% of the areas in which AI investment is being channeled.

New ways of purchasing thanks to AI

-Assistant Shoppers

Aid consumers in a more personalized than product suggestion programs. Based on preferences, shopping history, etc.

Not only they suggest what to buy, they interact with social media and can also be programmed to buy based on the user's preferences.



New ways of purchasing thanks to AI

-Internet of Things (IoT)

Networks of objects that communicate with other objects and with computers through the Internet.

Retail: appliances connected to the Internet and equipped with sensors, such as washing machines, can purchase products based on a set of conditions



In what way would interactions between Consumers and Trademarks be altered by AI?

- ❑ Suggest products originating only from the TM owner
- ❑ Suggest products originating from the TM owner's competitors
- ❑ Suggest products that are not related to those of the TM owner

(taken from D. Arcidiacono, *Gli atti di sfruttamento dei marchi da parte delle intelligenze artificiali. Prime riflessioni*, to be published)

- ❑ Similarity of goods/services - Related classes - Most likely AI will not buy water instead of tea.

Are they expected to perceive TM the same way as humans, imperfect recollection and all?

- ❑ A short technical consideration about types of AI:
 - i) ones will try to act or think like humans
 - ii) others might want to think or act even more rational than humans.
- ❑ New AI purchasing systems, which will be briefly summarized hereafter, imitate logic rational human thinking, in order to help humans towards better decision making.
- ❑ Possibility to program against confusion.

Can machines emulate consumer behavior better than other humans?

- ❑ Not a technical question
- ❑ From the legal standpoint: 'better' is also a subjective word. However, from the similarity examination, IPOs all over the world have reported to be working on AI related projects for examination of trademarks, including comparison (WIPO Meeting - 2018).
- ❑ Studying Big Data: AI can provide a better insight from previous case law and rulings.

Other Preliminary Conclusions

- ❑ If (human) consumer intelligence when buying products is not acknowledged, a consideration (at least for infringement cases) has to be made by judges on whether purchases are AI assisted.
- ❑ Assisted by AI, consumers could be considered to be able of processing non-deceptive information. Empathy, like in Blade Runner and Philip K. Dick's novel, might not only be human.
- ❑ AI is at the very minimum, a tool; or a intermediary; or a kind of consumer (although, so far, the consumer and the intermediary are required to be a person, legal or natural).





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