

From Trend to Trademark: The Rise of AI generated Hashtags in Social Media Marketing

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Hashtag generation through AI for social media marketing can be a great way to ensure that hashtags are relevant and engaging. AI can help identify the most popular hashtags for the industry and target audience. It can also help to create new and unique hashtags that will make the content stand out. A symbol or term containing the hash symbol (#), commonly known as a 'hashtag,' can be registered as a service trademark only if it serves as an identifier for the source of the applicant's goods or services. Successful registration of hashtag trademarks has occurred in both the United Kingdom and the United States. Under common law, business reputation, represented by a name or label, can only be safeguarded through a passing-off action, a process that is complex and uncertain in its outcome.

The Trade Marks Act of 1999 provides trademark registration, conferring statutory rights to the owner that surpass common law rights and offering a convenient method for safeguarding against infringement. In the contemporary world, social media plays a crucial role in achieving business objectives such as brand awareness and customer acquisition. Social media platforms have become essential tools for marketing companies to connect with their target audience. Among these tools, the hashtag (#) has gained significant prominence and has been globally registered as a trademark by numerous companies in the current decade. There is widespread awareness among owners and entrepreneurs regarding the use of hashtags in social media campaigns and their registration as trademarks. Despite the increasing use of hashtags in India over the years, there remains a question about whether, according to Indian Trademark law, hashtags can be considered for registration.

This paper delves into the importance of employing hashtags in India and examines their international usage. This paper examines the common law as well as trademark law remedies in India where the AI generated hashtag words are used in social media to boost search engines and e-marketing affecting the right of branded product owner.

Keywords: Hashtag, AI, Trademark, Passing off, Marketing

In the context of businesses, hashtags play a crucial role in forming a customer base that encompasses both current clients and individuals likely to express an interest in their products. Utilizing hashtags enables businesses to tap into this customer pool without incurring any expenses, showcasing a shrewd approach to leveraging hashtags.

Several advantages accompany the use of hashtags. They serve as an incredibly versatile marketing tool with minimal to no associated costs, thereby enhancing the searchability and accessibility of the business. Additionally, hashtags provide boundless opportunities for fostering creativity and innovation. Consequently, it is evident that, in the foreseeable future, hashtags will undeniably stand as a potent branding tool. The undeniable advancement of technology and its associated benefits cannot be ignored. However, the recent surge in the pursuit of

protection through intellectual property rights, driven by this rapid growth, is a cause for concern. This emerging pattern can be succinctly described as the rise of hashtags. For those unfamiliar with hashtag culture, it is a tool used to categorize content by adding a '#' symbol before a word or phrase. This practice simplifies the process for readers to locate specific content when searching for the designated word or phrase.¹ Hashtags have become ubiquitous, existing both online and offline, and were even recognized by Oxford University Press in 2015.² Utilizing advanced algorithms, an AI-powered hashtag generator stands as a sophisticated tool capable of deciphering language patterns and discerning pertinent words and phrases. This analytical prowess enables the generator to craft hashtags that strike a harmonious balance between creativity and relevance. By delving into the intricacies of language, the generator ensures that the hashtags it produces not only align with the essence of

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a brand or message but also carry a distinct and imaginative flair. The intersection of creativity and relevance empowers users to wield hashtags that capture attention in the dynamic landscape of social media, reflecting a fusion of innovation and contextual significance. The phenomenon of hashtag trend in social media represents a form of electronic communication and a platform for interaction and commercial speech. Sellers utilize virtual groups and networks to share information, ideas, and content. Social media emerged in the 1990s, with early services like SixDegrees.com and Blogger paving the way. The 2000s saw the rise of platforms such as LinkedIn, Facebook, and Twitter. Recognized as a powerful marketing tool, social media has led to a strategic shift.³ The growth of social media has presented challenges in the intellectual property (IP) domain, particularly in enforcing IP laws in the borderless digital realm. Therefore, adapting trademark laws to accommodate modern trends like hashtags is crucial.

Trademark infringement on social media platforms takes various forms, with the current focus being on the trending hashtag culture. The use of "#" before a word or phrase in hashtags is still a topic of debate. Hashtags enhance search results, making them akin to distinct words and expanding their reach to a broad audience. Over time, there has been a significant increase in global applications by companies seeking protection for specific hashtags. Despite hashtags appearing commonplace in social media, their presence in the sharing sector poses challenges for intellectual property infringements. Two essential conditions for a hashtag to qualify for trademark protection are its graphical visibility and its ability to differentiate itself from other products and services.

Legal Perspective of Trademark in India

In India, prior to 1940, trademark infringement issues, both registered and unregistered, arose and were addressed in accordance with Section 54 of the Specific Relief Act of 1877. Section 54 provides remedy of perpetual injunction for violating the rights of owner of the property. According to Section 54 property includes trademark for the purpose of application of this Section.⁴ Registration of immovable property was adjudicated under the Indian Registration Act, 1908 which requires for registration of documents relating to transfer above hundred rupees. However, there was no specific mentioning about the trademark registration under this Act. In

order to address these issues, the Indian Trademark Law was implemented in 1940.⁵ Trade and commerce saw significant expansion once the trademark law went into effect, which raised demand for trademark protection. This law was closely mirrored the UK Trade Marks Act, 1938. This law was further corrected by replacing with the Trademark and Merchandise Act, 1958. The Trademark law underwent a change with the introduction of the Trademark and Merchandise Act, 1958. This Act permits the registration of trademarks, providing legal right to the exclusive use of the mark. It enhances the protection of trademarks, preventing unauthorized or deceptive use of marks on goods. This law was further replaced with the Trademark Act, 1999 in compliance with TRIPS obligation recommended by World Trade Organization.⁶ The Trade Marks Act of 1999 has introduced significant modifications to the trade mark legislation. When it comes to unregistered trademarks, certain elements of the law have been incorporated into the statute, while others continue to rely on common law principles, necessitating consultation of Court rulings for guidance.

The goals of the Trademark Act include safeguarding users of trademarks, establishing regulations for property usage, and providing legal remedies for the enforcement of trademark rights. The Act empowers the police to make arrests in cases of trademark infringement. The term "infringement," frequently employed, is explicitly defined within the Act. Penalties and punishments for violators are specified by the Trademark Act. Additionally, it increases the time of registering as well as the process of registering a non-traditional trademark. The purpose of a trademark is to establish the identity of a manufacturer or trader's goods to the public, allowing them to gradually gain profits from the reputation they build through their skill, efforts, and business acumen. A genuine trademark provides assurance to buyers regarding the origin and quality of the product they are purchasing. The concept of trademarks and the laws regulating their use originated from business competition, customary practices, and traditions.⁷

Significant amounts of money are often invested in promoting a name or symbol through various advertising channels. Consequently, a trademark can gain a strong reputation and become a symbol of quality and origin. A well-established trademark serves as an excellent sales representative for the goods it represents.⁸ Every manufacturer or trader

who has worked hard to build a reputation for their trademark naturally wants to safeguard it against dishonest competitors who may engage in piracy. Protecting trademarks is essential not only for honest traders but also for the benefit of the purchasing public, preventing deception and fraudulent practices.⁹

Passing off is a tort under common law that can be invoked to enforce unregistered trademark rights. The legal framework of passing off aims to prevent individuals from misleading others about their goods or services.¹⁰ The concept of passing off has evolved over time, initially limited to misrepresentations of one person's goods to another. It later expanded to encompass commercial and non-commercial activities, including professions and non-trading activities. Today, it encompasses various forms of unfair trading and unfair competition where one person's actions cause harm to another. The central question in this tort revolves around whether the defendant's behavior is likely to deceive or confuse the public regarding the commercial activities of the two parties. The Trade Marks Act has established statutory rights for taking legal action against the infringement of trademarks. However, when it comes to the passing off of trademarks, the Act only acknowledges this action without defining its principles and grounds. The Act primarily outlines the procedural aspects to be followed in such cases, while the substantive elements, including the principles and grounds, continue to be derived from common law, from which they have been incorporated.

The remedies for passing off differ from those for trademark infringement. While passing off claims are based on common law, infringement claims have a legal basis.¹¹ In cases of trademark infringement related to a registered trademark, demonstrating that the infringing mark is identical or creates confusion with the registered mark is sufficient. However, merely establishing the similarity or identity of the marks is insufficient for supporting a passing off claim. For a passing off claim, it is essential to show that the use of the mark is likely to deceive or confuse consumers, and in an infringement lawsuit, the defendant's use of the mark should not cause harm to the plaintiff. In passing off claims, it is crucial to prove that the defendant's use of the trademark is intended to damage the plaintiff's goodwill or reputation. It's worth noting that when a trademark is registered, the registration is limited to a specific class

of goods. Therefore, only those goods are protected. In a passing off case, the defendant's products may not be identical; they could be different. In the case of Kaviraj Sharma's case,¹² the highest Court stated that there are distinct variations between the trial for passing off and the trial for trademark infringement. In the case of American Home Products Corporation,¹³ the Court affirmed the well-established principle that there are differences in the examination of infringement and passing off cases. In a passing off case, the Courts emphasize the assessment of deception, whereas in an infringement case, it's essential to acknowledge that the Trademark Act provides the owner with an exclusive right to use the mark, and infringement can occur with an identical mark. Even in cases involving related marks, infringement can occur despite the presence of deception.

In the case of Satyam Infoway Ltd. (P) Ltd.,¹⁴ the Court established three essential elements that need to be proven in order to proceed with a passing off action: The defendant must engage in the act of passing off their goods or services as those of the plaintiff. The purpose of a passing off claim is not only to protect the plaintiff's reputation but also to safeguard the public from deception. The defendant's actions must involve trading goods or providing services in a manner that has or would likely deceive the public into believing that the defendant's goods or services are actually those of the plaintiff. The plaintiff must establish that there is a likelihood of confusion or misconception created in the minds of the public, leading them to believe that the goods or services offered by the defendant are associated with the plaintiff. When assessing the potential for such confusion, the Court takes into account the imperfect recollection and ordinary memory of an individual. The third element in a passing off action is the presence of actual or potential harm or loss.

However, it should be noted that trademark registration under the applicable legislation only provides protection within India. To secure trademark rights and protection in other countries, it is necessary to register the trademark separately in each country. Trademark protection is jurisdiction-based, and each country requires its own registration. Additionally, in certain countries such as China, Japan, Continental Europe, and Indonesia, the person who applies for trademark registration first is granted the rights to the trademark, regardless of who first used the trademark.

Consequently, a different party could legitimately obtain trademark rights by applying for registration, even if another party had been using the trademark earlier.

Section 2(1)(m) of the Trade Marks Act of 1999 defines a "mark to include various elements such as a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging, or a combination of colors". Section 2(1)(zb) specifies that a hashtag can be considered a trademark if it can be graphically represented and effectively differentiates the goods or services of one producer from another. Although hashtags, comprising both letters and numbers, can be represented graphically, meeting the second condition outlined in the Act poses a significant challenge. As trademarks serve as source identifiers, fulfilling this condition becomes complex for hashtags. Section 9(1) of the Act prohibits the registration of trademarks lacking distinctive character. Consequently, for a hashtag to be registered in India, it must acquire distinctiveness over time. This distinctiveness may arise from the hashtag being an invented term or gaining recognition over an extended period, where people associate it with a specific entity. Mere application of a hashtag to a common word is insufficient for distinctiveness. Whether the hashtag consists of invented terms or common words used uniquely in connection with

Global Recognition of Hashtag Culture: Is it Broadening the Trademark Application?

The first aspect is connected to what can qualify for registration as a trademark. A trademark is a symbol that has the capacity to distinguish the goods and services of one company from those of another, aiding consumers in identifying the origin of a product or service. While a standalone #hashtag may not inherently possess source-identifying significance, its use in conjunction with a product name or campaign tagline can emulate the function of a trademark and may meet the criteria for registration. When employed in such a manner, a hashtag becomes a simple yet powerful tool for eliciting interest or responses to an event, product, or service. Despite its potential to boost brand promotion, drive sales, and enhance brand awareness, utilizing a hashtag in this way does not automatically qualify a brand name or advertising slogan for trademark registration.¹⁵

The question arises: under what conditions can a hashtag utilized in a marketing campaign be officially registered as a trademark? In accordance with

guidance from the United States Patent and Trademark Office (USPTO) as outlined in the Trademark Manual of Examining Procedure – Files and Archives, 2023, "A mark comprising or incorporating the hash symbol (#) or the term 'hashtag' is eligible for trademark registration in the service category only if it serves as an identifier of the source of the applicant's goods or services." Numerous hashtag trademarks, including examples like #smilewithacoke, #cokecanpics, #McDstories, and #makeitcount, have successfully obtained registration in the United States.¹⁶

The USPTO acknowledges that a term incorporating the hash symbol or the term "hashtag" may be eligible for trademark registration, but only if it serves as an identifier of the source of the applicant's goods or services. The USPTO further clarifies that the 'hash symbol and the term "hashing" do not inherently indicate the source because they primarily facilitate categorization and searching on online social media platforms. If a mark consists of the hash symbol or the term "hashtag" combined with wording that is merely descriptive or generic for the goods or services, the entire mark must be rejected as merely descriptive or generic.¹⁷ No longer confined to being mere symbols on phone keypads, hashtags have evolved into strategic assets for companies seeking to establish a distinctive brand presence. It is noteworthy that well-known brand campaigns, are legally protected as trademarks.¹⁸

As hashtags are predominantly utilized on social media platforms rather than directly on products, it is imperative that they possess uniqueness, not merely serving as an abbreviation of the product and being directly associated with it. In a legal context, the California Central Court, as seen in the case of *Vahan Eksouzian v Brett Albanese*, determined that hashtags are not trademarks but rather descriptive devices. The Court ruled in favor of the plaintiff, asserting that using hashtags in this manner did not constitute an infringing act likely to cause confusion. On the other hand, in *TWTB Inc. v Rampick*, the US District Court of Louisiana acknowledged the significance of trademarking a hashtag, considering its use as evidence of a specific business. Another case, *Fraternity Collection LLC v Fargnoli*, heard by the US District Court of Mississippi, recognized that in certain situations, the use of hashtags could potentially mislead customers, rendering them eligible for trademark protection. In the case of *Coca-Cola Co. v Who is Privacy Protection Service Inc. /Thien*

Le Trieu, Le Trieu Thien, the WIPO Arbitration and Mediation Centre clarified that a hashtag mark not derived from an existing mark would undergo the same analysis as a non-hashtag mark.¹⁹ Thus, a hashtag can be registered as a trademark, but it must meet criteria such as uniqueness, relevance, and avoidance of infringement on existing rights.²⁰ Before this development, numerous attempts to register hashtag trademarks faced rejection from the USPTO. However, the USPTO has since revised its stance, permitting registration if the mark includes words or phrases that serve as distinct source identifiers independently of the hashtag. Since 2013, the USPTO has approved over 100 hashtag registrations.²¹ Notably, the Trademark Manual of Examining Procedure (TMPEP) includes crucial guidelines, stating that a hashtag can be registered as a trademark by including a disclaimer of the term "hashtag" or the hash symbol, thereby distinguishing them from other registrable content.²²

Moreover, it is stipulated that the USPTO will not authorize the registration of marks with descriptive or generic characteristics. In the legal dispute between Eksouzian and Albanese, involving two rival manufacturers of compact vaporizer pens, a prior trademark disagreement regarding the term CLOUD was settled. The plaintiffs initiated legal proceedings to enforce the settlement, while the defendants counterclaimed, arguing that the plaintiffs' use of #cloudpen on social media violated the settlement terms. The settlement explicitly prohibited the plaintiffs from combining the words CLOUD, CLOUD V, and/or CLOUD VAPES with the words "pen," "penz," "fuel," and "pad" as a unified trademark. The Court in the Eksouzian case determined that the plaintiffs did not violate the settlement by using #cloudpen on social media because "hashtags are merely descriptive devices, not trademarks, unitary or otherwise, in and of themselves." Additionally, the Court observed that #cloudpen was used to direct consumers to the promotional content's location. In a more recent legal case, *Chanel, Inc. v WGACA, LLC*, Chanel filed claims of false advertising, trademark infringement, and unfair competition under the Lanham Act against WGACA, LLC. Chanel alleged that WGACA tagged photos of Chanel products with the hashtag #WGACACHANEL on its social media pages, creating the impression that WGACA was affiliated with or authorized by Chanel. The Court held that Chanel's allegation was sufficient.²³

In the United Kingdom, a mark qualifies for registration if it exhibits distinctiveness and the capacity to uniquely identify the goods and services associated with a particular business. If such an association exists, and the mark does not convey a message that is relevant to any other business, then, similar to other trademarks, a mark centered on a hashtag is deemed appropriate for registration. In 2014, Wyke Farms, the largest independent cheese producer in the UK, attained the milestone of becoming the first brand in the country to successfully register a trademark for its #freecheesefriday social media campaign.²⁴ In the United Kingdom, there is currently no specific policy outlining the systematic registration of hashtags. The registration process is likely guided by the same criteria of "distinctive character" that applies to regular word marks. According to the UK Courts, incorporating the hashtag symbol into a word mark doesn't appear to increase its likelihood of being approved for registration. The evaluation primarily centers on the inherent distinctiveness and non-descriptiveness of the word itself. This mirrors the approach taken in registering domain names as trademarks, where elements like .com or .co.uk are deemed entirely non-distinctive and are often overlooked in subsequent marks. Notably, Wyke Farms, one of the largest independent cheese producers in the UK, made history by being the first company in the country to successfully register a trademark for its hashtag #freecheesefriday brand campaign on social media in 2014.²⁵ The hashtag has gained significant recognition, achieving an impressive status, especially with the unprecedented growth in social media. There is concern about suggesting vulnerability within the Intellectual Property Rights (IPR) system, emphasizing the need for a more rapid and robust strengthening of the regime to preserve its integrity.

Ideology of Intellectual Property Rights and Hash Tag Registration as Trademark

Intellectual property protection is typically grounded in two primary theories: Entitlement theory of justice and Natural justice. The entitlement theory of justice revolves around acknowledging creations or inventions as a means of incentivizing further innovation or investment. On the other hand, the Natural theory of justice supports the notion that individuals should have the ability to safeguard the outcomes of their creative, inventive, or commercial efforts. Society's demand for intellectual productions

is crucial for its advancement in cultural, economic, technological, and social aspects. As a result, creators are granted intellectual property rights as a form of reward, allowing them to exploit their work and reap benefits. In reciprocation, by making their creations accessible to the public, creators contribute to the enrichment of the community. Thus, intellectual property law emerges as a result of a kind of social contract between the author and society.²⁶ In addition to the justifications, intellectual property rights are also associated with a social function. This inherent social function, present in any legal rule, allows the rights of individuals to be considered in relation to conflicting rights. As integral components of a broader legal system, these rights must always be considered in conjunction with other rights of comparable significance and collective interests. Consequently, works safeguarded by intellectual property are of equal importance to both society and the creator, ensuring mutual benefits. However, considering the recent trend of extending trademark protection to hashtags, it prompts legal scholars to carefully shape the social function of intellectual property in moderation. Where necessary, checks and balances should be implemented to curb expansive human behavior that leads to the unwarranted broadening of the law in alignment with technological advancements.

In broad terms, a trademark can encompass single or multiple words, devices, symbols, or a combination thereof, used to distinguish the goods or services of one entity from others. Scholars and Courts generally concur that trademarks serve two main purposes: safeguarding consumers from deception and confusion, and protecting the infringed mark as a form of property. Traditionally, when determining the distinctiveness of a trademark, Courts often categorize it as generic, descriptive, suggestive, fanciful, or arbitrary, depending on its relationship to the associated good or service.²⁷

The scope of the trademark system has expanded to include unconventional categories like shapes, smells, colors, sounds, and more. In the present landscape, companies are also seeking to register slogans as trademarks, with the spectrum from generic to arbitrary/fanciful applicable in these cases as well. Given this context, the question arises: does a hashtag align with the traditional legal framework for trademarks? If companies can register individual words, what sets a hashtag apart?

Courts' Perspective on Hashtag Trademark Violation

Throughout history, significant changes in legal provisions have often necessitated judicial decisions to determine their impact. This is also true for hashtag trademarks, where the judiciary is divided on the validity of trademark protection granted to hashtags. As a result, the outcomes in such cases have been inconsistent. The USA District Court²⁸ assess whether use of hashtag (#cloudpen) constituted a breach of a settlement agreement clause that explicitly forbade using the terms 'cloud' and 'pen' in close proximity as a unified trademark. The defendant held trademarks for 'cloud PENS' and 'Cloud PENZ,' and the agreement explicitly restricted the plaintiff from utilizing the terms 'Cloud,' 'Cloud V,' or 'Cloud Vapes' in conjunction with 'pen,' 'penz,' 'fuel,' 'pad,' or any other associated terms as a unified trademark for the plaintiff's products.²⁹ The Court concluded that there was no violation since hashtags are considered descriptive devices and not trademarks, whether unitary or otherwise, on their own. The Court determined that despite the use of the registered mark in the hashtag, employing it in this way did not constitute an act of infringement likely to cause confusion.

This verdict in the above case was followed in *AOP Ventures Inc. v Steam Distribution LLC*,³⁰ where the plaintiffs claimed that the defendants infringed on their registered mark DRIP CLUB by incorporating the hashtag #DRIPCLUB in a minimum of five social media posts. The Court clarified that the act of using a trademark as a hashtag alone does not constitute infringement of that particular mark. However, it's noteworthy that there are instances where Courts have considered the use of hashtags as contributing to a trademark infringement claim. In *TWTB Inc. v Rampick*,³¹ the Court determined that the utilization of hashtags was pertinent to a trademark claim, viewing the use of hashtags as proof that a former licensee was representing itself to be the same business as a current licensee. Interestingly, in *Fraternity Collection LLC*,³² The USA District Court declined to dismiss a trademark claim against a competitor's incorporation of a trademark as a hashtag, emphasizing that employing a competitor's name or product as a hashtag might, under specific circumstances, mislead consumers.

Further, reinforcing the applicability of trademark rights against hashtag usage is the case of *Coca-Cola Co. V Who is Privacy Protection Service Inc.*³³ where

WIPO highlighted that once a mark was established as either protectable or, conversely, not protectable, there was no need to scrutinize the hashtag version of the same term or mark. However, it mentioned that a hashtag mark not derived from an existing mark would undergo the same analysis as a non-hashtag mark, and its protectability would depend on whether the mark had acquired secondary meaning

Conclusion

The discussion about hashtags as trademarks reflects a balance between those in favour and those against. Beyond procedural considerations, the argument centers on a fundamental principle that IPR should both benefit individual creators and contribute to the welfare of the community. Balancing the rights of an individual or company with those of society at large is crucial. Proper use of these rights should align with their social function, avoiding "anti-social" practices that disregard essential values and competing rights. Emphasizing the social functions of IPRs underscores the need for moderation and balance in their conception and implementation. Given the pervasive influence of social media in daily life, it becomes imperative to refine the philosophical basis of IPR. Avoiding the inclusion of everything under an overcrowded IP protection umbrella is crucial, as the primary aim is to provide necessary protection to creators without creating a monopoly. Restraining excessiveness is essential to uphold the true essence of creativity within the IPR regime.

The foundational philosophy of intellectual property is not to establish a monopoly but to encourage competitive property rights and foster healthy competition. However, the rapid adoption of tools like hashtags by private corporations in social media has led to a surge in litigations. Policymakers and the judiciary need to address the chaos on trademark registers to reinforce the IPR regime. While a unanimous global decision acknowledges that hashtags can be registered as trademarks and their arbitrary use can lead to infringements, there are no specific laws in India to address the burgeoning hashtag culture. Existing precedents and laws governing trademark infringement in social media raise questions about the adequacy of current legislation in addressing technological advancements.

It is essential to monitor the use of hashtags in social media and infringement cases in the digital era. Amendments to the existing laws are crucial to

provide clarity and avoid legal ambiguities. Enforcement mechanisms should strike a balance, ensuring that measures are reasonable and proportionate. Innocent infringement by well-meaning fans or loyal customers should be handled with leniency, while strong legal actions should be taken in cases involving counterfeiting or impersonation.

It's important to highlight that frequent use of a hashtag may lead to the common law right of passing off, which safeguards a trader's goodwill from misrepresentation. Yet, establishing that a company has accumulated the necessary goodwill in a hashtag to prevent others from using it poses a potential challenge. The question then arises regarding the use of a brand's hashtag trademark – does incorporating such a trademark in a social media post expose one to potential liability for trademark infringement? If a user implies a connection or association with the trademark owner through the use of a hashtag, or if there is a likelihood of confusion or association, it could lead to grounds for infringement. However, if the hashtag is merely used to promote a social media message without creating such connections, infringement may not apply.

To determine if hashtags can be registered as trademarks, two crucial factors must be considered: the distinctiveness of the hashtag and the monopolization of hashtags. First, for a hashtag to qualify for trademark registration, its distinctiveness needs to be established through relevant tests. Yet, the dual function of hashtags inherently protects them from infringement claims since they serve the purpose of communication and are easily accessible to unauthorized parties. Secondly, the optimization of search results on social media platforms using hashtags makes it possible for them to be associated with various goods/services within the same or different classes. This creates a fundamental contradiction, as trademarking a hashtag, when its purpose is to enhance search results, strips it of this functionality when owned by a particular entity. Regarding monopolization, trademarking hashtags may be deemed unfair as it could lead to an abuse of power by dominant entities. If distinctiveness is the basis for trademarking, only well-established brands may have the means to utilize such hashtags due to their existing brand recognition and substantial social media presence. This would be unjust to emerging proprietors, as the market space would already be occupied by larger entities.

Hashtags play a crucial role in brand communication and increasing brand value. Trademarking them could eliminate their primary function, as their distinctiveness is often tied to popularity and usage. Additionally, trademarking hashtags may result in unfair competition, particularly in terms of search engine optimization, negatively impacting smaller businesses' ability to market themselves on social media platforms. Considering these drawbacks, it can be concluded that hashtags might meet the criteria for classification as trademarks under specific conditions. However, registering them as trademarks contradicts their fundamental functionality and may lead to unfair competition.

References

- 1 Shah B S, Digital trends, 1 April 2016, <https://www.digitaltrends.com/social-media/research-reveals-increasing-number-of-brands-are-trademarking-social-media-hashtags/>.
- 2 Sillito D, Hashtag is children's word of year, *BBC News*, 28 May 2015, <https://www.bbc.com/news/entertainment-arts-32902170>.
- 3 Selvamani V L, C. D. can hashtag (#) be a trade mark in Indian context? *Journal of Emerging Technologies and Innovative Research*, 2019, 273.
- 4 Kumar R, Recent developments in Trademark Laws in India, *Journal of Legal Research and Juridical Sciences*, 2022, 7.
- 5 Singh S S, Intellectual Property Rights Laws, (University Book House, Jaipur) 2019.
- 6 Ahuja V K, Intellectual property rights, (Universal Lexis Nexis, Haryana) 2017.
- 7 Menell P, Intellectual property: Legal aspects, *International Encyclopedia of the Social & Behavioral Sciences*, 2001, 7615.
- 8 Shao G, Proprietary interests, *Internet Law in China*, 2012, 183.
- 9 Han Z, Managing intellectual property rights, *Managing Foreign Research and Development in the People's Republic of China*, 2008, 117.
- 10 Dhirajlal R & Ratanlal, *The Law of Torts*, (LexisNexis, Haryana) 2018, 487.
- 11 Jolowicz W & Tort, (Thomson Reuters, London) 2015.
- 12 Kaviraj Pandit Durga Dutt Sharma v Navaratna Pharmaceutical Laboratories, AIR 1965 SC 980.
- 13 *American Home Products v Lupin Laboratories Ltd*, 1986 AIR 137.
- 14 *Satyam Infoway Ltd. v Sifynet Solutions (P) Ltd*, AIR 2004 Supreme Court 3540.
- 15 Jones C, Hashtag trademarks: What can be protected? WIPO, October 2017, https://www.wipo.int/wipo_magazine/en/2017/05/article_0009.html.
- 16 Michels R, Branded hashtags: The next big thing? *Wipo Magazine*, September 2014.
- 17 #TRADEMARKS: Registration of Hashtag Marks, 13 May 2016, <https://cdas.com/trademarks-registration-hashtag-marks-2/#:~:text=The%20USPTO%20will%20only%20register,identify%20their%20source%20or%20origin>.
- 18 Jones C, Hashtag trademarks: What can be protected? WIPO, October 2017, https://www.wipo.int/wipo_magazine/en/2017/05/article_0009.html.
- 19 Fidalgo V P, Coca-Cola files applications of hashtag trademarks, 6 January 2015, Inventa: <https://inventa.com/en/news/article/131/coca-cola-files-applications-of-hashtag-trademarks#:~:text=Right%20before%20the%20end%20of,of%20the%20social%20network%20Twitter>.
- 20 Arora K, Can hashtags be trademarked in India, *The IP Law Post*, 6 December 2023, <https://iplawpost.wordpress.com/2020/10/12/can-hashtags-be-trademarked-in-india/>.
- 21 Saha M P, Trademark issues in digital era, *Journal of Intellectual Property Rights*, 13 (2) (2008) 118.
- 22 Tmep 1202.18, Hashtag marks, *Bitlaw*, October, 2017, https://www.bitlaw.com/source/tmep/1202_18.html.
- 23 Cardon J E, Ongoing Chanel case provides limited clarity on use of third-party marks in hashtags, *World Trademark Review*, 12 December 2019, <https://www.worldtrademarkreview.com/article/ongoing-chanel-case-provides-limited-clarity-use-of-third-party-marks-in-hashtags>.
- 24 Chadha & Chadha, Hashtags and trademarks: A digital media prodigy, *Lexology*, 18 October 2022, <https://www.lexology.com/library/detail.aspx?g=87484f39-7763-4908-8ce0-2bf40eeef71>.
- 25 Ritchie L, #HASHTAGquestion: Trade mark issues surrounding hashtags, *Thomson Reuters Practical Law*, 2012, [https://uk.practicallaw.thomsonreuters.com/7-522-0480?transitionType=Default&contextData=\(sc.Default\)&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/7-522-0480?transitionType=Default&contextData=(sc.Default)&contextData=(sc.Default)&firstPage=true).
- 26 Geiger C, The social function of intellectual property rights, or how ethics can influence the shape and use of IP Law, *Max Planck Institute for Intellectual Property and Competition Law*, 2013, 153, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228067.
- 27 Ahuja V K, Intellectual Property Rights, (LexisNexis, Haryana) 2019.
- 28 *Vahan Eksouzian v Brett Albanese*, 2015 WL 4720478.
- 29 Trivedi H, Hashtag trademarks—An unpleasant reality of IP protection, *Practical Lawyer*, 19 March 2018, 112, <https://www.sconline.com/blog/post/2018/03/19/hashtag-trade-marks-an-unpleasant-reality-of-ip-protection/>.
- 30 *AOP Ventures Inc. v Steam Distribution LLC* US District Court for the Central District of California, 19 September 2019.
- 31 *TWTB, Inc. v Rampick*, United States District Court, 20 January 2016.
- 32 *Fraternity Collection LLC v Fargnoli*, (United States District Court, 31 March 2015). <https://law.justia.com/cases/federal/district-courts/mississippi/mssdce/3:2013cv00664/83663/62/>.
- 33 Dayal P, Trademark: Why hashtag trademarks should stay? <https://www.wisbar.org/aboutus/forlawstudents/Documents/Prashant%20Dayal%20-%20Submission.pdf>.